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Judicial and statutory definitions of words and phrases

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TABLE OF ABBREVIATIONS.

A

Abb. Adm.....Abbott's Admiralty (U. S.)
 Abb. Dec.....Abbott's Decisions (N. Y.)
 Abb. Law Dict.....Abbott's Law Dictionary.
 Abb. N. C.....Abbott's New Cases (N. Y.)
 Abb. Prac.....Abbott's Practice (N. Y.)
 Abb. Prac. (N. S.)...Abbott's Practice, New Series (N. Y.)
 Abb. Shipp.....Abbott on Shipping.
 Abb. (U. S.).....Abbott's United States.
 Abr.Abridgment.
 AdamsAdams (N. H.)
 Adams, Eq.....Adams' Equity.
 Add.Addams' Ecclesiastical Reports.
 Add.Addison (Pa.)
 Add. Cont.Addison on Contracts.
 Add. Ecc.....Addams' Ecclesiastical Reports.
 Add. TortsAddison on Torts.
 Adj. Sess.....Adjourned Session.
 Adol. & El.....Adolphus and Ellis' English King's Bench Reports.
 Adol. & El. (N. S.)...Adolphus and Ellis' English Queen's Bench Reports, New Series.
 Aik. Dig.....Aikin's Digest of Laws (Ala.)
 AikensAikens (Vt.)
 A. K. Marsh.....A. K. Marshall (Ky.)
 Ala.Alabama.
 Alb. Law J.....Albany Law Journal.
 Alex. Ins.....Alexander on Life Insurance in New York.
 Alger's Law Promoters & Prom. Corp.Alger's Law in Relation to Promoters and Promotion of Corporations.
 AllenAllen (Mass.)
 Allison's Am. Dict...Allison's American Dictionary.
 Amb.Ambler's English Chancery Reports.
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)
 Am. Bankr. Rep....American Bankruptcy Reports.
 Am. Dec.....American Decisions.
 Am. Ed.....American Edition.
 Am. Enc. Dict.....American Encyclopedic Dictionary.
 Amend.Amendment.
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.
 Am. Ina.....Arnold on Marine Insurance.
 Am. Law J.....American Law Journal.
 Am. Law Rec.....American Law Record (Cin.)
 Am. Law Reg. (N. S.)American Law Register, New Series.
 Am. Law Reg. (O. S.)American Law Register, Old Series.
 Am. Law Rev.....American Law Review.
 Am. Law T. Rep...American Law Times Reports.
 Am. Lead. Cas.....American Leading Cases (Hare & Wallace's).
 Amos & F. Fixt...Amos and Ferard on Fixtures.

Am. Reg.....American Law Register.
 Am. Rep.....American Reports.
 Am. St. Rep.....American State Reports.
 Am. & Eng. Dec. Eq..American and English Decisions in Equity.
 Am. & Eng. Enc. LawAmerican and English Encyclopedia of Law.
 Am. & Eng. Ry. Cas..American and English Railway Cases.
 Anc. Charters.....Ancient Charters (1692).
 And. Law Dict.....Anderson's Law Dictionary.
 Ang. Car.....Angell on Carriers.
 Ang. Highw.....Angell & Durfee on Highways.
 Ang. Ins.....Angell on Insurance.
 Ang. Lim.....Angell on Limitation of Actions.
 Ang. Tide Waters...Angell on Tide Waters.
 Ang. Water Courses..Angell on Water Courses.
 Ang. Waters.....Angell on Tide Waters.
 Ang. & A. Corp....Angell and Ames on Corporations.
 Ann.Queen Anne (as 8 Ann. c. 19).
 Ann. Code.....Annotated Code.
 Ann. St.....Annotated Statutes.
 Ann. St. Ind. T.....Annotated Statutes of Indian Territory.
 Anstr.Anstruther's English Exchange Reports.
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)
 App.Appleton (Me.)
 App. Cas.....Appeal Cases, English Law Reports.
 App. D. C.....Appeal Cases (D. C.)
 App. Div.....Appellate Division (N. Y.)
 Append.Appendix.
 Archb. Cr. Law....Archbold's Pleading and Evidence in Criminal Cases.
 Archb. Cr. Prac. & Pl.Archbold's Pleading and Evidence in Criminal Cases.
 Arch. Cr. Pl.....Archbold's Criminal Pleading.
 Arch. N. P.....Archbold's Law of Nisi Prius.
 Ariz.Arizona.
 Ark.Arkansas.
 Arn. Ins.....Arnold's Marine Insurance.
 Ashm.Ashmead (Pa.)
 Assem.Assembly (State Legislature).
 Assiz.Assizes.
 Atk.Atkyns' English Chancery Reports.
 Atl.Atlantic Reporter.
 Aust. Jur.....Austin's Jurisprudence.

B

Bac. Abr.Bacon's Abridgment.
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.
 Bac. Law Tracts...Bacon's Law Tracts.
 Bac. Max.....Bacon's Maxims of the Law.

Bac. Ben. Soc.....	Bacon on Benefit Societies and Life Insurance.	Best, Ev.....	Best on Evidence.
Ball.	Bailey (S. C.)	Best, Presumptions..	Best on Presumptions of Law and Fact.
Bailey	Bailey (S. C.)	Best & S.....	Best and Smith's English Queen's Bench Reports.
Bailey, Dict.....	Nathan Bailey's English Dictionary.	Bibb	Bibb (Ky.)
Bailey, Eq.....	Bailey's Equity (S. C.)	Bid. Ins.....	Biddle on Insurance.
Bailey, Mast. Liab..	Bailey's Law of Master's Liability for Injuries to Servant.	Bid. War. Sale Chat..	Biddle on Warranties in Sale of Chattels.
Bainb. Mines.....	Bainbridge on Mines and Minerals.	Big.	Bignell's Reports (India).
Baldw.	Baldwin (U. S.)	Bigelow, Estop....	Bigelow on Estoppel.
Ballinger's Ann.		Bigelow, Lead. Cas..	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.
Codes & St.....	Ballinger's Annotated Codes and Statutes (Wash.)	Big. Torts.....	Bigelow on Torts.
Bankr. Act.....	Bankruptcy Act.	Bin.	Biune (Pa.)
Bankr. Form.....	Bankruptcy Forms.	Bing.	Bingham's English Common Pleas Reports.
Ban. & A.....	Banning & Arden's Patent Cases (U. S.)	Bing. N. C.....	Bingham's New Cases, English Common Pleas.
Barb.	Barbour (N. Y.)	Bish. Cont.....	Bishop on Contracts.
Barb. (Ark.).....	Barber (Ark.)	Bish. Cr. Law....	Bishop on Criminal Law.
Barb. Ch.	Barbour's Chancery (N. Y.)	Bish. Cr. Proc.....	Bishop on Criminal Procedure.
Barb. Ch. Pr.....	Barbour's Chancery Practice.	Bish. Eq.....	Bispham's Principles of Equity.
Barb. Cr. Law.....	Barbour's Criminal Law.	Bish. Mar., Div. & Sep.	Bishop on Marriage, Divorce, and Separation.
Barn. & Adol.....	Barnewall and Adolphus' English King's Bench Reports.	Bish. Mar. & Div...	Bishop on Marriage and Divorce.
Barn. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Bish. New Cr. Law..	Bishop's New Criminal Law.
Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Bish. New Cr. Prac..	Bishop's New Criminal Procedure.
Barb. & C. Ky. St..	Barbour and Carroll's Kentucky Statutes.	Bish. Non-Cont. Law	Bishop on Non-Contract Law, Rights and Torts.
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Bish. St. Crimes....	Bishop on Statutory Crimes.
Barr	Barr (Pa.)	Bisp. Eq.....	Bispham's Principles of Equity.
Bates' Ann. St....	Bates' Annotated Revised Statutes (Ohio).	Blas.	Bissell (U. S.)
Bates, Part.....	Bates' Law of Partnership.	Bissett, Est.....	Bisset on Estates for Life.
Bat. Rev. St.....	Battle's Revisal of the Public Statutes of North Carolina.	Bl.	Henry Blackstone's English Common Pleas Reports.
Battle's Revisal....	Battle's Revisal of the Public Statutes of North Carolina.	Black	Black (U. S.)
Batts' Ann. St. } ...	Batts' Annotated Revised Civil Statutes (Tex.)	Blackb. Sales.....	Blackburn on Sales.
Batts' Rev. St. }		Black. Com.....	Blackstone's Commentaries on the Laws of England.
Baxt.	Baxter (Tenn.)	Black, Const. Law..	Black on Constitutional Law.
Bay	Bay (S. C.)	Black, Dict.....	Black's Law Dictionary.
Bayley, Bills.....	Bayley on Bills.	Blackf.	Blackford (Ind.)
Baylies, Sur.....	Baylies on Sureties and Guarantors.	Black, Interp. Laws..	Black on the Construction and Interpretation of Laws.
Beach, Contrib. Neg..	Beach on Contributory Negligence.	Black, Intox. Lq...	Black on the Laws Regulating the Manufacture and Sale of Intoxicating Liquors.
Beach, Inj.....	Beach on Injunctions.	Black, Judg.....	Black on Judgments.
Beach, Mod. Eq. Jur..	Beach's Commentaries on Modern Equity Jurisprudence.	Black, Law Dict....	Black's Law Dictionary.
Beach, Priv. Corp...	Beach on Private Corporations.	Black, St. Const....	Black on Construction and Interpretation of Laws.
Beach, Eq. Prac....	Beach's Modern Practice in Equity.	Black, Tax Titles...	Black's Treatise on Tax Titles.
Beach, Pub. Corp...	Beach on Public Corporations.	Blackw. Tax Titles..	Blackwell's Tax Titles.
Beasl.	Beasley (N. J.)	Bland	Bland (Md.)
Beav.	Beavan's English Rolls Court Reports.	Blatchf.	Blatchford (U. S.)
Beavan, Ch.....	Beavan's English Rolls Court Reports.	Blatchf. Prize Cas..	Blatchford's Prize Cases (U. S.)
Beawes' Lex Merc..	Beawes' Lex Mercatoria.	Blatchf. & H.....	Blatchford & Howland (U. S.)
Beck, Med. Jur....	Beck's Medical Jurisprudence.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Bee	Bee (U. S.)	Bliss, Code Pl.....	Bliss on Code Pleading.
Bell, Comm.....	Beil's Commentaries on the Law of Scotland.	Bliss, Ins.....	Bliss on Life Insurance.
Ben.	Benedict (U. S.)	B. Mon.....	B. Monroe (Ky.)
Ben. Adm.	Benedict's American Admiralty Practice.	Bond	Bond (U. S.)
Benj. Sales.....	Benjamin on Sales.	Bosw.	Bosworth (N. Y.)
Benn.	Bennett (Cal.)	Boa. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Benth. Jud. Ev.....	Bentham's Judicial Evidence.	Boa. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.

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C

Charlt., R. M.	R. M. Charlton (Ga.)	Code Proc.	Code of Procedure.
Charlt., T. U. P.	T. U. P. Charlton (Ga.)	Code Pub. Gen.	
Chase	Chase (U. S.)	Laws	Code of Public General Laws.
Chase's St.	Chase's Statutes at Large (Ohio)	Code Pub. Loc.	
Chase, Steph. Dig. Ev.	Chase on Stephens' Digest of Evidence.	Laws	Code of Public Local Laws.
Ch. Cas.	English Cases in Chancery.	Code R. (N. S.)	Code Reports, New Series (N. Y.)
Ch. Div.	Chancery Division, English Law Reports.	Code Rep.	Code Reporter (N. Y.)
Chest. Co. Rep.	Chester County Reports (Pa.)	Code Supp.	Supplement to the Code.
Cheves	Cheves (S. C.)	Cod. St.	Codified Statutes.
Cheves, Eq.	Cheves' Equity (S. C.)	Cohen, Adm. Law ..	Cohen's Admiralty Jurisdiction, Law, and Practice.
Chi. Leg. N.	Chicago Legal News (Ill.)	Co. Inst.	Coke's Institutes.
Chip., D.	D. Chipman (Vt.)	Coke	Coke's English King's Bench Reports.
Chip., N.	N. Chipman (Vt.)	Cold.	Coldwell (Tenn.)
Chit. Bills	Chitty on Bills.	Colem. Cas.	Coleman's Cases (N. Y.)
Chit. Bl. Comm.	Chitty's Edition of Blackstone's Commentaries.	Colem. & C. Cas.	Coleman & Caines' Cases (N. Y.)
Chit. Cont.	Chitty on Contracts.	Co. Litt.	Coke on Littleton.
Chit. Cr. Law	Chitty's Criminal Law.	Coll. Bank.	Collier's Law of Bankruptcy.
Chit. Gen. Pr.	Chitty's General Practice.	Colly.	Collyer's English Chancery Cases.
Chit. Pl.	Chitty on Pleading.	Colly. Partn.	Collyer on Partnership.
Chit. Pr.	Chitty's General Practice.	Colo.	Colorado.
Chitty	Chitty on Bills.	Colo. App.	Colorado Appeals Reports.
Chitty, Bl. Comm.	Chitty's Edition of Blackstone's Commentaries.	Colo. Law Rep.	Colorado Law Reporter.
Chitty, Com. Law ..	Chitty on Commercial Law.	Colq. Rom. Civ. Law ..	Colquhoun's Roman Civil Law.
Ch. Pl.	Chitty on Pleading.	Com. Dig.	Comyn's Digest of the Laws of England.
Cin. R.	Cincinnati Superior Court Reports (Ohio)	Comm.	Commentaries.
Cin. Super. Ct. Rep'r.	Cincinnati Superior Court Reporter (Ohio)	Com. on Con.	Comyn's Law of Contracts.
Cir. Ct. Dec.	Circuit Court Decisions (Ohio)	Comp. Laws.	Compiled Laws.
Cir. Ct. R.	Circuit Court Reports (Ohio)	Comp. St.	Compiled Statutes.
Cir. Ct. Rule.	Circuit Court Rule.	Comst.	Comstock (N. Y.)
City Ct. R.	City Court Reports (N. Y.)	Comyn	Comyn's English King's Bench Reports.
City Ct. R. Supp.	City Court Reports, Supplement (N. Y.)	Comyn, Usury.	Comyn on Usury.
City H. Rec.	City Hall Recorder (N. Y.)	Conf. R.	Conference Reports (N. C.)
Civ. Code.	Civil Code.	Cong.	Congress.
Civ. Code Practice ..	Civil Code of Practice.	Conn.	Connecticut.
Civ. Prac. Act.	Civil Practice Act.	Con. St.	Consolidated Statutes.
Civ. Proc. R.	Civil Procedure Reports (N. Y.)	Const.	Constitution.
C. L.	English Common Law Reports (American Reprint).	Const. Amend.	Amendment to Constitution.
Clancy, Husb. & W. } Clancy, Rights. }	Clancy's Treatise of the Rights, Duties, and Liabilities of Husband and Wife.	Const. U. S. Amend.	Amendment to the Constitution of the United States.
Clark	Clark (Pa.)	Con. Sur.	Connolly's Surrogate (N. Y.)
Clarke	Clarke (Iowa)	Cook, Corp.	Cook on Corporations.
Clarke, Ch.	Clarke's Chancery (N. Y.)	Cooke	Cooke (Tenn.)
Clark's Code.	Clark's Annotated Code of Civil Procedure (N. C.)	Cooke, Ins.	Cooke on Life Insurance.
Clark & F.	Clark and Finnelly's House of Lords Reports.	Cook's Pen. Code ..	Cook's Penal Code (N. Y.)
Clay's Dig.	Clay's Digest of Laws of Alabama.	Cook, Stock, Stockh. & Corp. Law.	Cook on Stock, Stockholders, and General Corporation Law.
Cleve. Law Rec.	Cleveland Law Recorder (Ohio)	Cooley, Bl. Comm.	Cooley's Edition of Blackstone's Commentaries.
Cleve. Law Rep.	Cleveland Law Reporter (Ohio)	Cooley, Const. Law ..	Cooley's Constitutional Law.
Clev. Insan.	Clevenger's Medical Jurisprudence of Insanity.	Cooley, Const. Lim.	Cooley's Constitutional Limitations.
Cliff.	Clifford (U. S.)	Cooley, Tax'n	Cooley on Taxation.
C. M. & R.	Compton, Meeson, and Roscoe's English Exchange Reports.	Cooley, Torts.	Cooley on Torts.
Co.	Coke's English King's Bench Reports.	Coop.	Cooper's English Chancery Reports temp. Eldon.
Cobb, Dig.	Cobb's Digest of Statute Laws (Ga.)	Coop. Eq. Pl.	Cooper's Equity Pleading.
Cobbey, Repl.	Cobbey's Practical Treatise on the Law of Replevin.	Copp, Pub. Land Laws	Copp's United States Public Land Laws.
Cobbey's Ann. St.	Cobbey's Annotated Statutes (Neb.)	Co. Rep.	Coke's English King's Bench Reports.
Code Civ. Proc.	Code of Civil Procedure.	Corn. Deeds	Cornish on Purchase Deeds.
Code Cr. Proc.	Code of Criminal Procedure.	Cornish, Purch. Deeds	Cornish on Purchase Deeds.
Code Gen. Laws.	Code of General Laws.	Cow.	Cowen (N. Y.)
Code Prac.	Code of Practice.	Cow. Cr. R.	Cowen's Criminal Reports (N. Y.)
		Cowell	Cowell's Law Dictionary.

Cowp. Cowper's English King's Bench Reports.
 Cox Cox (Ark.)
 Cox Cox's English Chancery Cases.
 Cox, C. C. Cox's English Criminal Cases.
 Cox, Cr. Cas. Cox's English Criminal Cases.
 Coxe Coxe (N. J.)
 C. P. Div. Common Pleas Division, English Law Reports.
 C. P. Rep. Common Pleas Reporter (Pa.)
 Crabbe Crabbe (U. S.)
 Crabb, Eng. Synonyms Crabb's English Synonyms.
 Crabb, Real Prop. Crabb on Real Property.
 Cr. Act. Criminal Act.
 Craig, Dict. Craig's Etymological, Technical, and Pronouncing Dictionary.
 Craig & P. Craig and Phillips' English Chancery Reports.
 Cranch Cranch (U. S.)
 Cranch, C. C. Cranch's Circuit Court (U. S.)
 Cranch, Pat. Dec. Cranch's Patent Decisions (U. S.)
 Or. Cir. Comp. Crown Circuit Companion (Irish)
 Cr. Code. Criminal Code.
 Cr. Law Mag. Criminal Law Magazine (N. J.)
 C. Rob. Adm. Charles Robinson's English Admiralty Reports.
 Cro. Car. Croke's English King's Bench Reports temp. Charles I (3 Cro.)
 Cro. Cas. Croke's English King's Bench Reports temp. Charles I (3 Cro.)
 Cro. Eliz. Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)
 Cro. Jac. Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)
 Cromp. Just. Crompton's Office of Justice of the Peace.
 Cromp., M. & R. Crompton, Meeson, and Roscoe's English Exchequer Reports.
 Crompt. Star Chamber Cases by Crompton.
 Cromp. & J. Crompton & Jervis' English Exchequer Reports.
 Cr. Prac. Act. Criminal Practice Act.
 Cr. Proc. Act. Criminal Procedure Act.
 Cr. St. Criminal Statutes.
 Cruise's Dig. Cruise's Digest of the Law of Real Property.
 Ct. Cl. Court of Claims (U. S.)
 Curt. Curtis (U. S.)
 Curt. Ecc. Curteis English Ecclesiastical Reports.
 Curt. Pat. Curtis on Patents.
 Cush. Cushing (Mass.)
 Cush. Law & Prac. Leg. Assem. Cushing's Law and Practice of Legislative Assemblies.
 Cushm. Cushman (Miss.)
 Cyc. Cyclopedic of Law and Procedure.
 Cyc. Law & Proc. Cyclopedic of Law and Procedure.
 Cyclop. Dict. Shumaker & Longsdorf's Cyclopedic Dictionary.
 C. & K. Carrington and Kirwan's English Nisi Prius Reports.
 C. & P. Carrington and Payne's English Nisi Prius Reports.

D

Dak. Dakota.
 Dall. (Pa.) Dallas (Pa.)
 Dall. (U. S.) Dallas (U. S.)
 Dall. Dig. Dallah's Digest and Opinions (Tex.)
 Dall. Laws. Dallas' Laws (Pa.)
 Daly Daly (N. Y.)
 Dana Dana (Ky.)
 Dane's Abr. Dane's Abridgment of American Law.
 Daniell, Ch. Pl. & Prac. Daniell's Chancery Pleading and Practice.
 Daniell, Ch. Prac. Daniell's Chancery Pleading and Practice.
 Daniel, Neg. Inst. Daniel's Negotiable Instruments.
 Dass. Ed. Dasser's Edition, Kansas Reports.
 Davis, Cr. Law. Davis' Criminal Law.
 Dawson's Code. Dawson's Code of Civil Procedure (Colo.)
 Day Day (Conn.)
 D. C. District of Columbia.
 D. Chip. D. Chipman (Vt.)
 Deac. Cr. Law. Deacon on Criminal Law of England.
 Deady Deady (U. S.)
 Dears. & B. Crown Cas. Dearsly and Bell's English Crown Cases.
 De Gex, F. & J. De Gex, Fisher & Jones' English Chancery Reports.
 De Gex, J. & S. De Gex, Jones, and Smith's English Chancery Reports.
 De Gex, M. & G. De Gex, Macnaghten, and Gordon's English Chancery Reports.
 De Jure Mar. Hale's De Jure Maris (Appendix to Hall on the Sea Shore).
 Del. Delaware.
 Del. Ch. Delaware Chancery.
 Del. Co. R. Delaware County Reports (Pa.)
 Del. Term R. Delaware Term Reports.
 Dem. Sur. Demarest's Surrogate (N. Y.)
 Denio Denio (N. Y.)
 Denison, Cr. Cas. Denison's English Crown Cases.
 Desana. Desaussure's Equity (S. C.)
 Desty, Tax'n. Desty on Taxation.
 Detroit Leg. N. Detroit Legal News (Mich.)
 Dev. Devereux (N. C.)
 Dev. Ct. Cl. Devereux's Court of Claims (U. S.)
 Dev. Eq. Devereux's Equity (N. C.)
 Devl. Deeds. Devlin on Deeds.
 Dev. & B. Devereux & Battle (N. C.)
 Dev. & B. Eq. Devereux & Battle's Equity (N. C.)
 Dicey, Conf. Laws. Dicey on Conflict of Laws.
 Dicey, Dom. Dicey's Law of Domicil.
 Dick. Dickinson (N. J.)
 Dickens Dickens' English Chancery Reports.
 Dict. Dictionary.
 Dict. Droit Civil. Dictionnaire Droit Civil.
 Dig. Digest.
 Dig. English's Digest of the Statutes (Ark.)
 Dig. Compiled Public Laws (R. I.)
 Dig. Rev. St. 1835 (Mo.)
 Dig. Fla. Thompson's Digest of Laws (Fla.)
 Dig. Littell and Swigert's Digest of Statute Law (Ky.)
 Dig. St. English's Digest of the Statutes (Ark.)

Dill.	Dillon (U. S.)	Elliott, R. R.	Elliott on Railroads.
Dill. Laws Eng. & Am.	Dillon's Laws and Jurisprudence of England and America.	Elliott, Supp.	Elliott Supplement to the Indiana Revised Statutes.
Dill. Mun. Corp.	Dillon on Municipal Corporations.	Ellis & Bl.	Ellis and Blackburn's English Queen's Bench Reports.
Disn.	Disney (Ohio)	Elm. Dig.	Elmer's Digest of Laws (N. J.)
Doct. & Stud. Dial.	Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England, by C. St. Germain.	Elph. Interp. Deeds.	Elphinstone's Rules for Interpretation of Deeds.
Dom. Civ. Law.	Domat's Civil Law.	El. & Bl.	Ellis and Blackburn's English Queen's Bench Reports.
Doug.	Douglas' English King's Bench Reports.	E. L. & Eq.	English Law and Equity (American Reprint).
Doug.	Douglass (Mich.)	Emerig. Assur.	Emerigon, Traité des Assurances et des Contrats à la Grosse.
Dowl.	Dowling's English Bail Court Cases.	Emerig. Ins.	Emerigon on Insurance.
Dowl. & L.	Dowling & Lowndes' English Bail Court Reports.	Enc. Amer.	Encyclopædia Americana.
Dowl. & R.	Dowling and Ryland's English King's Bench Reports.	Enc. Arch.	Gwilt's Encyclopedia of Architecture.
Dow. & C.	Dow and Clark's English House of Lord's Cases.	Enc. Brit.	Encyclopædia Britannica.
Drake, Attachm.	Drake on Attachment.	Enc. Dict.	Encyclopædic Dictionary, Edited by Robert Hunter 1879-1888.
Dud.	Dudley (Ga.)	Enc. Ins. U. S.	Insurance Year-Book.
Dud. Eq.	Dudley's Equity (S. C.)	Enc. Law.	American and English Encyclopædia of Law.
Dud. Law.	Dudley's Law (S. C.)	Enc. Pl. & Prac.	Encyclopedia of Pleading and Practice.
Duer	Duer's Superior Court (N. Y.)	End. Interp. St.	Endlich's Commentaries on the Interpretation of Statutes.
Dup. Jur.	Duponceau on Jurisdiction of United States Courts.	End. Bldg. Ass'n.	Endlich on Building Associations.
Durn. & E.	Durnford and East's English King's Bench Reports (Term Reports).	Eng.	English (Ark.)
Dutch.	Dutcher (N. J.)	Eng. C. L.	English Common Law Reports (American Reprint).
Duv.	Duvall (Ky.)	Eng. Ecc. R.	English Ecclesiastical Reports (American Reprint).
Dyche & P. Dict.	Dyche and Pardon's Dictionary.	Eng. Law & Eq.	English Law and Equity Reports (American Reprint).
Dyer	Dyer's English King's Bench Reports.	Eq.	Equity.
E		Eq. Cas. Abr.	English Equity Cases Abridged.
East	East's English King's Bench Reports.	Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
East, P. C.	East's Pleas of the Crown.	Ersk. Speeches.	Erskine's Speeches.
Eccl. R.	English Ecclesiastical Reports.	Escr. Dict.	Escrive's Dictionary of Jurisprudence.
E. C. L.	English Common Law Reports (American Reprint).	Esp.	Espinasse's English Nisi Prius Reports.
Ed.	Edition.	Ev.	Evidence.
Eden, Pen. Law.	Eden's Principles of Penal Law.	Ex.	English Exchequer Reports (Welsby, Hurlstone & Gordon).
Eden's Prin. P. L.	Eden's Principles of Penal Law.	Exch.	English Exchequer Reports (Welsby, Hurlstone & Gordon).
Edmonds' St. at Large	Edmonds' Statutes at Large (N. Y.)	Exch. Div.	Exchequer Division, English Law Reports.
Edm. Sel. Cas.	Edmonds' Select Cases (N. Y.)	Ex. Sess.	Extra Session.
E. D. Smith.	E. D. Smith (N. Y.)	El. & B.	Ellis and Blackburn's English Queen's Bench Reports.
Edw.	King Edward (as 4 Edw. I.)	F	
Edw. Bailm.	Edwards on the Law of Bailments.	Fairf.	Fairfield (Me.)
Edw. Bills & N.	Edwards on Bills and Notes.	Falc. Marine Dict.	Falconer's Marine Dictionary.
Edw. Brok. & F.	Edwards on Factors and Brokers.	Faust	Faust's Compiled Laws (S. C.)
Edw. Ch.	Edwards' Chancery (N. Y.)	Fearne, Rem.	Fearne on Contingent Remainders.
Edw. Rec.	Edwards on Receivers in Equity.	Fed.	Federal Reporter (U. S.)
El. & Bl. & El.	Ellis, Blackburn, and Ellis' English Queen's Bench Reports.	Fed. Cas.	Federal Cases (U. S.)
Eliz.	Queen Elizabeth (as 13 Eliz.)	Fernald, Eng. Synonyms	Fernald's English Synonyms.
Elliot, Deb. Fed. Const.	Elliot's Debates on the Federal Constitution.	Fett. Carr.	Fetter's Treatise on Carriers of Passengers.
Elliott, Roads & S.	Elliott on Roads and Streets.	Field, Corp.	Field on Corporations.

Finch, Law.....Finch, Sir Henry; a Dis-
course of Law (1759).
Fish. Dig.....Fisher's English Common
Law Digest.
Fish. Pat. Cas....Fisher's Patent Cases (U.
S.)
Fish. Pat. Rep....Fisher's Patent Reports
(U. S.)
Fish. Prize Cas....Fisher's Prize Cases (U.
S.)
Fitz. Abridg.....Fitzherbert's Abridgment.
Fla.Florida.
Flipp.Flippin (U. S.)
Foote & E. Incorp.
Co.Foote and Everett's Law
of Incorporated Compa-
nies Operating under Mu-
nicipal Franchises.
Fost.Foster (N. H.)
Fost. Crown Law...Foster's English Crown
Law or Crown Cases.
Fost. Fed. Prac....Foster's Treatise on Plead-
ing and Practice in Equ-
ity in Courts of United
States.
Fost. & F.....Foster and Finlason's Eng-
lish Nisi Prius Reports.
Fras. Dom. Rel....Fraser on Personal and
Domestic Relations, Scot-
land.
Freem.Freeman (Ill.)
Freem. Ch.....Freeman's Chancery (Miss.)
Freem. Judgm.....Freeman on Judgments.

G

G.King George (as 15 Geo. II).
Ga.Georgia.
Gabb. Cr. Law.....Gabbett's Criminal Law.
Ga. Dec.....Georgia Decisions.
Gale's St.....Gale's Statutes (Ill.)
Gale & Whatley
Easem.Gale and Whatley (after-
wards Gale) on Ease-
ments.
Gall.Gallison (U. S.)
Gantt's Dig.....Gantt's (& Caldwell's) Di-
gest of Statutes (Ark.)
Gav. & H. Rev. St..Gavin and Hord's Revis-
ed Statutes (Ind.)
Gear, Landl. & T...Gear on Landlord and
Tenant.
Gen. Assem.....General Assembly.
Gen. Dig. U. S.....General Digest of the Unit-
ed States.
Gen. Laws.....General Laws.
Gen. R. R. Act.....General Railroad Act.
Gen. St.....General Statutes.
Geo.King George (as 15 Geo.
II).
GeorgeGeorge (Miss.)
George, Partn.....George on Partnership.
GibbonGibbon on Nuisances.
Gil.Gilfillan (Minn.)
Gilbert, Ev.....Gilbert's Law of Evidence.
Gilbert, Tenures...Gilbert on Tenures.
Gilbert, Uses (by
Sugd.)Gilbert's Uses and Trusts by
Sugden.
Gill. Rents.....Gilbert's Treatise on
Rents.
Gill. Repl.....Gilbert on Replevin.
Gild.Gildersleeve Reports
(N. M.)
GillGill (Md.)
Gillet, Cr. Law.....Gillett's Treatise on Crimi-
nal Law and Procedure
in Criminal Cases.
Gill & J.....Gill & Johnson (Md.)
GilmanGilman (Ill.)
GilmerGilmer (Va.)
Gilp.Gilpin (U. S.)
Godd. Easem.....Goddard on Easements.
Gould, PL.....Gould on the Principles of
Pleading in Civil Actions.

Gould's Dig.....Gould's Digest of Laws
(Ark.)
Gould, Wat.....Gould on Waters.
Grah. & W. New
TrialsGraham and Waterman on
New Trials.
Grant, Cas.Grant's Cases (Pa.)
Grant's Dig.....Gantt's (& Caldwell's) Di-
gest of Statutes (Ark.)
Grat.Grattan (Va.)
GrayGray (Mass.)
Green, C. E.....C. E. Green (N. J.)
Green, Cr. Law R...Green's Criminal Law Re-
ports (N. Y.)
Greene, G.....G. Greene (Iowa)
Greenh. Pub. Pol...Greenhood's Doctrine of
Public Policy in the Law
of Contracts.
Green, H. W.....H. W. Green (N. J.)
Green, J. S.....J. S. Green (N. J.)
Greenl.Greenleaf (Me.)
Greenl. Cruise, Real
Prop.Greenleaf's Edition of
Cruise's Digest of Real
Property.
Greenl. Ev.Greenleaf on Evidence.
Green's Brice, Ultra
ViresGreen's Edition of Brice's
Ultra Vires.
Gross, St.....Gross' Illinois' Compiled
Laws (or Statutes).
GrotiusGrotius' Latin Law.

H

Hagg. Adm.....Haggard's English Admi-
rality Reports.
Hagg. Cona.....Haggard's English Con-
sistory Reports.
Hagg. Ecc.....Haggard's English Eccle-
siastical Reports.
Hale, Com. Law....Hale's History of the Com-
mon Law.
Hale, De Jure Mar..Hale's De Jure Maris (Ap-
pendix to Hall on the
Sea Shore).
Hale, P. O.....Hale's Pleas of the Crown.
Hale, Torts.....Hale on Torts.
HallHall's Superior Court (N.
Y.)
Halleck, Int. Law..Halleck's International
Law.
Hall, Mex. Law....Hall's Mexican Law.
Halst.Halsted (N. J.)
Halst. Ch.Halsted's Chancery (N. J.)
Ham.Hammond (Ohio)
Ham. Cont.....Hammon on Contracts.
HandHand (N. Y.)
HandyHandy (Ohio)
Har. (Del.).....Harrington (Del.)
Har. (Mich.).....Harrington (Mich.)
Har. (N. J.).....Harrison (N. J.)
HardinHardin (Ky.)
Hardw. Cas. Temp..Cases temp. Hardwicke, by
Lee and Hardwicke.
HareHare's English Vice Chan-
cellors' Reports.
Hare, Const. Law..Hare's American Constitu-
tional Law.
Harg. Co. Litt....Hargrave's Notes to Coke
on Littleton.
Hargrave & Butler's
Notes on Co. Litt..Hargrave and Butler's
Notes on Coke on Little-
ton.
Harp.Harper (S. C.)
Harp. Eq.Harper's Equity (S. C.)
HarrisHarris (Pa.)
Harrison, Ch.....Harrison's Chancery Prac-
tice.
Hart. Dig.Hartley's Digest of Laws
(Tex.)
Har. & G.Harris & Gill (Md.)
Har. & J.Harris & Johnson (Md.)
Har. & McH.Harris & McHenry (Md.)

Interst. Com. R.... Interstate Commerce Reports.
 Int. Rev. Manual... Internal Revenue Manual.
 Int. Rev. Rec..... Internal Revenue Record (N. Y.)
 Iowa Iowa.
 Ired. Iredell's Law (N. C.)
 Ired. Eq. Iredell's Equity (N. C.)
 Irwin's Code..... Clark, Cobb and Irwin's Code (Ga.)

J

Jac. King James (as 21 Jac. I.)
 Jac. Law Dict.... Jacob's Law Dictionary.
 Jagg. Torts..... Jaggard on Torts.
 Jarm. Willa..... Jarman on Willa.
 Jeff. Jefferson (Va.)
 Jellett, Cr. Law.... Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.
 Jeremy, Eq..... Jeremy's Equity Jurisdiction.
 J. J. Marsh. J. J. Marshall (Ky.)
 John. Johnson (N. M.)
 John. Dict..... Johnson's English Dictionary.
 John. Eng. Ch.... Johnson's English Vice-Chancellors' Reports.
 Johns. Johnson (N. Y.)
 Johns. Cas. Johnson's Cases (N. Y.)
 Johns. Ch. Johnson's Chancery (N. Y.)
 Johnson's Quarto Dict. Johnson's Quarto Dictionary.
 Jones Jones (Pa.)
 Jones, Bailm..... Jones on Bailments.
 Jones, Chat. Mortg. Jones on Chattel Mortgages.
 Jones, Easem..... Jones' Treatise on Easements.
 Jones, Eq..... Jones' Equity (N. C.)
 Jones, Law..... Jones' Law (N. C.)
 Jones, Liens..... Jones on Liens.
 Jones, Mortg..... Jones on Mortgages.
 Jones, Pledges..... Jones on Pledges and Collateral Securities.
 Jones, Securities.... Jones on Railroad Securities.
 Jones & S..... Jones & Spencer (N. Y.)
 Jones & V. Laws... Jones and Varick's Laws (N. Y.)
 Jour. Juris. Journal of Jurisprudence.
 Joyce, Ins..... Joyce on Insurance.
 J. P..... The Justice of the Peace, London (periodical).
 J. P. Smith..... J. P. Smith's English King's Bench Reports.
 J. Scott (N. S.).... English Common Bench Reports, New Series by John Scott.
 Jud. Repos. Judicial Repository (N. Y.)
 Jur. The Jurist, London.
 Jur. (N. S.)..... The Jurist, New Series, London.
 Just. Inst..... Institutes of Justinian.

K

Kames, Eq..... Kames' Principles of Equity.
 Kan. Kansas.
 Kan. App..... Kansas Appeals.
 Kay & J..... Kay and Johnson's English Vice Chancellors' Reports.
 Keb. Keble's English King's Bench Reports.
 Keen Keen's English Rolls Court Reports.
 Keen, Ch..... Keen's English Rolls Court Reports.
 Keener, Quasi Cont.. Keener on Quasi Contracts.
 Kel. Sir John Kelyng's English Crown Cases.

Kelly Kelly (Ga.)
 Kent, Comm. Kent's Commentaries on American Law.
 Kent & R. St..... Kent and Radcliff's Law of New York (Revision of 1801).
 Kern. Kernan (N. Y.)
 Kerr, Inj..... Kerr on Injunctions.
 Kerr, Rec..... Kerr on Receivers.
 Kersey, Dict..... John Kersey's English Dictionary, 1708.
 Keyes Keyes (N. Y.)
 Kielway Keilway's English King's Bench Reports.
 Kinney, Law Dict. & Glos..... Kinney's Law Dictionary and Glossary.
 Kirby Kirby (Conn.)
 Knight, Mech. Dict. Knight's American Mechanical Dictionary.
 Kulp Kulp (Pa.)
 Ky. Kentucky.
 Kyd Kyd on Bills of Exchange.
 Kyd, Corp..... Kyd on Corporations.
 Ky. Dec..... Kentucky Decisions.
 Ky. Law Rep. Kentucky Law Reporter.
 Ky. St. Law..... Morehead and Brown Digest of Statute Laws (Ky.)
 K. & R..... Kent and Radcliff's Law of New York (Revision of 1801).

L

La. Louisiana.
 La. Ann. Louisiana Annual.
 Lack. Jur. Lackawanna Jurist (Pa.)
 Lack. Leg. N..... Lackawanna Legal News (Pa.)
 Lalor, Supp. Lalor's Supplement to Hill & Denio's Reports (N. Y.)
 Lamb. Eir..... Lambard's Eiranarcha.
 Lanc. Bar Lancaster Bar.
 Lanc. Law Rev. .. Lancaster Law Review.
 Lans. Lansing (N. Y.)
 Lans. Ch..... Lansing's Chancery (N. Y.)
 Law J. Ch..... Law Journal, New Series, Chancery.
 Law J. Exch..... Law Journal, New Series, Exchequer.
 Law J. Q. B..... Law Journal, New Series, Queen's Bench (English).
 Law of Trusts (Tiff. & Bul.) Tiffany and Bullard on Trusts and Trustees.
 Law Rep..... Monthly Law Reporter, Boston, Mass.
 Law Rep. Ex..... English Law Reports, Exchequer.
 Lawson, Exp. Ev... Lawson on Expert and Opinion Evidence.
 Lawson, Pres. Ev... Lawson on Presumptive Evidence.
 Lawson, Rights, Rem. & Pr..... Lawson on Rights, Remedies and Practice.
 Lawson, Usages & Cust. Lawson's Law of Usages and Customs.
 Law T..... English Law Times Reports.
 Law T. (N. S.).... English Law Times Reports, New Series.
 Ld. Raym..... Lord Raymond's English King's Bench Reports.
 Lea Lea (Tenn.)
 Leach, Cr. Cas..... Leach's English Crown Cases.
 Leach's C. L..... Leach's Club Cases, London.
 Leam. & Spic..... Leaming and Spicer's Laws, Grants, Concessions and Original Constitutions (N. J.)
 L. Ed..... Lawyers' Edition Supreme Court Reports.

Lee (Cal.)	Lee (Cal.)	U. S. R. Prob. Div.	English Law Reports, Probate, Divorce and Admiralty Division.
Leg. Acts of the Legislature.	Leg. Chron. Legal Chronicle.	L. R. Prob. & Div.	English Law Reports, Probate and Divorce.
Leg. Gaz. Legal Gazette (Pa.)	Leg. Gaz. R. Legal Gazette Reports (Pa.)	L. R. Prov. & Div.	See L. R. Prob. & Div.
Leg. Int. Legal Intelligencer (Pa.)	Leg. News. Legal News, Chicago.	L. R. Q. B.	English Law Reports, Queen's Bench.
Leg. Op. Legal Opinions.	Leg. Rec. Rep. Legal Record Reports.	L. R. Q. B. Div.	English Law Reports, Queen's Bench Division.
Leg. Rep. Legal Reporter (Tenn.)	Leg. & Ins. Rep. Legal & Insurance Reporter.	Lush.	Lushington's English Admiralty Reports.
Lehigh Val. Law Rep. Lehigh Valley Law Reporter.	Leigh (Va.)	Lut.	Lutwyche's English Common Pleas Reports.
Leigh & C. Leigh and Cave's English Crown Cases.	Leon. Leonard's English King's Bench Reports.	Luz. Law T.	Luzerne Law Times (Pa.)
Levin. Levin's English King's Bench Reports.	Lewin, Cr. Cas. Lewin's English Crown Cases Reserved.	Luz. Leg. Obs.	Luzerne Legal Observer (Pa.)
Lewis, Em. Dom. Lewis on Eminent Domain.	Lewis, Perp. Lewis' Law of Perpetuity.	Luz. Leg. Reg.	Luzerne Legal Register (Pa.)
Lex Mercatoria Americana An Enquiry into the Law Merchant of the United States by George Caines.	Lieb. Herm. Lieber's Hermeneutica.		
Lil. Conv. Lilly's Conveyancer.	Lilly, Abr. Lilly's Abridgment, or Practical Register.		
Lindl. Copartn. Lindley on Partnership.	Lindl. Partn. Lindley's Law of Partnership.		
Litt. Coke on Littleton.	Litt. Littell (Ky.)		
Litt. Comp. Laws. Littell's Statute Law (Ky.)	Litt. Sel. Cas. Littell's Select Cases (Ky.)		
Litt. & S. St. Law. Littell and Swigert's Digest of Statute Law (Ky.)	Livermore, Ag. Livermore on Principal and Agent.		
Liv. Law Mag. Livingston's Law Magazine (N. Y.)	L. J. Ch. Law Journal, New Series, Chancery, English.		
L. J. Exch. Law Journal, New Series, Exchequer.	L. J. M. Cas. Law Journal, New Series, Magistrates' Cases.		
Loc. Acts. Local Acts.	Loc. Code. Local Code.		
Loc. Laws. Local Laws.	Lofft. Lofft's English King's Bench Reports.		
Lomax, Ex'ra. Lomax on Executors.	Lom. Dig. Lomax's Digest of Real Property.		
Long, Irr. Long on Irrigation.	Low. Lowell (U. S.)		
Lower Ct. Dec. Lower Court Decisions (Ohio)	L. R. A. Lawyers' Reports Annotated.		
L. R. App. Cas. English Law Reports, Appeal Cases, House of Lords.	L. R. C. P. English Law Reports, Common Pleas.		
L. R. Eq. English Law Reports, Equity.	L. R. Ex. Cas. English Law Reports, Exchequer.		
L. R. Exch. English Law Reports, Exchequer.	L. R. H. L. English Law Reports, English and Irish Appeal Cases.		
L. R. H. L. Sc. English Law Reports, Scotch and Divorce Appeal Cases.	L. R. P. C. English Law Reports, Privy Council, Appeal Cases.		
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		McAll. McAllister (U. S.)	
		MacArthur. MacArthur (D. C.)	
		MacArthur, Pat. Cas. MacArthur's Patent Cases (U. S.)	
		MacArthur & M. MacArthur & Mackey (D. C.)	
		Macaulay, Hist. Eng. Macaulay's History of England.	
		McCahon. McCahon (Kan.)	
		McCart. McCarter (N. J.)	
		McCarty, Civ. Proc. McCarty's Civil Procedure Reports (N. Y.)	
		McClain, Cr. Law. McClain's Criminal Law.	
		McClain's Code. McClain's Annotated Code and Statutes (Iowa)	
		McClel. Dig. McClellan's Digest of Laws (Fla.)	
		McCord. McCord's Law (S. C.)	
		McCord, Eq. McCord's Equity (S. C.)	
		McCrary. McCrary (S. S.)	
		McCrary, Elect. McCrary's American Law of Elections.	
		McCul. Dict. McCulloch's Commercial Dictionary.	
		McGloin. McGloin (La.)	
		McKelvey, Ev. McKelvey on Evidence.	
		Mackey. Mackey (D. C.)	
		McLean. McLean (U. S.)	
		Macl. Shipp. Maclachlan on Merchant Shipping.	
		McMul. McMullan (S. C.)	
		McMul. Eq. McMullan's Equity (S. O.)	
		Macn. & G. Macnaghten and Gordon's English Chancery Reports.	
		Macq. Macqueen's Scotch Appeal Cases.	
		Madd. Maddock's Reports, English Chancery.	
		Maine, Anc. Law. Maine's Ancient Law.	
		Man. Manning (Mich.)	
		Man., G. & S. Manning, Granger, and Scott's English Common Pleas Reports.	
		Mansf. Dig. Mansfield's Digest of Statutes (Ark.)	
		Manson, Bankr. Cas. Manson's Bankruptcy and Winding-Up Cases.	
		Man. Unrep. Cas. Manning's Unreported Cases (La.)	
		Man. & G. Manning & Granger's English Common Pleas Reports.	
		Man. & R. Manning & Ryland's English Magistrates' Cases.	
		Marsh. Marshall's English Common Pleas Reports.	
		Marsh., A. K. A. K. Marshall (Ky.)	
		Marsh. Ins. Marshall on Marine Insurance.	
		Marsh., J. J. J. J. Marshall (Ky.)	

Martin, Dict.....	Edward Martin's English Dictionary.
Mart. (N. C.).....	Martin (N. C.)
Mart. (N. S.).....	Martin's New Series (La.)
Mart. (O. S.).....	Martin's Old Series (La.)
Mart. & Y.....	Martin & Yerger (Tenn.)
Marv.	Marvel's Reports (Del.)
Mason	Mason (U. S.)
Mass.	Massachusetts.
Math. Pres. Ev.....	Mathews on Presumptive Evidence.
Maule & S.....	Maule and Selwyn's English King's Bench Reports.
Maxw. Adv. Gram..	W. H. Maxwell's Advanced Lessons in English Grammar.
Maxw. Cr. Proc.....	Maxwell's Treatise on Criminal Procedure.
Maxw. Interp. St..	Maxwell on Interpretation of Statutes.
May, Ins.....	May on Insurance.
Md.	Maryland.
Md. Ch.	Maryland Chancery.
Me.	Maine.
Mechem, Ag.....	Mechem on Agency.
Mechem, Pub. Off..	Mechem on Public Offices and Officers.
Mees. & W.....	Meeson and Welsby's English Exchequer Reports.
Meigs	Meigs (Tenn.)
Meigs, Dig.....	Meigs' Digest of Decisions of the Courts of Tennessee.
Mer.	Merivale's English Chancery Reports.
Merl. Report.....	Merlin, Répertoire de Jurisprudence.
Metc. (Ky.)	Metcalfc (Ky.)
Metc. (Mass.)	Metcalf (Mass.)
Nich.	Michigan.
Mich. N. P.....	Michigan Nisi Prius.
Miles	Miles (Pa.)
Mill, Const.	Mill's Constitutional Reports (S. C.)
MHler, Const.	Miller on the Constitution of the United States.
Miller's Code.....	Miller's Revised and Annotated Code (Iowa)
Mills' Ann. St.....	Mills' Annotated Statutes (Colo.)
Mills, Em. Dom....	Mills on Eminent Domain.
Mill. & V. Code....	Milliken & Vertrees' Code (Tenn.)
Minn.	Minnesota.
Minor	Minor (Ala.)
Minor, Inst.	Minor's Institutes of Common and Statute Law.
Misc. Laws.....	Miscellaneous Laws (Or.)
Misc. Rep.	Miscellaneous Reports (N. Y.)
Miss.	Mississippi.
Mitch. Mod. Geog..	Mitchell's Modern Geography.
Mitf. Eq. Pl.....	Mitford's Equity Pleading.
Mo.	Missouri.
Moak, Eng. R.....	Moak's English Reports.
Moak, Underh. Torts	Moak's Edition of Underhill on Torts.
Mo. App.	Missouri Appeal Reports.
Mo. App. Rep'r ...	Missouri Appellate Reporter.
Mod.	Modern Reports, English King's Bench.
Monag.	Monaghan (Pa.)
Mon., B.	B. Monroe (Ky.)
Mon., T. B.....	T. B. Monroe (Ky.)
Mont.	Montana.
Montg. Co. Law Rep'r	Montgomery County Law Reporter (Pa.)
Month. Law Bul..	Monthly Law Bulletin (N. Y.)
Mont. & B.....	Montagu & Bligh's English Bankruptcy Reports.
Mont. & M.....	Montagu and MacArthur's English Bankruptcy Reports.
Moody, Cr. Cas....	Moody's Crown Cases, English Courts.
Moody & M.....	Moody and Malkin's English Nisi Prius Reports.
Moody & R.....	Moody and Robinson's English Nisi Prius Reports.
Moore	Moore (Ark.)
Moore	Sir Francis Moore's English King's Bench Reports.
Moore, Cr. Law....	Moore's Criminal Law and Procedure.
Moore, P. C.....	Moore's Privy Council Reports.
Moore, Presb. Dig..	Moore's Presbyterian Digest.
Moore & S.....	Moore and Scott's English Common Pleas Reports.
Mor. Corp.....	Morawetz on Private Corporations.
Moreau & Carleton's Partidas	Moreau-Lislet and Carleton's Laws of Las Siété Partidas in force in Louisiana.
Mor. Priv. Corp....	Morawets on Private Corporations.
Morrell, Bankr. Cas.	Morrell's English Bankruptcy Cases.
Morris	Morris (Iowa)
Morris, Repl.....	Morris on Replevin.
Morr. Min. Rep....	Morrison's Mining Reports.
Morse, Banks	Morse on the Law of Banks and Banking.
Mos.	Mosely's English Chancery Reports.
Mun. Code.....	Municipal Code.
Munf.	Munford (Va.)
Murfree, Off. Bonds..	Murfree on Official Bonds.
Murph.	Murphey (N. C.)
Murray's Eng. Dict..	Murray's English Dictionary.
Myl. & C.....	Myline & Craig's English Chancery Reports.
Myl. & K.	Myline and Keen's English Chancery Reports.
Myr. Prob.	Myrick's Probate Court Reports (Cal.)
M. & C. Partidas...	Moreau-Lislet and Carleton's Laws of Las Siété Partidas in force in Louisiana.
M. & W.....	Meeson and Welsby's English Exchequer Reports.
N	
Nat. Bankr. Law..	National Bankruptcy Law.
Nat. Bankr. R.....	National Bankruptcy Register (U. S.)
N. B. R.....	National Bankruptcy Register (U. S.)
N. C.....	North Carolina.
N. C. Term R....	North Carolina Term Reports.
N. Chip.....	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Neg. Inst. Law....	Negotiable Instrument Law.
Nev.	Nevada.
Nev. & M.....	Neville and Manning's English King's Bench Reports.
Newb. Adm.	Newberry's Admiralty (U. S.)
Newell, Defam.	Newell on Defamation, Slander and Libel.

- Newell, Eject.....Newell's Treatise on the Action of Ejectment.
 Newell, Mal. Pros..Newell's Treatise on Malicious Prosecution.
 Newell, Sland. & L..Newell on Slander and Libel.
 Newl. Ch. Prac....Newland's Chancery Practice.
 N. H.New Hampshire.
 Nisi Prius & Gen. T. Rep.Nisi Prius & General Term Reports (Ohio)
 Nix. Dig.Nixon's Digest of Laws (N. J.)
 N. J. Eq.New Jersey Equity.
 N. J. LawNew Jersey Law.
 N. J. Law J.....New Jersey Law Journal.
 N. M.New Mexico.
 NorrisNorris (Pa.)
 Northam. Law Rep..Northampton County Law Reporter (Pa.)
 Northumb. Co. Leg. N.Northumberland County Legal News (Pa.)
 Nott & McO.Nott & McCord (S. C.)
 N. R. L.Revised Laws 1813 (N. Y.)
 N. S.New Series.
 N. W.Northwestern Reporter.
 N. Y.New York.
 N. Y. Ann. Cas. ...New York Annotated Cases.
 N. Y. Cr. R.....New York Criminal Reports.
 N. Y. Daily Reg....New York Daily Register.
 N. Y. Law J.....New York Law Journal.
 N. Y. Leg. Obs.New York Legal Observer.
 N. Y. St. Rep.New York State Reporter.
 N. Y. Super. Ct....New York Superior Court.
 N. Y. Supp.....New York Supplement.
- O**
- O. C. D.Ohio Circuit Decisions.
 Odgers, L. & Sland. } Odgers on Libel and Slander.
 Odgers, Sland. & L. }
 Ogilvie, Dict.....Ogilvie's Imperial Dictionary of the English Language.
 OhioOhio.
 Ohio Cir. Ct. R....Ohio Circuit Court Reports.
 Ohio Dec.....Ohio Decisions.
 Ohio Law J.....Ohio Law Journal.
 Ohio Leg. N.....Ohio Legal News.
 Ohio N. P.....Ohio Nisi Prius.
 Ohio St.....Ohio State.
 Ohio S. & C. P. Dec.Ohio Superior and Common Pleas Decisions.
 Okl.Oklahoma.
 OlcottOlcott (U. S.)
 O. L. D.....Ohio Lower Court Decisions.
 Ont.Ontario Reports.
 Op. Attys. Gen....Opinions of the United States Attorneys General.
 Or.Oregon.
 Ord.Ordinance.
 O. S.Old Series.
 OuterbridgeOuterbridge (Pa.)
 Overt.Overton (Tenn.)
 OwenOwen's English King's Bench Reports.
 O. & W. Dig.....Oldham and White's Digest of Laws (Tex.)
- P**
- Pa.Pennsylvania State.
 Pac.Pacific Reporter.
 Pa. Co. Ct. R.....Pennsylvania County Court Reports.
 Pa. Com. Pl.....Pennsylvania Common Pleas Reporter.
 Pa. Dist. R.....Pennsylvania District Reports.
 PaigePaige's Chancery (N. Y.)
 PainePaine (U. S.)
 Paine, Elect.....Paine on Elections.
 Pa. Law J.....Pennsylvania Law Journal.
 Paley, Ag.....Paley on Principal and Agent (or Agency).
 Paley, Mor. Ph....Wm. Paley's Moral Philosophy (English).
 Pamphl. Laws....Pamphlet Laws (Acts).
 Park, Ins.....Park on Marine Insurance.
 Parker, Cr. R.....Parker's Criminal Reports (N. Y.)
 Pars. Bills & N....Parsons on Bills and Notes.
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 Pars. Mar. Ins....Parsons on Marine Insurance and General Average.
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 Pars. Merc. Law...Parsons on Mercantile Law.
 Pars. Shipp. & Adm..Parsons on Shipping and Admiralty.
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 Pasch. Dig.....Paschal's Texas Digest of Decisions.
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 Pears.Pearson (Pa.)
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 Pen. Laws.....Penal Laws.
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 Penning.Pennington (N. J.)
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edies & Remedial Rights.
Pom. Spec. Perf...Pomeroy on Specific Per-
formance of Contracts.
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Bench Reports.
Port. (Ala.)Porter (Ala.)
Port. Ins.....Porter's Laws of Insur-
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Prest. Est.....Preston on Estates.
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Priv. St.....Private Statutes.
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Prob. Div.Probate Division, Eng-
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Prob. Pr. Act.....Probate Practice Act.
Prob. R.Probate Reports (Ohio)
Prov. St.Statutes (Laws) of the
Province of Massachu-
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Pub. ActsPublic Acts.
Pub. Gen. Laws...Public General Laws.
Pub. Laws.....Public Laws.
Pub. Loc. Laws...Public Local Laws.
Pub. St.....Public Statutes.
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PuffendorfPuffendorf's Law of Nature
and Nations.
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QuincyQuincy (Mass.)

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Rand. Com. Paper..Randolph on Commercial
Paper.
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Cyclopædia.
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Reeves, Eng. Law..Reeve's History of the Eng-
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Rep.Coke's English King's
Bench Reports.
ReportsThe Reports, English.
Rev.Revision of the Statutes
Revised.
Rev. Civ. Code....Revised Civil Code.
Rev. Civ. St.....Revised Civil Statutes.
Rev. Code.....Revised Code.
Rev. Code Civ.Proc..Revised Code Civil Proce-
dure.
Rev. Code Cr. Proc..Revised Code of Criminal
Procedure.
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LawsReynolds' Spanish and
Mexican Land Laws.
R. I.Rhode Island.
RiceRice's Law (S. C.)
Rice, Eq.Rice's Equity (S. C.)
Rice, Ev.....Rice's Law of Evidence.
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(Colo.)
Rich.Richard (as 5 Rich. II).
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 South. Southern Reporter.
 Southard Southard (N. J.)
 Sp. Acts.....Special Acts.
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 Chancery.
 Spencer Spencer (N. J.)
 Spinks, Prize Cas. Spinks' Admiralty Prize
 Cases.
 Sp. Laws.....Special Laws.
 Spr. Sprague (U. S.)
 Sp. Sess. Special Session.
 Sp. St.....Private and Special Laws.
 St. Laws or Acts (in some
 states).
 St. State, Statutes.
 Stand. Dict. Standard Dictionary.
 Stanton's Rev. St....Stanton's Revised Statutes
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 Stew. & P.....Stewart & Porter (Ala.)
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 St. Law.....Loughborough's Digest of
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 St. Lim.....Statute of Limitations.
 Stockt. Stockton's Equity (N. J.)
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 United States.
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 Story, Ag.....Story on Agency.
 Story, Bailm. Story on Bailment.
 Story, Bills Story on Bills.
 Story, Comm. Const..Story's Commentaries on
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Story, Conf. Laws.....Story on the Conflict of
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 Story, Const. Story's Commentaries on
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 Story, Eq. Pl.....Story on Equity Pleading.
 Story, Merchants...Abbott's Merchant Ships
 and Seamen by Story.
 Story, Partn.....Story on Partnership.
 Story, Prom. Notes..Story on Promissory Notes.
 Story, Sales.....Story on Sales of Personal
 Property.
 Story's Laws.....Story's United States Laws.
 Strange Strange's English King's
 Bench Reports.
 Strob. Strobhart's Law (S. C.)
 Strob. Eq. Strobhart's Equity (S. C.)
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 Bench Reports.
 Sub. Rev.....Supplement to the Revi-
 sion.
 Sugd. Powers.....Sugden on Powers.
 Sumn. Sumner (U. S.)
 Sup. Ct. Supreme Court Reporter.
 Super. Ct. Rep....Superior Court Reports
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 Supp. Code.....Supplement to Code.
 Supp. Gen. St.....Supplement to the General
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 Supp. Rev.....Supplement to the Revi-
 sion.
 Supp. Rev. Code...Supplement to the Revised
 Code.
 Supp. Rev. St.....Supplement to the Revised
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 Supp. U. S. Comp.
 St. 1903 Supplement 1903 to the
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 Statutes of 1901.
 Sus. Leg. Chron....Susquehanna Legal Chron-
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Wend.	Wendell (N. Y.)	Winst. Eq.	Winston's Equity (N. C.)
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West Coast Rep.	West Coast Reporter.	Witthaus & Becker's Med. Jur.	Witthaus and Becker's Medical Jurisprudence.
West. Law J.	Western Law Journal, Cincinnati (Ohio)	Wkly. Dig.	Weekly Digest (N. Y.)
West. Law Month.	Western Law Monthly (Ohio)	Wkly. Law Bul.	Weekly Law Bulletin (Ohio)
West. L. M.	Western Law Monthly (Ohio)	Wkly. Law Gaz.	Weekly Law Gazette (Ohio)
Westm.	Statute of Westminster.	Wkly. Notes Cas.	Weekly Notes Cases (Pa.)
Whart.	Wharton (Pa.)	Wkly. Rep.	Weekly Reporter, London (English).
Whart. Ag.	Wharton on Agency.	Wm.	William (as 9 Wm. III.)
Whart. Am. Cr. Law.	Wharton's American Criminal Law.	Wm. Bl.	Sir William Blackstone's English King's Bench Reports.
Whart. Conf. Laws.	Wharton's Conflict of Laws.	Wm. Rob. Adm.	William Robinson's English Admiralty Reports.
Whart. Cr. Ev.	Wharton on Criminal Evidence.	Wms. Ex'rs	Williams on Executors.
Whart. Cr. Law.	Wharton's American Criminal Law.	Wm. & Mary.	William and Mary (as 2 Wm. & Mary, c. 1).
Whart. Cr. Pl. & Prac.	Wharton's Criminal Pleading & Practice.	Woerner, Adm'n.	Woerner's Treatise on the American Law of Administration.
Whart. Ev.	Wharton on Evidence in Civil Issues.	Woodb. & M.	Woodbury & Minot (U. S.)
Whart. Homicide.	Wharton's Law of Homicide.	Woodf. Landl. & T.	Woodfall on Landlord and Tenant.
Whart. Law Dict.	Wharton's Law Dictionary (or Law Lexicon).	Wood, Ins.	Wood on Fire Insurance.
Whart. Law Lexicon	Wharton's Law Dictionary (or Law Lexicon).		
Whart. Neg.	Wharton on Negligence.		
Whart. St. Tr.	Wharton's State Trials (U. S.)		
Whart. & S. Med. Jur.	Wharton and Stille's Medical Jurisprudence.		
Wheat.	Wheaton (U. S.)		
Wheat. El. Int. Law	Wheaton's Elements of International Law.		

JUDICIAL AND STATUTORY DEFINITIONS

OF

WORDS AND PHRASES.

VOLUME 8.

SUPERSEDE.

To "supersede" is to set aside or annul, and an order which sets aside or annuls a decree dissolving an injunction must reinstate the injunction. *New River Mineral Co. v. Seeley* (U. S.) 117 Fed. 981, 982.

"In the military sense 'to be superseded' means to have one put in the place which by the ordinary course of military promotion belongs to another." *Ex parte Hall*, 18 Mass. (1 Pick.) 261, 262.

SUPERSEDEAS.

A *supersedeas* is a writ issued to a ministerial officer commanding him to suspend or desist in a proceeding under another writ previously issued to him. *Tyler v. Presley*, 13 Pac. 856, 857, 72 Cal. 290 (citing *Abb. Law Dict.*).

A "*supersedeas*" is a statutory remedy by which the enforcement of a decree of a court is superseded or delayed during appeal. *State v. Lafin*, 58 N. W. 936, 937, 40 Neb. 441.

Jacob in his *Law Dictionary* says that "*supersedeas*" is a writ that lies in a good many cases. It signifies, in general, the command to stay some ordinary proceedings at law, on good cause shown, which ought otherwise to proceed. This court, in the case of *Blackerby v. People*, 10 Ill. (5 Gilman) 266, 267, said that the order allowing a *supersedeas* does not operate as a suspension of the judgment until the bond is filed and the writ of error issued. When these proceedings are had, the clerk issues the certificate, the object of which is to notify all other parties that the proceedings are stayed. *Perteet v. People*, 70 Ill. 171, 177.

A *supersedeas* is a statutory remedy, and is only obtained by strict compliance

with all the required conditions. It does not relate back to the date of an order appealed from, so as to annul proceedings already had, or restore rights under it already lost. The stay simply leaves the proceedings on the order, and the rights of the appellant under it, just as they are when it takes effect on the date of filing the bond. *Woolfolk v. Bruns*, 45 Minn. 96, 97, 47 N. W. 460.

The writ of *supersedeas* is an auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review. *Williams v. Bruffy*, 102 U. S. 249. Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come into his hands. In modern times the term is often used synonymously with "stay of proceedings," and is "employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment." *Dulin v. Pacific Wood & Coal Co.*, 33 Pac. 123, 124, 98 Cal. 304.

A "*supersedeas*," in the language of the Civil Code, is a written order, signed by the clerk, commanding the appellee and all others to stay proceedings on the judgment or order, meaning, of course, the judgment or order appealed from. *Roberts v. Jenkins*, 4 Ky. Law Rep. 648, 650, 80 Ky. 666. It is a remedy provided by law for the unsuccessful litigant, who complains of certain errors committed to his prejudice by the court below, and stops all proceedings on the judgment until this court disposes of the appeal. *Smith v. Western Union Tel. Co.*, 83 Ky. 269, 271.

"*Supersedeas*," properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if a writ of execu-

tion is issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but, if the writ of execution has been not only lawfully issued but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded. *Hovey v. McDonald*, 3 Sup. Ct. 136, 141, 109 U. S. 150, 27 L. Ed. 888.

A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, so as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is that whatever is done under the judgment after and while it is suspended, being done without authority from the judgment, which is then powerless, should be set aside as improperly and irregularly done, but that whatever is done according to the judgment before the supersedeas takes effect is upheld by the authority of the judgment, and not overreached by the supersedeas. *Runyon v. Bennett*, 34 Ky. (4 Dana) 509, 29 Am. Dec. 431 (cited, approved, and followed in *Weber v. Tanner* [Ky.] 64 S. W. 741, 742).

A supersedeas has the effect to suspend further proceedings in relation to a judgment, but it does not, like a reversal, annul it. The supersedeas, being preventive in its nature, does not set aside what the trial court has adjudicated, but stays other proceedings in relation to the judgment until the appellate court acts thereon. In Florida, so long as an appeal with supersedeas from an order granting injunction is pending, the power of the court to enforce the injunction or to punish as contempt acts in violation of its terms committed during such time is suspended. *Powell v. Florida Land & Improvement Co.*, 26 South. 700, 41 Fla. 494.

"Supersedeas," as the word indicates, supersedes the judgment of the court below, and no step should be taken toward execution after the Supreme Court has determined *prima facie* that the defendant has not been legally convicted, and has ordered that a writ of error in a criminal case be made supersedeas. *Ritchey v. People*, 43 Pac. 1026, 1028, 22 Colo. 251.

A writ of certiorari, issuing out of the Supreme Court and directed to the court for the trial of small causes, is in its nature and effect a "supersedeas," and ought to stay all

further proceedings in the cause; for, after it is received, the justice has no right to take any proceeding or issue any writ. *Mairs v. Sparks*, 5 N. J. Law (2 Southard) 513, 516.

"Supersedeas," properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it. *Staffords v. King* (U. S.) 90 Fed. 136, 140, 32 C. C. A. 536.

A supersedeas is a written order, signed by the clerk, commanding appellee and all others to stay proceedings on the judgment or order. *Ind. T. Ann. St. 1899, § 795.*

SUPERSEDEAS BOND.

A "supersedeas bond" merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment, nor prevent any party thereto from invoking it, as an estoppel. *Ransom v. City of Pierre* (U. S.) 101 Fed. 665, 669, 41 C. C. A. 585.

SUPERSTITIOUS USE.

The statute of mortmain has been extended to Pennsylvania only so far as it prohibits dedication of property to superstitious uses and grants to corporations without a statutory license. A trust in favor of an unincorporated religious society is not a gift to a superstitious use. "Superstitious use" by the British courts has been extended to all uses which are subordinate to the interest and will of the Established Church. *Methodist Church v. Remington* (Pa.) 1 Watts, 219, 225, 28 Am. Dec. 61.

A bequest of money made by a member of the Roman Catholic church to a priest for the celebration of a mass for the soul of the testator and another, though it would be void under the English common law as being for "superstitious uses," is valid and will be upheld in the United States, where such provision of the common law never became a part of the law of the country. *Harrison v. Brophy*, 51 Pac. 883, 884, 59 Kan. 1, 40 L. R. A. 721.

SUPERSTRUCTURE.

"Superstructure," as used in Act April 21, 1858, providing that where property of a railroad company, except the superstructure of the road and water stations, should be subject to taxation by ordinance for city purposes, means the roadbed, with whatever has been constructed upon it, although the word might in present railway engineering phraseology be limited to sleepers, rails, and fastenings. *City of Philadelphia v. Philadelphia & R. R. Co.*, 35 Atl. 610, 611, 177 Pa. 292.

"Superstructure," as used in Comp. St. c. 77, § 39, requiring the officers of railroad corporations to return to the Auditor of Public Accounts for assessment and taxation the number of miles of railroad in the state, including roadbed, right of way, and superstructure thereon, cannot be construed to include a bridge over the Missouri river. Webster defines the word "superstructure," referring to railroad engineering, to be the sleepers, rails, and fastenings, in distinction from the roadbed, called also "permanent way." *Cass County v. Chicago, B. & Q. R. Co.*, 41 N. W. 246, 25 Neb. 348, 2 L. R. A. 188.

SUPERVISE.

"Supervising" means taking part in the work, and hence, where an insured had stated that he was a confectioner, and his duties were supervising, the insurance company will be liable on the policy, though the policy classified him as a proprietor, not working, and his death was caused while working. *Schmidt v. American Mut. Acc. Ass'n*, 71 N. W. 601, 602, 96 Wis. 304.

SUPERVISING FARMER.

The term "supervising farmer," in a classification of the risks of an insurance company, covers a person who employs farm laborers and does but little work himself. "We think that the supervision of a farm includes in its care and oversight the doing of such incidental things as may be required for keeping it in order, and does not mean absolute idleness as far as physical labor is concerned." *National Acc. Soc. of City of New York v. Taylor*, 42 Ill. App. 97, 102.

SUPERVISION.

"Webster says 'supervision' means to oversee for direction, to superintend, to inspect, as to supervise the press for correction." It is so used in Rev. St. U. S. § 441 [U. S. Comp. St. 1901, p. 252], charging the Secretary of the Interior with the supervision of the office relating to the public lands; and hence the statute gives the Secretary of Interior and, under his direction, the Commissioner of the General Land Office, the power to review all the acts of the local officers, and to correct and direct a correction of any error committed by them. *Van Tongeren v. Heffernan*, 38 N. W. 52, 56, 5 Dak. 180.

"Supervision," as used in the Constitution of Wyoming, providing that the state shall control the public waters in the state, and such control shall consist in a supervision of the waters, their appropriation, distribution, and diversion, by a board of control, etc., includes official action, administra-

tive, rather than judicial, in its fundamental character, although as a necessary incident thereto there is involved quasi judicial authority to determine respective right. *Farm Inv. Co. v. Carpenter*, 61 Pac. 258, 266, 9 Wyo. 110, 50 L. R. A. 747, 87 Am. St. Rep. 918.

Const. art. 11, § 4, providing that the "supervision of instruction" in the public schools shall be vested in the board of education, does not mean that the board shall enter into the details of giving instruction or carrying on the schools. It means no more than a general oversight over the matter of instruction, and would not include the selection of books on particular subjects. *State ex rel. Wolfe v. Bronson*, 21 S. W. 1125, 1126, 115 Mo. 271.

"Supervision" is defined by Webster to be "the act of overseeing, inspection, or superintendence," and is so used in an act giving a board of transportation general supervision of railroads; and hence the act clothes the board with necessary powers for such purposes. *State v. Freemont, E. & M. V. R. Co.*, 35 N. W. 118, 124, 22 Neb. 813.

SUPERVISOR.

See "Road Supervisor."

A supervisor is an officer of the civil township, as are justices of the peace and constables, and is charged with the opening, repairing, and keeping in repair the public roads or highways within his road district. *Woodworth v. State*, 26 Ohio St. 196, 197.

A supervisor is a ministerial officer, whose duties and authority are prescribed and limited by statute, and which, for the most part, are confined to his own district. His duties, generally, are to open and keep in repair and unobstructed the public roads in his district not owned or operated under private charters or by incorporated companies. *Grove v. Mikesell*, 13 Ohio St. 158, 165.

The word "supervisors," when applied to county officers, has a legal signification, and means those officers having the general management of the affairs of the county. The duties of such officers are various and manifold, sometimes judicial, and at others legislative and executive. From the necessity of the case it would be impossible to reconcile them to any particular head, and therefore, in matters relating to the police and physical regulation of counties, they are allowed to perform such duties as may be enjoined on them by law, without any nice examination into the character of the powers conferred. This rule preserves the utility of these officers, while at the same time the rule is in harmony with the spirit of state Constitutions. *State v. Ormsby County Com'rs*, 7 Nev. 392, 397 (citing *People v. Eldorado*

County Court, 8 Cal. 58; *People v. Marin County Sup'rs*, 10 Cal. 344; *Waugh v. Chauncey*, 13 Cal. 12; *Robinson v. Sacramento County Sup'rs*, 16 Cal. 208).

A "supervisor" cannot be created by legislative enactment. The office of supervisor is a constitutional one (Const. art. 3, § 22), and is elective; and to clothe any one with powers of a supervisor who has not been elected would be to act in direct conflict with the spirit and intent of that portion of the Constitution making supervisors elective. *Williams v. Boynton*, 25 N. Y. Supp. 60, 67, 71 Hun, 309.

An action brought by "the supervisors of the town" means the supervisors of the town eo nomine, without use of their personal names, and the action is that of the town, and not of the supervisors personally. *State v. Town of Decatur*, 17 N. W. 20, 22, 58 Wis. 291.

SUPERVISORY CONTROL.

The term "supervisory control," as used in Const. art. 8, § 2, giving the Supreme Court supervisory control, implies something to supervise, as well as something to control, and the exercise of judicial discretion on the part of the court. The supervisory power granted to this court is a co-ordinate power, and, as with its original and appellate jurisdiction, so with this. The power thus conferred will only be exercised after consideration, deliberation, and a judicial determination of the merits of the controversy with reference to which it is sought to be invoked. It cannot be appealed to, and a remedy had under it, as a matter of course. *In re Weston*, 72 Pac. 512, 516, 28 Mont. 207.

SUPPLEMENT.

A "supplement" is that which supplies a deficiency; that which fills up, completes, or makes an addition to something already organized, arranged, or set apart; a part added to or a continuation of. It is used sometimes as a synonym of "appendix." *State v. Wyandot County*, 16 Ohio Cir. Ct. R. 218, 221 (quoting 9 Ohio Dec. 90, 91).

"Supplement" is a supplying by addition of what is wanting. Thus it was held that where an act authorized the construction of waterworks for a city, but required the assent of the voters, the purpose of a subsequent act repealing the provision as to assent was sufficiently expressed by its title as a supplement to, etc. *Rahway Sav. Inst. v. City of Rahway*, 20 Atl. 756, 757, 53 N. J. Law, 48.

SUPPLEMENTAL ACT.

The word "supplemental" is defined by Webster as that which supplies a deficiency

or meets a want. A legislative act, providing that so much of a certain other act which changed the time for holding court in a certain county as required the court to be held in such county on a certain day should not take effect until the following year, etc., may be fairly described as a "supplemental" act, and not an amendatory act, within the provisions of Const. Tex. art. 7, § 25, forbidding the amendment of an act by reference to its title. *Loomis v. Runge*, 66 Fed. 856, 859, 14 C. C. A. 148.

SUPPLEMENTAL AFFIDAVIT.

A "supplemental affidavit" is not confined to an explanation of the original affidavit, but may set up a new and different defense. The setting up of a new or different defense, however, is suspicious, and requires that the same shall be closely scrutinized. *Callan v. Lukens*, 89 Pa. 134, 136.

SUPPLEMENTAL ANSWER.

A "supplemental answer" is in the nature of a plea puis darrein continuance under the old practice, which it was necessary to plead at the first opportunity, and before the next continuance, and could only be pleaded at a later date by leave granted by the court in its discretion, on showing a satisfactory excuse for the negligence. The ends of justice require the same rule to be applied in the case of supplemental answers. Where, pending an action, matter has arisen constituting a good technical, though an inequitable, defense, which, the defendant, having notice, has for several years neglected to plead, one trial having intervened, the court, after such delay, in the exercise of its discretion will, on the ground of laches, refuse leave to file a supplemental answer setting up such matter as a defense. *French v. Edwards* (U. S.) 9 Fed. Cas. 778, 780.

SUPPLEMENTAL BILL.

See "Bill of Revivor and Supplement."

A supplemental bill "is a bill filed for the purpose of supplying a defect which has arisen in the progress of the suit by the happening of some event subsequent to the filing of the original bill, and is in continuation of the original suit." *Butler v. Cunningham* (N. Y.) 1 Barb. 85, 87.

A supplemental bill is a mere continuation of the original suit by or against a party having or acquiring the interest of the former party, and it forms, together with the original bill and the proceedings under it, but one record. *Harrington v. Slade* (N. Y.) 22 Barb. 161, 166.

A supplemental bill is a bill which is merely "in continuation of the original suit and filed for the purpose of filling up such a deficiency as does not cause a material al-

teration in the matter in litigation or a change of the principal parties, and when, therefore, it is only requisite to add something to the former proceedings in order to attain complete justice." *Bowie v. Minter*, 2 Ala. 406, 411.

A supplemental bill is considered merely as an addition to the original bill, and, while it is often permissible and proper to introduce matter that has occurred after the institution of the suit, and of such a nature as cannot be properly the subject of an amendment, yet such new matter must not be such as to change the rights and interests of the parties before the court. *Ledwith v. City of Jacksonville*, 13 South. 454, 458, 32 Fla. 1.

A "supplemental bill," says Story, Eq. Pl. § 332, "is merely an addition to the original bill, in order to supply some defect in its original frame or structure. In many cases an imperfection in the frame of the original bill may be remedied by an amendment. Generally a mistake in the bill in the statement of a fact should be corrected by an amendment, and not by a right statement of the fact in a supplemental bill; but the imperfection of a bill may remain undiscovered while the proceedings are in such a state that an amendment can be permitted according to the practice of the court, or it may be of such a nature, having occurred after the suit is brought, as may not properly be the subject of an amendment. By the practice of the court no amendment is generally allowable after the parties are at issue upon the points of the original bill and witnesses have been examined; nor is it generally allowable to introduce into the bill by amendment any matter which has happened since the filing of the bill. In such cases a supplemental bill is the appropriate remedy, and such a supplemental bill may not only be for the purpose of putting in issue new matter, which may vary the relief prayed in the original bill, but also for the purpose of putting in issue matter which may prove the plaintiff's right to the relief originally prayed." *Bloxham v. Florida Cent. & P. R. Co.*, 22 South. 697, 704, 39 Fla. 243, *Ely v. Wilcox*, 26 Wis. 91, 98.

A supplemental bill is an addition to an original bill, and is ordinarily filed to correct imperfection or mistake in the original bill, or to bring some new party into the case. It may also be filed in some cases to bring before the court new matters which have occurred since the filing of the original bill, and in that event the relief originally prayed for may be modified or enlarged to meet the case as presented after the addition of the new matter. *Schwab v. Schwab*, 49 Atl. 331, 93 Md. 382, 52 L. R. A. 414 (citing *Story*, Eq. Pl. § 333 et seq.).

When an event happens subsequently to the filing of an original bill, which gives a new interest in the matter in dispute to any

person, whether or not already a party, without depriving all of the original plaintiffs of their interest, the defect arising from this event may be settled by a supplemental bill. 1 *Fost. Fed. Prac.* p. 409, § 187. This bill may be filed at any time during the progress of the suit, as well after as before a decree, and even during the pendency of an appeal. A defendant may file a supplemental bill, which may also be brought in behalf of the defendant in the suit. The authorities are clear that when new parties must be brought in, or new matter is brought forward by persons not parties to the original suit, but whose rights and interests are affected by the decree already made, and who seek to set up matters which occurred during the pendency of the action, the filing of a supplemental bill in the nature of a bill of review is the proper practice. *Thompson v. Schenectady R. Co.* (U. S.) 119 Fed. 634, 638.

Strictly speaking, a "supplemental bill" relates to matters occurring after bill filed, as changes of interest pendente lite, etc. *Melton v. Withers*, 2 S. C. (2 Rich.) 561, 567.

SUPPLEMENTAL COMPLAINT.

Any complaint made by the representative of a deceased plaintiff, though it be the first filed in the action, is a "supplemental complaint," within the meaning of Rev. St. § 2803, authorizing actions to be revived, on motion, within one year from the death, etc., "or afterwards, on a supplemental complaint." *Plumer v. McDonald Lumber Co.*, 42 N. W. 250, 252, 74 Wis. 137.

A supplemental complaint is an additional complaint, consisting of facts arising after the filing of an original, and it and the original constitute the complaint in the cause. Under Rev. St. 1881, § 399, providing that the court may on motion allow supplemental pleadings showing facts which occur after the former pleadings were filed, it is within the discretion of the trial court to allow the filing of additional pleadings after the issues are closed. *Pouder v. Tate*, 132 Ind. 327, 329, 30 N. E. 880.

SUPPLEMENTAL PETITION.

A petition containing merely a statement of transactions constituting his cause of action arising before the bringing of the suit is technically an "amended petition," and it was incorrect to designate it as "supplemental petition," since it pleaded no new facts accruing after the filing of his original petition. *Scroggin v. Johnston*, 64 N. W. 236, 238, 45 Neb. 714.

SUPPLEMENTARY.

"Supplementary," as used in a contract reciting that it was a supplementary agree-

ment, is a term which well comports with the idea of new provisions in a contract. A liability created on the part of one of the parties, where none existed before, is rather supplementary, than explanatory. *Wescott v. Mitchell*, 50 Atl. 21, 23, 95 Me. 377.

SUPPLEMENTARY COMPLAINT.

The office of a supplementary complaint is to add to the cause of action already averred, not to enable the plaintiff to recover upon a cause of action which has accrued since the action was commenced. *Halsted v. Halsted*, 27 N. Y. Supp. 408, 7 Misc. Rep. 23.

SUPPLEMENTARY PROCEEDING.

As action, civil action, or special proceeding, see "Action"; "Civil Action—Case—Suit—Etc."; "Special Proceeding."

A supplementary proceeding is a separate proceeding in an original action, in which the court where the action is pending is called upon to exercise its jurisdiction in aid of the judgment in the action, and is entirely statutory. *Bryant v. Bank of California* (Cal.) 7 Pac. 128, 130.

Supplementary proceedings are not an action on a judgment, within Code Civ. Proc. § 382, subd. 7, providing that an action on a judgment rendered in a court not of record must be commenced within six years. *Green v. Hauser* (N. Y.) 18 Civ. Proc. R. 354, 358, 9 N. Y. Supp. 660.

SUPPLY.

The phrase "to supply" signifies to make provision for; to provide; to serve instead of; to take the place of. The repealing clause in Act 1889, art. 19, § 2, providing that "all acts or parts of acts, inconsistent herewith or supplied by the provisions hereof, be, and the same are, hereby repealed," means simply that, when the subject of an existing enactment is fully and completely covered by the provisions of such act of 1889, the power, right, or proceedings, as the case may be, shall thereafter be treated as based upon that act, rather than upon the older one supplied by it. The phrase "supply" seems obviously to have reference to other enactments concerning those subjects upon which the statute in question has made full and complete provision, designed to take the place of the former and to serve in their stead. *City of Reading v. Shepp*, 2 Pa. Dist. R. 134, 140.

Where a person obtained gas from another customer of a gas company, it was not "supplied" in any fair sense of the term, or within the meaning of Laws 1890, c. 566, § 65, requiring gas companies to supply any owner or occupant of a building, on compli-

ance with certain conditions, with gas, under certain penalties. *Jones v. Rochester Gas & Electric Co.*, 60 N. E. 1044, 1045, 168 N. Y. 65.

"Supplying," as used in a city ordinance granting a water company the right and privilege, for the term of 25 years, of supplying the city and its inhabitants, was intended in its primary sense, intending thereby to give the water company the right to furnish all the water the city and its inhabitants may need to have furnished during such period. *City of Brenham v. Brenham Water Co.*, 4 S. W. 143, 147, 67 Tex. 542.

"Supplying," as used in an exemption from local taxation of the property used in supplying electricity, includes the manufacturing of such electricity. The power to supply includes the power to manufacture. *Southern Electric Light & Power Co. v. City of Philadelphia*, 43 Atl. 123, 191 Pa. 170.

A contract requiring a coke manufacturing company to furnish 15 cars of coke per day for a certain time at an agreed price, but providing that the company were "not to be held in damages for the railroad company's failure to supply transportation," means, in the light of an established custom that a coke manufacturer will divide his supply of cars ratably among all orders on hand when a shortage occurs, a failure to supply cars and other means of transportation equal to the demands of the trade, and the company were not liable for failure to supply the 15 cars, though the railroad company furnished such a number per day. *McKeefrey v. Connellsville Coke & Iron Co.* (U. S.) 56 Fed. 212, 216, 5 C. C. A. 482.

SUPPLY (Noun).

See "Full Supply"; "Necessary Supplies"; "Operating Supplies"; "Plantation Supplies"; "School Supplies."

The word "supply" is defined in the *Standard Dictionary* as "that which is or can be supplied; available aggregate of things needed or demanded; an amount sufficient for a given use or purpose." In the *Imperial Dictionary*, "that which is supplied; sufficiency of things for use or want; a quantity of something furnished or on hand." As used in a contract to purchase all supplies of a certain description for a certain period from a certain firm, the word means all of the specified goods necessary for the purchaser's business during such period. *W. P. Fuller & Co. v. Schrenk*, 68 N. Y. Supp. 781, 784, 58 App. Div. 222.

A primary meaning of the word "supply" is "an amount sufficient for a given use or purpose." It was held used in such sense in a contract whereby plaintiff agreed to furnish defendant borough a supply of water for its fire hydrants, to be used for the purpose, and no other, of extinguishing fire.

"The clause, fairly construed, not only restricted the use of the water, but clearly implied that the supply through these hydrants should be of sufficient force and volume to be reasonably effective for the purpose for which the company agreed to supply it." *Waymart Water Co. v. Borough of Waymart*, 4 Pa. Super. Ct. 211, 220.

If we are to stand upon the mere etymology of the word "supply," in the act prohibiting any officer or agent of any corporation or municipality to be interested in the sale or furnishing of any supplies or materials to the organization or body which he represents or of which he is a member (Act March 31, 1860, § 66), we find it derived from "sub," meaning under, and "plere," to fill, and defined by Webster as "the act of furnishing with what is wanted." As a noun it is generally used in the plural, and we are unable to see why the word "supplies" cannot be applied to horses, wagons, cars, or labor indiscriminately. Under such section township supervisors are prohibited from employing their own teams or minor children upon the township roads. In *re Hazle Tp. (Pa.)* 6 Kulp, 491, 493.

"Supplies" has a fairly well defined meaning; that is to say, such stores of food, etc., as are kept on hand for daily use. So it is held that a mortgage of a steam saw-mill, with all supplies on hand, does not include saw logs. *Conner v. Littlefield*, 79 Tex. 76, 77, 15 S. W. 217.

Dry goods such as calico, lawn, poplin, white cotton hose, and the like, sold to laborers on a plantation, gave no privilege to the vendor on the crop of cotton of that year, since a privilege is only given on the growing crop for necessary supplies. *Wallace v. Urquhart*, 23 La. Ann. 469, 470.

Supplies for agricultural purposes.

"Supplies," as used in Code 1871, making the husband the general agent of the wife to contract for supplies for carrying on agricultural operations on her plantation, embraces such things as are necessary or adapted to the conduct of agricultural operations; and whether an article falls within the class designated by the word "supplies" must be determined by resort to the usages and customs of the agricultural interests. *Wright v. Walton*, 56 Miss. 1, 5.

"Supplies" means that which is or can be supplied; available aggregate of things needed or demanded; an amount sufficient for a given use or purpose. As used in a contract between a landlord and tenant, giving the landlord a lien on the crops of the tenant for supplies furnished and to be furnished, it includes money furnished by the landlord and used by the tenant in making and gathering the crops. *Strickland v. Stiles*, 33 S. E. 85, 86, 107 Ga. 308.

"Supplies," as used in Code, § 1978, providing that landlords furnishing supplies to their tenants may secure themselves thereon upon the crops, includes board furnished a tenant by the landlord. *Jones v. Eubanks*, 12 S. E. 1065, 1066, 86 Ga. 616.

Mules purchased by a tenant of his landlord are "supplies," within Code 1890, § 1301, giving a landlord a lien on the crops produced by the tenant for all advances for "supplies" furnished during the term of the lease. *Trimble v. Durham*, 12 South. 207, 70 Miss. 295.

Hutch. Code, § 498, which declares that all contracts for the purchase of "supplies for the plantation," etc., owned by any married woman, made by the husband or wife, or either of them, shall be obligatory upon the husband and wife, etc., means whatever is necessary for the cultivation of the plantation, and includes work horses or mules which are used on the plantation. *Robertson v. Ward*, 20 Miss. (12 Smedes & M.) 490, 491.

Supplies for city.

"Supplies," as used in reference to a city, in its broad etymological sense embraces anything which is furnished to a city or its inhabitants; but as used in section 419 of the Greater New York charter, requiring competitive bids for supplies, it has no application to contracts for furnishing water to the inhabitants of New York. *Gleason v. Dalton*, 51 N. Y. Supp. 337, 338, 28 App. Div. 555.

In a general sense, the word "supplies" comprises anything yielded or afforded to meet a want; but the use of a pier, hired by a city for the purpose of removing offal from the city, is not a "supply" furnished, within Laws 1853, c. 217, § 12, providing that all work to be done for the city and all supplies to be furnished for the corporation involving an expenditure of more than \$250 must be by contract founded on sealed bids. *Farmers' Loan & Trust Co. v. City of New York*, 17 N. Y. Super. Ct. (4 Bosw.) 80, 89.

Supplies for county offices.

"Supplies," as used in Comp. Laws, § 609, as amended by Laws 1889, c. 49, § 104, providing that all contracts for the furnishing of stationery, blank books, and supplies generally for all county offices shall be made at a certain time, clearly signifies pencils, paper, rubber bands, blanks, ink, and articles of that description required and constantly used by county officers. *Dewell v. Hughes County Com'rs*, 66 N. W. 1079, 1080, 8 S. D. 452.

Supplies to loggers.

The word "supplies" is used in Rev. St. § 3330, providing for a lien in favor of persons furnishing supplies to men engaged in

getting out logs and timber in that county, though stated in the statute to mean feed used for teams and food necessarily used in camp to support the men, also includes the board of men, where furnished at a hotel in a city several miles from the place where they are at work. *Kollock v. Parcher*, 9 N. W. 67, 69, 52 Wis. 393.

Supplies for manufacturing or mercantile company.

"Supplies" includes pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, within the meaning of Code, § 2485, giving a lien for fuel and all other supplies necessary to the operation of any manufacturing company. *Virginia Development Co. v. Crozer Iron Co.*, 17 S. E. 806, 807, 90 Va. 126, 44 Am. St. Rep. 893.

"Supplies" are necessities collected and held for distribution and use, and a kiln for the drying of lumber cannot be classed as "supplies necessary" to the operation of a corporation organized for the manufacture and sale of lumber, under Code, § 2485, giving a lien for such supplies furnished to certain classes of corporations. *Boston Blower Co. v. Carman Lumber Co.*, 26 S. E. 390, 391, 94 Va. 94.

In a mortgage of a steam sawmill, with all its fixtures and appurtenances and all the supplies on hand, "supplies" should be construed to refer to a commissary, where there was one attached to the mill, and to include the stores therein kept, and other farm produce and merchandise kept ordinarily on hand for operating the mill, but not to include saw logs at the mill, nor an iron safe used therein. *Conner v. Littlefield*, 15 S. W. 217, 218, 79 Tex. 76.

"Supplies furnished," as used in a statute entitling liens for supplies furnished to priority over a lien created by a mortgage, does not include goods delivered by a firm to laborers in payment of orders on a mercantile firm for merchandise in payment of their wages. *Seventh Nat. Bank v. Shenandoah Iron Co.* (U. S.) 35 Fed. 436, 440.

"Supplies furnished," as used in a statute entitling persons who have a lien for supplies furnished to priority over a lien created by a mortgage, does not include a debt due a railroad company for freight charges for carrying iron, coal, etc., for an iron manufacturing company. *Seventh Nat. Bank v. Shenandoah Iron Co.* (U. S.) 35 Fed. 436, 440.

Supplies to paupers.

Acts of kindness or charity or aid furnished as a gift or loan do not constitute "supplies" within the pauper act making the town wherein the person furnished with such supplies has his settlement liable there-

for. *Inhabitants of Hampden v. City of Bangor*, 68 Me. 368, 369.

Under Rev. St. 1840, c. 32, § 7, providing that any person resident in any town at the date of the passage of this act, who has not within one year previous to that date received support or supplies from some town as a pauper, shall be deemed to have a settlement in the town where he dwells and had his home, supplies cannot be considered as furnished to a man as a pauper, unless furnished to himself personally or to one of his family, and those only can be considered as his family who continue under his care and protection. *Green v. Inhabitants of Buckfield*, 3 Me. (3 Greenl.) 136, 140.

Supplies for vessels.

The word "supplies," as applied to a vessel, means those articles which a boat may find to be necessary for consumption and use on a voyage. *Gibbons v. The C. J. Caffrey*, 40 Mo. 257, 259.

"Supplies," as used in Rev. St. c. 122, tit. 26, § 1, providing that every ship, boat, or vessel used in navigating the waters of the state shall be subject to a lien for all debts contracted by the master, owner, agent, or consignee thereof on account of supplies furnished for the use of such ship, boat, or vessel, has a well-defined meaning, and cannot by any fair construction be so construed as to include material furnished. *Lawson v. Higgins*, 1 Mich. (Man.) 225, 226.

The word "supplies," in article 3204, Civ. Code, relative to ships, does not cover money advanced to purchase materials for a vessel, although both words, "materials" and "supplies," are used in the article. *Shaw v. Grant*, 13 La. Ann. 52, 53.

Whisky furnished to the master of a boat to supply the place of other whisky lost in the course of transportation, and to thus enable the boat to fulfill a contract of af-freightment, will not be deemed "supplies," within a statute subjecting the boats and vessels to a lien for all the debts contracted by the master, owner, agent, or consignee of such boat or vessel on account of stores or supplies furnished for the use thereof. *Bailey v. The Concordia*, 17 Mo. 357, 358.

Merchandise furnished the master of a steamboat for the purpose of enabling him therewith to purchase wood and other necessities for the boat in the prosecution of her trip becomes a debt contracted by the master on account of "supplies" furnished for the use of such boat, within the meaning of the act concerning boats and vessels (Act March 19, 1835), providing that every boat or vessel used in navigating the waters of the state shall be liable for all debts contracted by the master on account of supplies fur-

nished for the use of such boat or vessel. *The Gen.-Brady v. Buckley*, 6 Mo. 558, 561.

Section 1 of the act concerning boats and vessels, giving a lien on a boat on account of debts contracted by the master and owner thereof for stores and supplies for the use of the boat, cannot be interpreted to mean supplies of money for all the purposes for which money may be required in the navigation of the vessel. In its ordinary acceptance "supplies" are understood to mean those articles which a boat may find it necessary to purchase for consumption and use on the voyage. It is something different from wages, for which a lien is also specifically given. Moneys loaned for the specific purpose of enabling a boat to purchase such supplies, or to pay wages or debts incurred already or to be incurred in future, for things which are liens, have been held to be a debt contracted for those things, and therefore a lien also on the boat; but money loaned to enable the boat to pay her debts or expenses generally, which may be for things which are not liens as well as for those which are, will not be a lien under the statute. *Gibbons v. The Fanny Barker*, 40 Mo. 253, 254; *Bryan v. The Pride of the West*, 12 Mo. 371, 374.

SUPPORT.

Not only does the word "support" include "bearing weight," but it is also used by the student and understood in common phraseology as covering "to keep from falling," and other kindred expressions, and will be so construed when necessary to sustain a patent for an invention. *Hatch Storage Battery Co. v. Electric Storage Battery Co. (U. S.)* 100 Fed. 975, 981, 41 C. C. A. 133.

Gen. St. c. 25, § 73, declares that it shall not be lawful for any person to drive any horse or other beast at a rate faster than a walk on any bridge with string pieces 30 feet long between the supports on which they rest. Held, that the word "supports," as used in the statute, refers to that on which the bridge stands or rests, and which supports it from beneath, such as abutments, on the banks, or piers or trestles standing between the abutments, on which the string pieces rest. *Abbott v. Town of Wolcott*, 38 Vt. 666, 668.

A condition in a mining lease that the lessee shall "support the superincumbent bed of rock" is not equivalent to a representation or assurance by the lessor that there is such a bed of rock over the coal. *Beatie v. Rocky Branch Coal Co.*, 56 Mo. App. 221, 225.

"Support," as used in reference to common schools, means maintaining the schools by continuing the regular expenditures, so that a fund for the support of common schools cannot be used for building a new house or purchasing the site. *Sheldon v. Purdy*, 49 Pac. 228, 230, 17 Wash. 135.

SUPPORT (Of person).

See "Competent Support"; "Good and Comfortable Support and Maintenance"; "Good and Sufficient Support"; "Means of Support"; "Reasonable Support"; "Right of Support."

"Support," according to Webster, means to sustain; to supply funds for the means of continuing, as to support the expenses of the government. *Opinion of Justices*, 13 Fla. 687, 689 (quoting *Webst. Dict.*).

The words "comfort and support," as used in Rev. Code, § 2370, providing that the wife's separate statutory estate shall be liable for all contracts for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, have the same meaning and are synonymous with "maintenance," and are expressive of the narrowest signification of necessities at common law; and, when the household has been supplied with food, raiment, habitation, medical assistance, and medicine, the boundary prescribed by the statute has been reached. *Eskridge v. Ditmars*, 51 Ala. 245, 255.

A declaration which alleged defendant's breach of an undertaking to pay to plaintiff such sums of money as might be necessary for her food, etc., was variant with proof showing the promise to have been to "support" the plaintiff, inasmuch as defendant might have supported plaintiff, without paying or giving to her any money whatever. *Bull v. McCrea*, 47 Ky. (8 B. Mon.) 422, 424.

Const. art. 16, § 18, providing that each county and incorporated city shall "make provision for the support of its own officers," subject to such regulations as may be provided by law, means to make provision for the fees or per diem of those officers. The support of an officer is derived from the emoluments of the office, and these emoluments, under the Constitution, consist of fees or per diem. *Gadsden County v. Greem*, 22 Fla. 102, 110.

A contract between the council of a borough and a county that all prisoners should be confined in the jail of the county, and should receive their "support and maintenance" therein at so much a head, construed to not merely require such prisoners to be supplied with room, clothing, bedding, and fuel, but to also include salaries of officers and expenses of repairs of the prison, and hence that the borough was not responsible for the latter charges in addition to the agreed compensation. *Reg. v. Council of Borough of Gravesend*, 5 El. & Bl. 459, 467.

"Supporting," as used in St. 1892, No. 55, § 1, providing that the town shall give assistance to one in need, and that, if such person has not resided in such town for

three years supporting himself and family, the town so furnishing assistance may recover the expense from the town in which such person last resided for the space of three years supporting himself and family, is synonymous with "maintaining." In construing the words "maintains himself and family," it was said in *Town of Tunbridge v. Town of Norwich*, 17 Vt. 493: "It is not to be inferred from the expression 'and family' that a man, in order to change his settlement, must have a family, or that he must necessarily have maintained himself and family, independent of all aid from any source whatever besides his own personal labor and services. This would be an unreasonable, not to say an absurd, construction. But the meaning of the statute undoubtedly is that he shall maintain himself, or himself and family, if he have one, so that neither shall become chargeable to any town for support. But if the man or his family should receive presents, or if either should inherit property, or if the family should maintain him, instead of his maintaining the family, as is sometimes the case, it would not prevent the change of settlement. All that is necessary is that he should have his permanent domicile in the town, and keep himself and family from being chargeable to either town." *Town of Craftsbury v. Town of Greensboro*, 29 Atl. 1024, 1026, 66 Vt. 585.

The word "supported," as used in the statute providing that every insane person supported in any county asylum shall be personally liable for his maintenance, means every person maintained in any county asylum, and the provision was not intended to be limited to the pauper or indigent insane. *Board of Chosen Freeholders of Camden County v. Ritson*, 54 Atl. 839, 840, 68 N. J. Law, 666.

As used in Gen. Laws Dak. 1891, c. 123, relating to the amount recovered by administrators for the wrongful death of their decedent, and providing that any demand "for the support of the deceased" and funeral expenses shall be first deducted and paid, does not extend to demands for the support of the family and does not make the sum subject to payment of all debts incurred by the deceased for the support of himself and family, but means only such as were incurred in consequence of, or at any rate after, the injury causing the death. *State v. Probate Court*, 53 N. W. 463, 464, 51 Minn. 241.

The word "support," like most words, has a variety of meanings. One of the illustrative examples of its use, given by Webster, is "to support a student at college." The use of the word "support" in *Bastardy Act* (Revision, p. 72) § 12, requiring a bond to indemnify the township against costs and expenses incurred for the support of the

child, was meant to include the performance of all those duties which are due from a father to a child, and which the public may be called upon to execute in case of the father's default. It includes those services on behalf of the infant, against the expenses for which, in the entire history of the bastardy statutes, the father has been compelled to indemnify the parish or the township. Education is one of the duties owing to the child. *State v. Such*, 53 N. J. Law (24 Vroom) 351, 354, 21 Atl. 852, 853.

Act March 11, 1889 (St. 1889, p. 111), as amended by Act March 23, 1893 (St. 1893, p. 328) § 24, providing that money to be contributed by counties of the state for the care and support of the inmates of the reform school should be placed in the state treasury in the fund of such school for its use, and also providing that county funds were for the "keeping and taking care of each minor committed to such institution," did not authorize the trustees of such reform school to erect buildings out of such fund; the court saying: "Of course, the word 'support' * * * may be said to mean 'for the use of such institution'; but, conceding this, it does not, in our opinion, aid the plaintiff's construction. On the contrary, as we view it, it is strong proof that the Legislature never intended to give the trustees unlimited power to convert the county and state money to the erection of buildings, which money was appropriated by the state and contributed by the counties for the support and the care and keeping of the children committed to the school." *Mitchell v. Colgan*, 122 Cal. 296, 300, 54 Pac. 905, 907.

The word "support," as used in the section relating to insane paupers and indigent persons, shall be construed to mean all necessary food, clothing, medicine, and medical attendance. *Gen. St. Conn. 1902*, § 2742.

Benefit distinguished.

See "Benefit."

As limited to board.

"Support," as used in Pub. St. c. 87, § 31, providing that the price for the support of paupers in state lunatic hospitals should be a certain sum per week, should be construed to include, not merely board, but everything necessary to proper maintenance. *Gould v. City of Lawrence*, 35 N. E. 462, 463, 160 Mass. 232.

The word "support," according to Webster, means maintenance, subsistence, or an income sufficient for the support of a family. As used in a contract whereby one agrees to support another and his wife, it does not include merely sufficient provisions, but such other conveniences and necessities as are reasonable and suitable to make such party and his wife comfortable. *Wall v.*

Williams, 98 N. C. 327, 330, 53 Am. Rep. 458.

"Support," as used in the act for the relief of insolvent debtors, providing that, when a person imprisoned for debt shall be unable to support himself in prison, the plaintiff shall stand chargeable, etc., embraces food and lodging; but as, under the law, the county must furnish the lodging, such plaintiff is only compelled to furnish food. *Buttles v. Carlton*, 1 Ohio, 33, 85.

"Support," as used in a will by which a husband gave his wife, in lieu of dower, a decent and comfortable support out of his estate, in sickness and in health, during her lifetime, does not mean such sum as would be requisite to support her in a boarding house, but means a sufficient amount to maintain her in housekeeping at the place of her residence and in the manner to which she had been accustomed while living with her husband. *Tolley v. Greene* (N. Y.) 2 Sandf. Ch. 91, 94.

Building of house.

"Support," as used in a will providing a fund for the support of testatrix's mother, cannot be construed to include the building of houses in whole or in part. The building of a house, in whole or in part, cannot be considered a part of the support of a person who is to occupy it. *Morford v. Dieffenbacker*, 20 N. W. 600, 608, 54 Mich. 593.

Comfort synonymous.

See "Comfort."

Education.

"Support," as used in a will wherein the testator directed that all his property should be kept together until his son should arrive at full age, for the support of the family with respect to the infant children, should be construed to embrace a suitable education for each, as well as board and clothing. *Addison v. Bowie* (Md.) 2 Bland, 606, 627.

A will directing that the interest accruing on the residue of testator's estate after the death of his wife, or so much thereof as might be necessary, should be applied to the "support and maintenance" of his infant grandchildren during their minority, should be construed to include their proper education at a private school. *Patterson v. Read*, 9 Atl. 579, 580, 42 N. J. Eq. 146, 621.

In a will providing that property shall be applied to the support of S. and his family, the word "support" was intended to include the education of the children. *Whelan v. Rellly*, 3 W. Va. 597, 610.

Family expense distinguished.

See "Family Expense."

As food, clothing, and shelter.

"Support and maintenance," as used in a petition to recover damages for death, which alleges that the plaintiff and children were dependent upon deceased for support and maintenance, means food, clothing, and shelter. *Kearney Electric Co. v. Laughlin*, 63 N. W. 941, 943, 45 Neb. 390.

Irregular gifts.

The irregular and infrequent bestowal of comparatively diminutive gifts upon a person cannot properly be regarded as "support of a family." *Gregg v. Brickley*, 69 N. E. 1072, 1073, 27 Ind. App. 154.

Keeping boarding house.

In construing Code, § 1826, providing that no married woman may contract, so as to affect her estate, except for the support of the family, without the written consent of the husband, the court said, in answer to the claim that family supplies procured to keep up a boarding house, from which the family derived their support, were embraced within the words: "We think it has a more restricted meaning, and is confined to goods bought for the direct benefit of the members of the family, such as food, clothing, and other necessities, and not for the successful prosecution of a business from the profits of which such support is to be obtained, whether by keeping a boarding house, or a hotel, or by engaging in any other general occupation. For these larger outside operations, whose results are speculative, the written consent of the husband, whose advice should be sought, must be obtained, and this is the protection secured to her by the statute." *Clark v. Hay*, 4 S. E. 190, 192, 98 N. C. 421.

Medical attendance.

In an agreement whereby a person who conducted the business of a store belonging to another was to have a support for himself and family out of it as a compensation for his services, "support" includes clothing and food for the family and necessary medical attendance to those of them that are sick. *Morse v. Powers*, 45 Vt. 300, 302.

Medicines.

"Support" generally means articles for ordinary sustenance, as food, etc., and does not include medicines, unless the context shows such intention. An order to let a family have whatever they want for their "support," addressed to one who is not a physician or druggist, does not authorize him to buy drugs for them in sickness. *Grant v. Dabney*, 19 Kan. 388, 389, 27 Am. Rep. 125.

Money.

An allegation in a claim against a decedent's estate for services in the care of

and "aiding and supporting" decedent's sister and minor children includes aid and support by the contribution of money. *Grimm v. Taylor's Estate*, 55 N. W. 447, 448, 96 Mich. 5.

Necessaries.

"Support," as used in Rev. St. 1894, § 7288, making licensed saloon keepers liable on their bond for illegal sales to any person who shall sustain any injury or damage to his means of support on account of the use of such intoxicating liquors so sold, is necessarily a flexible term, and should not be limited to mean actual necessities of life, or that one's means of support is only damaged, where such person is reduced to a state of dependency; and hence the loss of the services of a son, who contributed by his earnings to the expenses of his father's family, is a damage to the father's means of support, though the earnings of the father may be sufficient to keep the family from becoming dependent. *Reath v. State*, 44 N. E. 808, 809, 16 Ind. App. 146.

As determined by position in life.

The word "support," as used in Comp. Laws, pp. 218, 220, § 27, providing that, when a divorce is granted a wife, the court may set apart such portion for her support and the support of the children as shall be deemed just and equitable, includes everything—necessities and luxuries—which a person in such wife's position is entitled to have and enjoy. *Lake v. Bender*, 7 Pac. 74, 78, 18 Nev. 361.

"Support and education," as used in a will in which the testator charged his estate with the support and education of a child, without naming any amount therefor, means such sum as would support the child in a comfortable manner. *Williams v. MacDougall*, 39 Cal. 80, 83.

An undertaking whereby one agrees to "support and take care of another" is to be construed according to the various circumstances of the party, and does not necessarily imply that the person to be supported is not to use any exertions to support himself. *Bull v. McOrea*, 47 Ky. (8 B. Mon.) 422, 425.

As creating a trust.

"Support," as used in a will giving all the testator's estate, both personal and real, to his wife for life, for her support and comfort, merely express the purpose and motive of the gift, and does not make the gift conditional. It has little, if any, more significance than the words "to be for her benefit and enjoyment," and is not sufficient to cut down the clearly expressed absolute gift to a qualified or conditional one. *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376.

As the word "support" means sustenance, maintenance, subsistence, etc., its use

in a will, giving the income of property to the use and support of the testator's son, implies the creation of a spendthrift trust, and prevents the vesting of the property in the son in fee. The word indicates that the son is to have out of the income those things which are essential to his personal physical subsistence. *Winthrop Co. v. Clinton*, 46 Atl. 435, 437, 196 Pa. 472, 79 Am. St. Rep. 729.

The phrase "for the support of himself and family, and for no other purpose," incorporated into a will, in which testator bequeaths a sum of money to his son, for the support of himself and family, and for no other purpose, operates to make the bequest in trust for the declared purpose. *White's Ex'r v. White*, 30 Vt. 338, 343.

SUPPORT OF THE POOR.

A bequest for the "support of the poor" of the county is to be construed as a charitable bequest. *Heuser v. Harris*, 42 Ill. 425.

SUPPOSE.

"Suppose," as used by a witness who, after stating that he had known a slave, in answer to interrogatories as to such slave's value, said "I suppose he was worth _____ dollars," is used in the sense of "believe," and the witness really gave his opinion of the slave's value. *Ward v. Reynolds*, 32 Ala. 384, 389.

"Supposed," as used in an instruction that if plaintiff in an action in good faith supposed he had a cause of action against the defendant on account of personal injuries, which he believed resulted from the conduct of the defendant, and threatened to sue defendant on account thereof, and defendant executed the note sued on in consideration that the plaintiff would not sue him, which was accepted by plaintiff in settlement, such compromise and settlement was a good and lawful consideration for such note, means substantially the same thing as "believed." The definition of "suppose" is given in Webster's Unabridged Dictionary as "imagine, to believe, or to receive as true"; and the same authority gives the definition of "believe" as "to think; to suppose." *Parker v. Enslow*, 102 Ill. 272, 276, 40 Am. Rep. 588.

"Supposed to have been forfeited" as used in Act March 28, 1797 (Laws N. Y. 1797, p. 162, c. 52), providing that no person having any claim or demand in or to any lands, messuages, tenements, or hereditaments "supposed to have been forfeited" to the people of the state, in consequence of the attainder or conviction of any persons for any act or crime done or committed during the late war after the lapse of a certain period of time, referred to the estate which has

been sold where there might be room for supposition and mistake, but not to the fact of attainder or conviction, which must ever be a matter of record and notoriety, and about which there could be no doubt or mistake. There must have been an actual forfeiture by the attainder or conviction of some person, and a sale by the commissioners of some property supposed to have belonged to such attainted and convicted person, but in fact claimed by some one else. *Fisher v. Hamden* (U. S.) 9 Fed. Cas. 129, 132.

Death is "supposed to have been caused by violence," within Rev. St. § 1221, providing for inquest by the coroner when a dead body is found within the county and when death is supposed to have been caused by violence, whenever, from such observation as the coroner may be able to make and from the information that may come to him, there is substantial reason for belief or surmising that death was caused by unlawful means. *State v. Bellows*, 56 N. E. 1028, 1029, 62 Ohio St. 307.

SUPPOSED CODICIL.

An instruction in a will contest, referring to an instrument as the "supposed codicil," is not equivalent to telling the jury that the codicil was not the real codicil of the testator. Such use of the word casts no discredit upon its validity, and the instruction cannot be considered to amount to a statement that the instrument is not a codicil. *Smith v. Henline*, 51 N. E. 227, 232, 174 Ill. 184.

SUPPOSED DEBT.

It has been held that a reference in a plea to the "supposed debt" is a virtual admission. *Gale v. Capern*, 1 Adol. & E. 102. But a reference to the "supposed debt, if any such there be," is not an admission. *Margetts v. Bays*, 4 Adol. & E. 489. And the words "claimed and demanded" are equivalent to "supposed." *Scadding v. Eyles*, 9 Q. B. 858, 860, 862.

SUPPOSED LEGAL TITLE.

A conveyance under which defendant claimed title, which vested an estate for life in the plaintiff, with remainder in fee to the defendant, subject to be revested in the plaintiff on the nonperformance by the defendant of conditions annexed, was not a "supposed legal title," within the meaning of Gen. Laws, c. 224, § 6, relating to the right of betterments of one holding under a supposed legal title. *Walker v. Walker*, 5 Atl. 460, 461, 64 N. H. 55.

SUPPOSITION.

In an instruction that "if the evidence, though in part circumstantial, is to your

mind consistent with the supposition that defendant is guilty of this charge and inconsistent with the supposition that he is innocent of it," etc., "it is your duty to find him guilty," the word "supposition" is used in the sense of hypothesis, and as meaning primarily what is not known to be true and not proved; and hence the instruction was not erroneous. *State v. Harras*, 65 Pac. 774, 775, 25 Wash. 416.

Requested instructions in a criminal case used the words "suppositions, hypotheses, and theories," and asserted, if two of them may be drawn or may arise out of the testimony, one consistent with the defendant's innocence and the other tending to establish his guilt, the defendant shall be acquitted. The court said: "These charges are faulty in several respects. Supposition has no legitimate sphere or habitation in judicial determination. So, in the connection in which they were invoked, the words 'hypotheses' and 'theories' have very doubtful and indefinite significations." *Johnson v. State*, 102 Ala. 1, 16 South. 99, 104.

On a criminal prosecution it is error to instruct that the evidence should exclude every supposition, save the guilt of accused, in order to warrant a conviction. *Baldwin v. State*, 111 Ala. 11, 15, 20 South. 528.

SUPPRESS.

See "Motion to Suppress Deposition."

Under a charter authorizing the common council to provide for the suppression of vice and immorality, the council has authority to pass ordinances making certain acts misdemeanors and providing for their punishment, since "suppress" means to prevent, put down, or end by force, and no better way exists to put down than to provide for punishment. *Ogden v. City of Madison*, 87 N. W. 568, 569, 111 Wis. 413, 55 L. R. A. 506.

The words "abate" and "suppress," in a statute giving a city power to abate nuisances and suppress gambling houses, are practically synonymous. *Incorporated Town of Nevada v. Hutchins*, 13 N. W. 634, 635, 59 Iowa, 506.

Power to license implied.

"Suppress," as used in the Chicago charter, empowering the council to suppress and restrain disorderly houses and groceries, means to prevent, and not to license or sanction, and the city was authorized to prohibit the sale of liquor absolutely. *Schwuchow v. City of Chicago*, 68 Ill. 444, 448.

Where a penal statute of Texas prohibits disorderly houses in the state, and another statute confers on a certain city power to "suppress and restrain" such houses, and authorizes the city council to "restrain and punish" the inmates and to prevent and

punish the keeping of such houses, and authorizes the adoption of summary measures for the removal or suppression, or the regulation and inspection, of all such establishments, the words "suppress, restrain, and regulate" should not be construed as giving power to license such houses. *Ex parte Garza*, 13 S. W. 779, 28 Tex. App. 381, 19 Am. St. Rep. 845.

Power to punish implied.

The power to suppress or restrain did not authorize the city to punish a keeper of a disorderly house. *City of Chariton v. Barber*, 6 N. W. 523, 54 Iowa, 360, 37 Am. Rep. 209 (cited in *City of Centerville v. Miller*, 10 N. W. 293, 294, 57 Iowa, 56).

St. 1885, conferring on the city of Denver power by ordinance to "prohibit and suppress" disorderly houses, means that the city is given the right to provide a punishment to be inflicted on those maintaining such houses. *Rogers v. People*, 12 Pac. 843, 845, 9 Colo. 450, 59 Am. Rep. 146.

SUPPRESSION.

Where there is an obligation to speak, a failure to speak will constitute the "suppression of a fact"; but, where there is no obligation to speak, silence cannot be termed "suppression." *Chicora Fertilizer Co. v. Dunan*, 46 Atl. 347, 351, 91 Md. 144, 50 L. R. A. 401.

The "suppression of a deposition" destroys it for all evidential purposes, and while the paper upon which it was written may remain in the files of the court, and purport on its face to bear the signature of the party to the case, so that what is set down therein would be competent, as admissions and the like against the party, upon proof of the signature or of his assent to the statements contained in the paper, in and of itself, having lost by the suppression the verification which it had as a deposition, it is no more than any other paper, casually and accidentally in the file, purporting to have been signed by a party sought to be charged by the admissions embraced in it, and not evidence against him, unless preliminary proof connecting him with it is adduced. *Gross v. Coffey*, 20 South. 428, 430, 111 Ala. 468.

SUPREME COURT.

See "Next Supreme Court."

The "supreme court" is a court for the correction of errors at law. *State v. Bailey*, 1 S. C. 1, 5.

The word "supreme," as applied to a court, means "highest," in the sense of final or last resort. "The errors of this court, in

absence of a federal question, are beyond the pale of correction by any human tribunal, as the title of this court indicates, being the 'Supreme Court of Appeals.'" *Koonce v. Doolittle*, 37 S. E. 644, 645, 48 W. Va. 592.

"The name 'Supreme Court' indicates that it is a court of the highest authority in the state, and so it is in this state. Yet in New York this name is given to courts possessing similar jurisdiction to that given to the district courts in this state, and the name 'Court of Appeals' is given to the highest court. In Texas the name 'Court of Appeals' is given to a court having appellate jurisdiction in criminal cases, and the name 'Supreme Court' applies to the court having appellate jurisdiction in civil cases." *State v. Atherton*, 10 Pac. 901, 906, 19 Nev. 332.

Under the provisions of the Constitution that "the Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum and pronounce a decision," if the office of one of the judges becomes vacant, the other two may act. *Snider v. Rinehart*, 31 Pac. 716, 718, 18 Colo. 18.

SUPREME LAW.

The "supreme law" is the Constitution of the United States and the state. *Jones v. McMahan*, 30 Tex. 719, 735.

"Supreme law of the land," as used in Const. art. 1, § 2, providing that the Constitution of the United States is the "supreme law of the land," relates to those matters wherein the general government assumes to control the individual states; and, the requirement of a presentment by a grand jury not being one of them, the further provision of the state Constitution relating to prosecutions by information, and dispensing with grand juries, is not affected by section 2. In *re Rafferty*, 25 Pac. 465, 466, 1 Wash. St. 382.

SUPREME LODGE.

The words "grand or supreme lodge," when used "in their ordinary and popular sense, apply only to secret organizations or supreme bodies constituted from and having jurisdiction over secret societies." The term is so used in Laws 1885, c. 131, § 30, in reference to insurance, which provides that the act shall not apply to any association of religious or secret societies now existing or under the supervision of a grand or supreme lodge. *State v. National Ass'n of the Farmers' & Mechanics' Mut. Aid Ass'n*, 9 Pac. 956, 960, 35 Kan. 51.

SUPT.

Judicial notice will be taken that the term "Supt." stands for the word "superin-

tendent," and, as the superintendent is a managing agent in a replevin suit, an affidavit in replevin signed by a certain person as Supt. is a sufficient compliance with Rev. St. 1879, § 2882, providing that the statement shall be verified by the affidavit of the plaintiff, his agent, or attorney. *South. Missouri Land Co. v. Jeffries*, 40 Mo. App. 360, 361.

SURCHARGE.

"Surcharge" is the term applied in an action of account to the entering on the account of any debit or credit which ought to have been made and which has been omitted. *Phillips v. Belden* (N. Y.) 2 Edw. Ch. 1, 23.

An account stated is not absolutely conclusive; but if any of the parties can show an omission for which credit ought to be, that is a "surcharge," or if anything is inserted that is a wrong charge he is at liberty to show it, and that is a "falsification." *Rehill v. McTague*, 7 Atl. 224, 228, 114 Pa. 82, 60 Am. Rep. 367 (citing *Pit v. Cholmondeley*, 2 Ves. Sr. 565).

Surcharging applies to the balance of the whole account, and supplies credits omitted which ought to be allowed. Leave to surcharge and falsify an account does not authorize a restatement of it on different principles. The principles of an accounting are all settled, but all items of overcharge or mischarge and of failure to credit may be corrected. Such correction would carry with each item a change of its incidents, such as commissions and interest, and necessarily requires a restatement on the principles already established. *Kennedy v. Adickes*, 15 S. E. 922, 923, 37 S. C. 174.

SURETIES.

"Sureties," as used in Code, § 1853, relating to judicial proceedings, and requiring a bond therein, with sureties, though plural in form, should be construed to include the singular number also, in the same way that a word importing a singular number may be extended to mean several persons or things. *Elliott v. Stevens*, 10 Iowa, 418, 422.

SURETY.

See "Common Surety"; "Sufficient Sureties."

A surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for the same. *Young v. McFadden*, 25 N. E. 284, 125 Ind. 254.

The word "surety" is defined by Webster to mean certainty; safety; security against

loss or damage; security for payment; in law, one who enters into a bond or recognizance to answer for another's appearance in court, or for his payment of a debt, or for the performance of some act. *Pitkins v. Boyd* (Iowa) 4 G. Greene, 255, 259.

A surety is defined as a person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment before the surety was compelled to do so. *Johnson v. Young*, 20 W. Va. 614, 657. A surety is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have made payment or to have performed before the surety is compelled to do so. *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529 (quoted with approval in *Chattanooga Foundry & Pipe Works v. Hembree*, 117 Ala. 301, 23 South. 38, 39); *Wise v. Miller*, 45 Ohio, 388, 399, 14 N. E. 218; *Cassan v. Maxwell*, 39 Minn. 391, 40 N. W. 358; *Wentlandt v. Sohre*, 33 N. W. 700, 701, 37 Minn. 162; *Hoffman v. Habighorst*, 63 Pac. 610, 612, 38 Or. 261, 53 L. R. A. 908.

A surety is one who, at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor. Civ. Code Cal. 1903, § 2831; Civ. Code Mont. 1895, § 3670; Rev. Codes N. D. 1899, § 4649; Civ. Code S. D. 1903, § 1993; *Sather Banking Co. v. Arthur R. Briggs Co.*, 72 Pac. 352, 353, 138 Cal. 724; *O'Connor v. Morse*, 44 Pac. 305, 306, 112 Cal. 31, 53 Am. St. Rep. 155; *Valentine v. Donohoe-Kelly Banking Co.*, 65 Pac. 381, 382, 133 Cal. 191; *London, Paris & American Bank v. Smith*, 35 Pac. 1027, 1028, 101 Cal. 415.

A surety or guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. The words "surety" and "guarantor" are often used indiscriminately as synonymous terms; but, while a surety and guarantor have in common that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal in the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal

does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance. *Hall v. Weaver* (U. S.) 34 Fed. 104, 106.

A surety, says Chancellor Wythe, "is one bound that something shall be done, not by himself in the first instance, but by some other hand, and, in case of default by this prior agent, that the obligor shall perform the act or compensate for nonperformance." *Field v. Harrison* (Va.) Wythe, 273, 281. To make one a surety, he must be bound by contract or engagement entered into at the request of another, who is the real debtor. *Sherman's Adm'r v. Shaver*, 75 Va. 1, 4.

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. *Roberts v. Hawkins*, 38 N. W. 575, 578, 70 Mich. 566.

A surety is one who contracts to answer for a debt, default, or miscarriage of another—an obligation accessorial to that of the principal debtor; but the relation of surety does not exist where the consideration moves directly to or from the person claiming the privilege of a surety. *Mobile & O. R. Co. v. Nicholas*, 12 South. 723, 735, 98 Ala. 92.

The word "surety" generally means a co-obligor or co-promisor entering into a contract with the principal jointly, or jointly and severally, and at the same time. *Read v. Cutts*, 7 Me. (7 Greenl.) 186, 189, 22 Am. Dec. 184.

In Gen. St. c. 66, § 36, allowing parties severally liable upon the same obligation or instrument, and sureties on the same instrument, to be included in the same action, a "surety," within the meaning of the statute, is any one who is bound on the same instrument for its payment with another, who, as between themselves, is the principal debtor, whatever may be the particular form of the undertaking. *Hammel v. Beard-sley*, 17 N. W. 858, 859, 31 Minn. 314.

A surety has always the right to pay the debt of the principal, and when he does so he becomes entitled to be subrogated to the rights of the creditor and to receive the benefit of any surety which the creditor may hold against him. *Willis v. Davis*, 3 Minn. 17, 27 (Gil. 1, 5).

The term "surety" in its broadest sense includes every person whose estate is ob-

ligated to answer for the default of another. *Waitress v. Pierce*, 32 N. H. 560; *Magill v. Brown*, 50 S. W. 642, 20 Tex. Civ. App. 662.

"Sureties," as used in Comp. Laws 1876, p. 403, § 1240, providing that persons severally liable upon some obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action at the option of plaintiffs, includes guarantors. "Surety" is a general term, and "guaranty" is a special. In a statute where there is nothing to limit it, "surety" is taken to include "guaranty." *Gagan v. Stevens*, 9 Pac. 706, 707, 4 Utah, 348.

Sureties are not bound beyond the strict terms of engagement, and their liability is not to be extended by implication beyond the terms of their contract. A city council elected a superintendent of waterworks, while there was no law or ordinance specifying his duties or requiring him to give any bond. He gave the bond, with sureties, conditioned for the proper discharge of his duties of superintendent and the payment of moneys that might come to his hands as such. Subsequently an ordinance was passed providing for the appointment of such superintendent and defining his duties, one of which was the collection of water rents. He collected the rents and became a defaulter to a large amount thereof. The sureties were not liable for the default; the additional and different duty of collecting water rents imposed being an additional peril to the sureties beyond their engagement. *City of Lafayette v. James*, 92 Ind. 240, 243, 47 Am. Rep. 140.

A surety has all the rights of a guarantor, may compel the principal to perform the obligation when due, may satisfy the principal obligation, with or without legal proceedings, "and compel the principal to reimburse him, with costs and expenses." is entitled to all the security held by the creditor, is entitled to enforce all the remedies which the creditor has against the principal, and may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden. Civ. Code, § 1681; *Kennedy v. Falde*, 29 N. W. 667, 670, 4 Dak. 319.

A surety has the right to stand on the very terms of his contract, and, where his undertaking is that his principal shall perform the conditions of a contract regarding the sale on commission of implements to be furnished him in the future, the surety is not liable for default of the principal respecting implements already on hand, which the principal and the owner, without the

knowledge of the surety, had afterwards agreed should be sold as though furnished under the contract of suretyship. *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 248, 11 N. E. 232.

Sureties on the bond on appeal from the judgment of a justice of the peace for possession of real estate and damages for its detention are not liable beyond the penalty, notwithstanding Rev. St. 1881, § 5236, providing that in such cases damages on appeal by defendant shall be deemed as covered by the appeal bond, and section 1221, providing that where official bonds, recognizances, etc., are defective, the principal and sureties shall be bound to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond. *Graeter v. De Wolf*, 112 Ind. 1, 2, 13 N. E. 111.

On appearance bond.

A surety on an appearance bond is something more than a simple obligor; for the principal is supposed to be in the surety's constant custody, and the former, being the latter's jailer, may at any time surrender him to the custody of the law. *State v. Toups*, 11 South. 524, 527, 44 La. Ann. 896.

On note.

A surety on a note is an original maker, and becomes primarily liable to any person lawfully holding the paper; and it is held that the mere addition of the word "surety," written after the name of a person signing the note as a surety, is not sufficient to restrict his liability to that of an indorser. *Ballard v. Burton*, 24 Atl. 769, 772, 64 Vt. 387, 16 L. R. A. 664.

Where a person makes a promissory note in the singular number, and another signs the same, adding the word "surety," after the name, both are liable, and may be sued together as makers. Such a note is joint and several, and both parties are principals. *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 223.

The word "surety," affixed to the name of the maker of a promissory note, does not show that he stands in such a relation to the transaction in which it was given that he may not be made liable to a recovery on a common count for money had and received, or for money lent, or for money paid out. *Vaughn v. Rugg*, 52 Vt. 235, 237.

In a note signed by P., under which is the signature of C., with the words "security for the fulfillment of the above," C. was not a "guarantor," but an immediate party. His name was signed at the foot, beneath that of P., the principal debtor, but, to exclude misconception of his character in the transaction, with the marginal annexation

of the words "security for the fulfillment of the above," which are not inconsistent with the direct engagement. They serve to note that he had signed, not as a "guarantor," but as a "surety." They are not technical words in a contract of guaranty, and the juxtaposition of the signatures, as well as the absence of apt words to indicate a contingent responsibility, shows that the parties intended to be jointly bound. *Craddock v. Armor* (Pa.) 10 Watts, 258.

Where the surety on a promissory note pays it after the principal has been discharged under the insolvency act, the surety may recover the amount from the principal, whose discharge will be no bar to the action. *Paxson v. Haster*, 11 N. J. Law (6 Halst.) 410.

Though a person added the word "surety" to his name when signing a note, it is quite possible that he was in truth a principal debtor; and though a jury, in the absence of proof to the contrary, might infer from the tenor of the note that he was a surety, still it would be a presumption of fact to be made by the jury, and not a presumption of law to be declared by the court. *Sisson v. Barrett*, 2 N. Y. (2 Comst.) 406, 407.

One may become a party to a promissory note or a bill of exchange as a surety, and is entitled to all the privileges applicable to that character as fully as though he was a surety in some other form of contract. *Griffith v. Reed* (N. Y.) 21 Wend. 502, 503, 34 Am. Dec. 267.

SURETY FOR THE PEACE.

"Surety for the peace" is one of the branches of preventive justice, and consists in obliging those persons of whom there is probable ground to suspect future misbehavior to stipulate with and give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace. *Hyde v. Greuch*, 62 Md. 577, 582 (citing 4 Bl. Comm. 251).

SURETYSHIP.

"Suretyship" is a direct contract to pay the debt of another. *McIntosh-Huntington Co. v. Reed* (U. S.) 89 Fed. 464, 466.

A suretyship is a primary obligation, and a guaranty of collateral undertaking. A surety is directly liable for the debt; a guarantor, only after a due and unsuccessful effort to collect from the debtor. *Allegheny County Light Co. v. Reinhold*, 21 Pa. Ct. R. 118, 119.

"The relation of suretyship," say the editors of *White & Tudor's Leading Cases in Equity*, "grows out of the assumption of a liability at the request of another and for his benefit. It may consequently arise,

though the name of the principal does not appear in the instrument which constitutes the evidence of the debt." *Hoffman v. Habighorst*, 63 Pac. 610, 612, 38 Or. 261, 53 L. R. A. 908 (quoting *Lead. Cas. Eq.* [4th Ed.] 149).

A contract of a wife in executing a new note, after the married women's act of 1881 went into effect, in renewal of a note executed by the husband and wife for money loaned to the wife and used by the husband before the passage of such act, was a contract of suretyship. *Lackey v. Boruff*, 53 N. E. 412, 414, 152 Ind. 371.

Rev. St. § 5119, prohibiting married women to enter into any "contract of surety," etc., does not apply to a note executed by a wife in payment of a transcript of a judgment against her husband, necessary to appeal the case. *Morningstar v. Hardwick*, 29 N. E. 929, 930, 3 Ind. App. 431.

A warranty in a wife's conveyance of her separate realty in discharge of her husband's debt is not a contract of suretyship, within *Burns' Rev. St.* 1894, § 6964 (*Rev. St.* 1881, § 5119), avoiding her contracts of suretyship; the transaction having extinguished the debt. *Nichol v. Hays*, 50 N. E. 768, 769, 20 Ind. App. 309.

The term "suretyship," rather than that of "guaranty," applies to the promise in which the promisor binds himself to do that which another is bound to do, if the latter does not do it himself, as it is an original undertaking. *Woody v. Haworth*, 57 N. E. 272, 273, 24 Ind. App. 634.

An instrument of writing reciting: "We hereby guaranty that the town of Homer will furnish a free right of way to the La. & N. W. R. R. Co."—is in terms and in legal effect an ordinary contract of commercial guaranty, and not of suretyship, and the parties signing the same bind themselves jointly. *Louisiana & W. R. Co. v. Dillard*, 26 South. 451, 453, 61 La. Ann. 1484.

"Whenever a contract is shown which upon the face of it shows defendant to be a surety, certain principles immediately apply, one of which imposes on the creditor the duty of showing that nothing has been done on his part tending to exonerate the principal and burden the security." *Williams v. Collins*, 4 N. C. 382, 388.

A contract of guaranty or suretyship is said to be *strictissimi juris*, and one in which the guarantor has the right of prescribing the exact terms upon which he will enter into the obligation and to insist on his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. *Schoonover v. Osborne*, 79 N. W. 263, 264, 108 Iowa, 453.

A note executed by a wife in payment of a transcript of a judgment against her husband, necessary to appeal the case, is not a contract of surety, within Rev. St. § 5119, prohibiting married women to enter into any such contract. *Morningstar v. Hardwick*, 29 N. E. 929, 930, 3 Ind. App. 431.

Payment by a surety, though it may discharge the debt and extinguish liens held by the creditor, does not have that effect as between the principal debtor and his surety. As between them, payment by the latter is in the nature of a purchase from the creditor, and operates as an equitable assignment of the debt. *Thomas v. Stewart*, 117 Ind. 50, 51, 18 N. E. 505, 506, 1 L. R. A. 715.

Where a husband receives the entire consideration for a sale of a certain business, and his wife joins in a covenant that neither would engage in it again for a certain time, she was a principal therein and was personally bound thereby. *Koh-i-moor Laundry Co. v. Lockwood*, 141 Ind. 140, 143, 40 N. E. 677.

"Suretyship" is an accessorial promise, by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not. *Civ. Code La.* 1900, art. 3035.

Guaranty distinguished.

See "Guaranty."

As requiring strict construction.

The contract of a surety is to be construed strictly, both in law and equity, and his liability is not to be extended by any implication beyond the terms of his contract. *Reynolds v. Hall*, 2 Ill. (1 Scam.) 35, 38.

A contract of suretyship is one whereby one obligates himself to pay the debt of another. The liability of a surety is said to be *strictissimi juris*; that is, the obligation of a surety must not be extended to another subject, or to any other person or period of time than is expressed or necessarily included in it. The contract, however, is subject to common-sense rules of interpretation, such as govern any commercial instrument. No surety is to be bound beyond the extent of the engagement, which shall appear from the expression of the security and the nature of the transaction, to have been in his contemplation at the time of entering into it. The intent or latitude of the contract of suretyship is to be ascertained by fair and liberal construction of the instrument, in furtherance of the intention of the parties, and the liability of the surety can in no way be extended by implication. In short, the strict construction of the obligation of a surety applies to its nonextension to sub-

jects, persons, or periods of time not necessarily or expressly included in it; otherwise, it is subject to the ordinary rules of construction. *Fisse v. Einstein*, 5 Mo. App. 78, 87.

As requiring a primary obligation.

A contract of suretyship is collateral to and predicated upon a primary obligation. In order to establish suretyship, it is first necessary to prove the existence of the primary contract. *Thornburg v. Allman*, 35 N. E. 1110, 8 Ind. App. 531.

"A contract of suretyship is accessory to an obligation contracted by another person, either contemporaneously, or previously, or subsequently," to answer on the default of the principal. "It is the essence of the contract that there be a subsisting, valid obligation of a principal debt. Without a principal there can be no accessory, and by the extinction of the former the latter becomes extinct." *Russell v. Fallor*, 1 Ohio St. 327, 329, 59 Am. Dec. 631.

According to the civil law a party who enters voluntarily into an agreement is bound by his stipulation, and he who accepts the guaranty looks to it for the ultimate fulfillment of the original undertaking. According to Code La. art. 3004, suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. Pothier says a suretyship is a contract by which a person obligates himself on behalf of a debtor to a creditor for the payment of a whole or a part of what is due from such debtor, by way of accession to his obligation. *Ringgold v. Newkirk*, 3 Ark. (3 Pike) 96, 108.

A "suretyship" is a mere accessory promise by which a person binds himself for another already bound. An individual member of a copartnership cannot, therefore, become surety on an attachment bond executed by his firm as principal; for he cannot be both principal and surety at one and the same time, in the same obligation, and for the same liability. *Bayne v. Cusimano*, 23 South. 361, 363, 50 La. Ann. 361.

A contract of suretyship is usually defined to be a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation accessorial to that of the principal debtor. Therefore, if the principal is discharged because of matters inherent in the transaction, even after judgment against the surety, the latter will be exonerated thereby. Where a tax collector executed an additional bond, on which was one new surety besides the sureties on the first bond, and separate actions were brought and the same breaches assigned for a default covered by each, a judgment on a verdict in an action on the first bond in favor of the obligors

operated as a discharge of the principal and sureties on the second bond. *State v. Parker*, 72 Ala. 181, 183.

Rev. Civ. Code, art. 3035, defines "suretyship" to be "an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not." *Lachman v. Block (La.)* 15 South. 649, 650.

The obligation of a surety is an obligation accessory to that of a principal debtor. It is said the essential of this obligation is that it should be a valid obligation of such principal. *Bernd v. Lynea*, 43 Atl. 189, 71 Conn. 733.

SURFACE.

"Surface" means that part of the land which is capable of being used for agricultural purposes. *Murray v. Allred*, 43 S. W. 355, 358, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740 (citing *Railway Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, 7 Ch. App. 699; *Attorney General v. Timeline*, 5 Ch. Div. 762).

The word "surface," when specifically used as a subject of conveyance, has a definite and certain meaning, and means that part of the land which is or may be used for agricultural purposes. The very fact of conveying the surface carries with it the idea of an express grant alone of the surface, and severs it from every other material composing the land. *Williams v. South Penn Oil Co.*, 43 S. E. 214, 215, 52 W. Va. 181 (citing *Knight v. Iron Co.*, 47 Ind. 105, 17 Am. Rep. 692).

"Surface," as used in a grant of minerals, wherein it was provided that the grantee should take his right under the servitude that he would support the surface above his mine, meant all strata superincumbent upon the mineral strata granted, and not merely the geometrical surface. *Yandes v. Weight*, 66 Ind. 319, 325, 32 Am. Rep. 109.

"Surface," as used in Municipal Code, § 494 (66 Ohio Laws, p. 232), providing that the owner or possessor of a city or village lot shall be liable for damage occasioned to buildings on any adjoining lots by excavation which he makes on his own lot to the depth of more than nine feet below the curb of the street, or, if there be no curb, below the surface of the adjoining lots, means "an actual existing surface, whether it be a natural surface, or the result of filling or grading the lots." *Burkhardt v. Hanley*, 23 Ohio St. 558, 559.

SURFACE LINE.

The "surface line" of a street is as essential a part of the street as its laterals

lines. *Righter v. City of Philadelphia*, 28 Atl. 1015, 1016, 161 Pa. 73.

SURFACE RIGHTS.

"Surface rights," as used in a contract sale of surface rights of land, means the entire surface of the land, reserving the minerals to the grantor. *Keweenaw Ass'n v. Friedrich*, 70 N. W. 896, 897, 112 Mich. 442.

SURFACE STREAMS.

"Surface streams" are streams which flow in a permanent, distinct, well-defined channel from the land of one owner to that of another. *Tampa Waterworks Co. v. Cline*, 20 South. 780, 782, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262.

"Surface streams" are regarded as a species of private property, and their use is regulated by rules differing very materially from the rules applied to subterranean streams. *Roath v. Driscoll*, 20 Conn. 533, 541, 52 Am. Dec. 352.

SURFACE WATERS.

"Surface waters" are those which, however originating, are shed and passed from the lands of one proprietor to those of another, without any distinct or well-defined channel. *Tampa Waterworks Co. v. Cline*, 20 South. 780, 782, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262.

"Surface water" is water on the surface of the ground, the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well-defined and substantial existence; and where water from surrounding lands collects in a basin, which in rainy season holds large quantities of water, and there is no natural outlet, but the basin sometimes becomes dry by evaporation, the water is surface water. *Brandenburg v. Zeigler*, 39 S. E. 790, 791, 62 S. C. 18, 55 L. R. A. 414, 89 Am. St. Rep. 887 (citing *Cairo, V. & C. Ry. Co. v. Brevoort* [U. S.] 62 Fed. 129, 131, 25 L. R. A. 527; *Lawton v. South Bound R. Co.*, 39 S. E. 752, 61 S. C. 548).

"Surface waters" are waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows, occasional outbursts of water, which in time of freshet or melting of snows descend from the mountains and inundate the country, and the moisture of wet,

spongy, springy, or boggy ground. *Lawton v. South Bound R. Co.*, 39 S. E. 752, 753, 61 S. C. 548; *Neal v. Ohio River R. Co.*, 34 S. E. 914, 915, 47 W. Va. 316.

The law is well settled in this state that water overflowing the banks of a stream must be regarded as "surface water." *Edwards v. Missouri, K. & T. R. Co.*, 71 S. W. 366, 367, 97 Mo. App. 103 (citing *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, 280, 53 Am. Rep. 581).

The superabundant water of a stream, which at times of ordinary floods spreads out and overflows its bank and channel, is deemed "surface water." The flow of a river, when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons or by the melting of snows, does not constitute surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. *Cairo, V. & C. R. Co. v. Brevoort* (U. S.) 62 Fed. 129, 131, 133, 25 L. R. A. 527.

"Surface water" includes such water as is carried off by surface drainage; that is, drainage independently of the water course. *Bunderson v. Burlington & M. R. R. Co.*, 61 N. W. 721, 722, 43 Neb. 545 (cited in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, 56 N. W. 946).

All water courses are made up more or less from surface water, but, after it enters into the stream and commences to flow within its banks, it is no longer to be considered "surface water." Surface water is considered a common enemy, that each proprietor of land may and must fight for himself, with a view to protect himself without being responsible to others therefor, provided he does so in a usual and careful manner. *Jones v. Hannovan*, 55 Mo. 462, 467.

"Surface water" is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs. A flood water, becoming severed from the main current, or leaving the stream never to return, and spreading out over low grounds, is "surface water." *Morrissey v. Chicago, B. & Q. R. Co.*, 56 N. W. 946, 38 Neb. 406; *Crawford v. Rambo*, 7 N. E. 429, 431, 44 Ohio St. 279; *O'Connell v. East Tennessee, V. & G. Ry. Co.*, 13 S. E. 489, 491, 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. Rep. 246.

Overflow from a river in time of high water is "surface water." *Jean v. Pennsylvania Co.*, 36 N. E. 159, 9 Ind. App. 56;

Shane v. Kansas City, St. J. & C. B. R. Co., 71 Mo. 237, 247, 38 Am. Rep. 480.

Some courts hold that flood waters from a stream are "surface water"; but the larger number class such water as part of the stream, and hold that it is not surface water. In *O'Connell v. East Tennessee, V. & G. Ry. Co.*, 13 S. E. 489, 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. Rep. 246, the authorities on the question as to what constitutes surface water and as to the rights of parties to divert water, whether surface or otherwise, are fully reviewed. The court says: "If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel animo revertendi presently to return, as by the recession of the waters, it is still to be regarded as part of the river." In *Cairo, V. & O. Ry. v. Brevoort (U. S.)* 62 Fed. 129, 25 L. R. A. 527, the court says: "Surface water ceases to be such when it enters a water course in which it is accustomed to flow; for, having entered the stream, it becomes a part of it and loses its original character. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow." *Sullivan v. Dooley*, 73 S. W. 82, 83, 31 Tex. Civ. App. 589.

A lake fed by streams which in times of flood find exit by rapid percolation through a bed of gravel, so that there is a sensible current toward the gravel bed, is a water course and not merely surface water. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 194, 46 Am. Rep. 199.

A stream does not cease to be a water course, and become merely surface water, because at a certain point it spreads out over a level meadow several rods in width, and flows for a distance without defined banks, before flowing again in a definite channel. It is sometimes difficult to distinguish between a water course and mere surface water. Much may depend upon the soil and other surroundings and conditions. It is well known that certain Western streams—some marked as rivers upon the map—have quite extended sections which for months are perfectly dry. In defining a water course, Chief Justice Dixon said: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual fresh-

ets or other extraordinary causes." *Blohowak v. Grochoski*, 96 N. W. 551, 553, 119 Wis. 189.

SURFACED—SURFACING.

The use of the word "surfaced," in a contract with a railroad company to lay its tracks and to make the track in good running order, well surfaced, high, evenly and firmly embedded, etc., is employed in the sense of those engaged in the construction of such roads, and may be explained by extrinsic evidence. *Western Union R. Co. v. Smith*, 75 Ill. 496, 502.

"Surfacing," as used in a contract for railway construction, seems to be a technical term among civil engineers, and does not include filling in between the ties nor raising the roadbed. *Snell v. Cottingham*, 72 Ill. 161, 167.

"Surfacing track," as applied to a railroad, means filling the dirt and gravel between the ties, and dressing up the surface. *Heine v. Chicago & N. W. Ry. Co.*, 17 N. W. 420, 58 Wis. 525.

SURGEON.

See "Police Surgeon"; "Veterinary Surgeon."

A dentist is one whose profession is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones; and a dentist will not be held to be a surgeon or physician, within the statutes relating to privileged communication. *People v. De France*, 62 N. W. 709, 711, 104 Mich. 563, 28 L. R. A. 139 (citing *State ex rel. Flickinger v. Fisher*, 24 S. W. 167, 119 Mo. 344, 22 L. R. A. 799); *City of Cherokee v. Perkins*, 92 N. W. 68, 69, 118 Iowa, 405.

SURGERY.

Webster's Dictionary describes "surgery" as a branch of medical science. It cannot be denied that practical surgery is ordinarily thus spoken of. *United States v. Massachusetts General Hospital*, 100 Fed. 932, 938, 41 C. C. A. 114.

The practice of surgery was said, in *Smith v. Lane (N. Y.)* 24 Hun, 632, to be limited to manual operations usually performed by surgical instruments or appliances. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

"Therapy" is the treatment of disease, and "surgery" is therapy of a distinctly operative kind. *Stewart v. Raab*, 55 Minn. 20, 21, 56 N. W. 256.

The term "surgery" is applied to a place where medicines for the use of passengers

were kept by the physician employed on board a passenger ship. *Allan v. State S. S. Co.*, 30 N. E. 482, 484, 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556.

SURNAME.

Where a testator devised lands to M. for life, he taking and using the testator's surname of L., instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname, instead of their own, and with limitations over to other persons, after which the will provided that, when any of the premises should vest in any person not bearing the surname of L., that person should take on himself such name and use the same for his own, and should within three years procure his name to be altered to the testator's surname, the word "surname" was not used to denote a name inherited from the father, and a bearing de facto answered every useful purpose of an actual change, and was sufficient to satisfy the general and ordinary meaning of the words "bearing the surname," and therefore one who took under the limitation over, who was bearing the name de facto, did not forfeit his right by not having the change made by legislative act within the time limited. *Luscombe v. Yates*, 5 Barn. & Ald. 544.

SURPLUS.

See "Accumulated Surplus."

"Surplus" is defined as "overplus; that which remains when use is satisfied; excess beyond what is prescribed or wanted in law; the residue of an estate after the debts and legacies are paid." *People's Fire Ins. Co. v. Parker*, 35 N. J. Law (6 Vroom) 575, 577.

"Surplus," as used in Ky. St. § 2132, providing that, after the death of either the husband or wife, the survivor shall have an absolute estate in one-half of the surplus personalty left by such decedent, means what is left after payment of funeral expenses, charges of administration, and debts. *Towery v. McGaw* (Ky.) 56 S. W. 727, 728.

"Surplus," as used in a will giving the use, etc., of the testator's real estate to his wife for life, and also his personal estate of every description absolutely, "having full confidence that she will leave the surplus to be divided at her decease justly among his children," means all that shall remain thereafter, and does not give any right of disposition to the widow during her life. *Appeal of Coates*, 2 Pa. (2 Barr) 129, 137.

Expert evidence has been held admissible that the word "surplus," among insur-

ance people, when applied to life insurance "means a sum of money or assets which has been accumulated over and above all debts and liabilities of any and all kinds whatsoever." *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 126.

A provision in an insurance policy entitling insured to participate in the distribution of the "surplus" of the company issuing it, according to such methods as may be adopted by the company, means the amount of funds in the hands of the company after deducting its liabilities, as ascertained by certain rules adopted by the insurance department for determining the value of each risk. *Greeff v. Equitable Life Assur. Soc.*, 54 N. E. 712, 715, 160 N. Y. 19, 46 L. R. A. 288, 73 Am. St. Rep. 659.

War Revenue Act July 13, 1898, c. 448, § 2, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], provides that bankers and persons and firms engaged in various occupations, employing a capital not exceeding \$25,000, shall pay a certain additional sum for every \$1,000 of capital above \$25,000, and in estimating capital surplus should be included. It was held that, as the act did not refer exclusively to national banks, the word "surplus," as used in the act, would not be restricted, in assessing national banks, to the meaning given it in previous national bank legislation as covering only so much of the surplus profits as the board of directors have set apart for a reserved capital, but includes the entire surplus of assets over liabilities. *Leather Mfrs' Nat. Bank v. Treat* (U. S.) 116 Fed. 774, 775.

Capital stock distinguished.

The surplus of a banking corporation is not the same as its capital stock, but is that portion of the property, over and above the capital stock, which is the property of the bank until it is divided among the stockholders. *Bank of Commerce v. Tennessee*, 16 Sup. Ct. 456, 461, 161 U. S. 134, 40 L. Ed. 645.

Real estate.

Where a testator, after making several devises, declared that of the "rest, residue, and remainder of my estate I give and bequeath" several legacies, and that "if, after the payment of all these legacies, there should remain a surplus undisposed of, I do give and bequeath the same unto my sons," the word "surplus" should be construed to include the real estate. *Lamb v. Lamb*, 30 N. E. 133, 131 N. Y. 227.

A Pennsylvania testator gave to his wife a life estate in the homestead and two lots, and charged upon his goods and lands an annuity to her, but did not mention his lands in any other part of the will, and then, after sundry legacies, bequeathed the surplus to

be applied to the purposes of a Presbyterian church. Held, the word "surplus" did not relate to his lands. *Allen's Ex'rs v. Allen*, 50 U. S. (18 How.) 385, 391, 15 L. Ed. 396.

SURPLUS EARNINGS.

In 1 Rev. St. p. 415, § 6, providing that moneyed corporations shall be liable to taxation on a valuation equal to the amount paid in and their surplus earnings, "surplus earnings" means an amount owned by the company over and above the capital and actual liabilities, and includes one-half of the premiums received on unexpired policies of a fire insurance company. *People v. Commissioners of Taxes and Assessments*, 76 N. Y. 64, 68.

SURPLUS MONEY.

"Surplus money" realized by sale of lands owned under a deed of trust is treated as realty, and not personality, in respect to rules of law governing its disposition. It remains real estate in the hands of the trustee, to be disposed of according to the law of real property. *Eubank v. Finnell* (Mo.) 73 S. W. 354, 355.

SURPLUS PROCEEDS.

"Surplus proceeds," as used in Act 1855, § 18, providing that, after a certain railroad shall be completed, equipped, and in operation, it shall be required to pay into the treasury of the state the surplus proceeds of all land sales or such other securities as may be provided, etc., means only so much of such proceeds as remains after deducting the amount of all expenses and obligations lawfully incurred by the corporation in completing, equipping, and putting in operation its railroad. *Hannibal & St. J. R. Co. v. Bartlett*, 123 Mass. 15, 19.

SURPLUS PROFITS.

"Surplus profits," as used in Act April 11, 1862, § 10, providing that it shall not be lawful for a banking corporation or the directors to make any dividends, except from surplus profits arising from the business of the corporation, imports an excess of receipts over expenditures, and without receipts there cannot properly be said to be profits. Money earned as interest, however well secured or certain to be presently paid, cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits, within the meaning of the statute. *People v. San Francisco Sav. Union*, 13 Pac. 498, 72 Cal. 199.

SURPLUS WATER.

Where the original owner of land on both sides of the river operated a gristmill on the west side, where the river bed was divided into two channels, and where the

water in the west channel was sufficient for such mill, and he afterwards conveyed the land, with a provision that the grantee might put a dam across the river and use the surplus of water on his side of the river, not to the injury of the grantor's gristmill, the word "surplus" should be construed to mean the surplus of water in the east channel over the amount necessary to run grantor's mill. *Eastman v. Parker*, 27 Atl. 611, 612, 65 Vt. 643.

Water running from a higher to a lower level of a canal, the use of which in its passage has been leased by the state to individuals, is not "surplus water," within the intention of St. 1833, p. 261, § 1, declaring that the canal commissioners, after diverting the waters of a stream, must first resume the use of all surplus water which had been leased on that level. *Lynch v. Stone* (N. Y.) 4 Denio, 356, 359.

SURPLUSAGE.

"Surplusage" is another allegation without which the pleading would be adequate at law. *State v. Whitehouse*, 49 Atl. 869, 871, 95 Me. 179; *State v. Watson*, 42 S. W. 728, 727, 141 Mo. 338.

"Surplusage" is defined in And. Law Dict. as "matter in any instrument foreign to the purpose; whatever is extraneous, impertinent, superfluous, or unnecessary." Surplusage, in construing a writing, may be rejected. *Adams v. Capital State Bank*, 20 South. 881, 882, 74 Miss. 307.

"Surplusage" is that which is impertinent or entirely superfluous, as not being necessary either to the substance or the form of the pleading. Gould, Pl. c. 3, § 11. Where attached property is replevied, and, after a judgment for plaintiff in the attachment suit and a judgment for defendant in the replevin suit for a return of the property, the sheriff brings an action against the surety on the replevin bond, an allegation in the complaint that search has been made on the execution on the judgment in the attachment suit for property of the judgment debtors, and that none could be found, is mere surplusage, since, if it were stricken out, a good cause of action would remain. *Bradley v. Reynolds*, 61 Conn. 271, 278, 23 Atl. 928.

Surplusage allegations in an indictment do not render it insufficient, when there is sufficient matter alleged to indicate the crime and the person charged. *State v. Sarlis*, 34 N. E. 1129, 1130, 135 Ind. 195.

Rest or residue distinguished.

"Surplusage," as used in a will directing the surplusage of property to be divided pro rata among the beneficiaries therein, is not equivalent to "rest" or "residue," having a more restricted meaning than either of such terms, and more properly applied to

moneys than lands; and under such will the residuary legatees will take only the residue of personality. *Bragaw v. Bolles*, 25 Atl. 947, 950, 51 N. J. Eq. 84.

SURPRISE.

"Surprise" is the act of taking un-awares; sudden confusion or perplexity. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 694.

"Surprise" is defined by Mr. Story to be, "in private transactions, an undue advantage taken of a party under circumstances which mislead, confuse, or disturb the just results of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning." *Turley v. Taylor*, 65 Tenn. (6 Baxt.) 376, 386.

"Surprise" is defined in practice to be that situation in which a party is unexpectedly placed, without any default of his own, which will be injurious to his interest. *Gidionsen v. Union Depot R. Co.*, 31 S. W. 800, 802, 129 Mo. 392 (citing *Graham & W. New Trials*).

The word "surprise," in its legal acceptation, denotes an unforeseen disappointment against which ordinary prudence would not have afforded protection. *Patrick v. Boonville Gaslight Co.*, 17 Mo. App. 462, 463, 465; *Peers v. Davis' Adm'rs*, 29 Mo. 184, 190.

A party to an action cannot claim a new trial on the ground of "surprise," where he was not misled by any person, but he assumed that the witnesses knew more than it transpired they did know. *Van Tassell v. New York, L. E. & W. R. Co.*, 20 N. Y. Supp. 715, 716, 1 Misc. Rep. 312.

The word "surprise," as employed in Rev. St. 1879, § 3704, denotes an unforeseen disappointment in some reasonable expectation, against which ordinary prudence would have afforded no protection. If there is any element of negligence in the case, there is no surprise. *Fretwell v. Laffoon*, 77 Mo. 26, 27.

Going to trial in a case without depositions which have been taken in it constitutes no legal surprise to the adverse party which will entitle him to have the verdict set aside on such ground, as, if the depositions have not been transmitted to the court before trial, either party may, if he wants to use them, move for a continuance until they come to hand, or if they have been transmitted, and the party by whom they were taken does not offer them in evidence, the adverse party may offer them, or any part of them, in evidence. *Heath v. Scott*, 4 Pac. 557, 560, 85 Cal. 548.

As equivalent to accident.

"Surprise," though not necessarily synonymous with "accident," when used as a

ground for a new trial, has substantially the same meaning in legal practice, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or neglect of his own, which ordinary prudence could not have guarded against. *Zimmerer v. Fremont Nat. Bank*, 81 N. W. 849, 850, 59 Neb. 661 (citing *McGuire v. Drew*, 83 Cal. 229, 23 Pac. 313).

As reasonable surprise.

"Surprise," as used in Code N. O. § 274, providing that the judge may, in his discretion, etc., relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not mean any surprise, but is confined to a reasonable surprise, occasioned by some fact or some thing that has or has not been done, of which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other proceeding of which he complains. *Skinner v. Terry*, 12 S. E. 118, 119, 107 N. O. 103.

Mistake of or misapprehension as to law.

A mistake as to the law, or a misapprehension of it, does not constitute such surprise as to warrant a continuance of the cause. *Bemis v. Williams* (Tex.) 74 S. W. 332, 334 (citing *Phillips v. Wheeler*, 10 Tex. 536).

Neglect of counsel.

The term "surprise," in Code Cr. Proc. § 135, authorizing the setting aside of a judgment taken through the mistake, inadvertence, surprise, or excusable neglect of a party, includes a case where the party retains an attorney to enter a plea for him and the attorney fails so to do. *Griel v. Vernon*, 65 N. C. 76, 78.

The terms "mistake, inadvertence, surprise, or excusable neglect" in Code, § 274, providing that the court may, in its discretion, within one year, without notice thereof, relieve the party from a judgment taken against him through such neglect, was construed to apply to a judgment taken against the defendant, who attended court for four days during the return term, and then left his case in charge of counsel, who failed to look after the case, thinking the action had been brought in another county, where properly it should have been brought, thus permitting a default judgment to go against his client. *Taylor v. Pope*, 11 S. E. 257, 258, 106 N. C. 267, 19 Am. St. Rep. 530.

Unexpected evidences.

Surprise as a ground for new trial was held in *McFarland's Adm'r v. Clark*, 39 Ky. (9 Dana) 136, to be altogether a different

ground from that of the discovery of testimony to impeach a witness who testified on the trial. The court said that surprise "does not, like discovery, imply negligence, but shows a satisfactory reason for the non-production of the testimony known to exist, but the materiality of which, on the trial, results entirely from the unexpected fact respecting which the party seeking a new trial had been lulled, either by the antagonistic party or the witness of that party; and therefore been surprised." In a case between landlord and tenant which involved the subletting of premises, the tenant testified on the trial that the landlord's president had consented to such subletting. The president was absent at such time, and the question of consent had not been raised in the trial in the justice's court. It was held that the landlord was entitled to a new trial on the ground of surprise. *Louisville & N. R. Co. v. Bickel*, 30 S. W. 600, 602, 97 Ky. 222.

In an action on a warranty of a slave to be sound, defendant is not entitled to a new trial on the ground that he was "surprised" by testimony of plaintiff as to the unsoundness of the slave. *Anderson v. Duffield*, 8 Tex. 237, 238.

"Surprise," as used in *Burns' Ann. St. 1894*, § 568 (Rev. St. 1881, § 569), providing that a new trial may be granted for surprise which ordinary prudence could not have guarded against, cannot be construed to permit a new trial merely because defendant produced evidence not anticipated. *Working v. Garn*, 47 N. E. 951, 953, 148 Ind. 546.

Violation of agreement.

The words "surprise, mistake, inadvertence, or excusable neglect," in *Hill's Ann. Laws*, § 102, authorizing a court to set aside its judgment at any time within a year, if the judgment has been procured against the party asking such relief through his mistake, inadvertence, surprise, or excusable neglect, included a judgment procured in violation of an agreement to extend the time to answer. Mr. Black says: "It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case shall be continued, or not pressed, or not brought to trial, though that is also a kind of fraud." *Thompson v. Connell*, 48 Pac. 467, 468, 31 Or. 231, 65 Am. St. Rep. 818 (quoting 1 Black. Judgm. 336).

SURRENDER.

Abandonment distinguished, see "Abandon—Abandonment."

The word "surrender" means yield, render, or deliver up. *Nolander v. Burns*, 50 N. W. 1016, 1018, 48 Minn. 13.

The surrender of property is the relinquishment that a debtor makes of all his property to his creditors when he finds himself unable to pay his debts. *Civ. Code La. 1900*, art. 2170.

The word "surrender," as used in a count of an indictment for violation of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], in that defendant abetted the cashier of a national bank in defrauding the bank by the surrender and delivery of an unpaid note to the defendant without receiving any part of the sum due thereon, carries with it something more than a mere delivery, and indicates a transfer of title, as well as of possession. *Evans v. United States*, 14 Sup. Ct. 934, 937, 153 U. S. 584, 38 L. Ed. 830.

The term "surrender," as used in Code Civ. Proc. § 751, providing that no money or securities in the custody of the court shall be surrendered, except on the certified order of the court, does not apply to the transfer by the county treasurer of securities in which the funds are invested. The term "surrender" does not in any sense suggest the transaction of a sale and delivery. It involves the idea of yielding, of delivering in response to a demand, and cannot be intended to include every transfer or delivery that it might become necessary for the treasurer to make in the course of the management of any particular fund. *Tompkins County v. Ingersoll*, 81 N. Y. Supp. 242, 244, 81 App. Div. 344.

Merger distinguished.

The doctrine of merger applies as well where the remainder interest comes into the possession of the life tenant as when the life estate comes into the ownership and possession of the remainderman. In either event the two estates become merged in one. A distinction is pointed out between "surrender" and "merger," and it is said that "merger" is a wider term than "surrender," in that it takes place when the two estates are united, either in the hands of the remainderman or reversioner, or in the hands of the tenant of the particular estates, without regard to the method in which the two estates were united, while surrender is confined to the relinquishment by the tenant of the particular estate to his successor in reversion or remainder. *Harrison v. Johnston*, 70 S. W. 414, 417, 109 Tenn. 245 (citing *Fisher v. Edington*, 80 Tenn. [12 Lea] 189).

Of charter.

Charters are in many respects compacts between the government and the corporations; and as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal, solemn act of the

corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form, the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist. *Boston Glass Manufactory v. Langdon*, 41 Mass. (24 Pick.) 49, 53, 35 Am. Dec. 292.

Of estate.

"Surrender" is defined to be the resignation of a particular estate for life or for years to one in the immediate reversion or remainder. *Bedford v. Terhune* (N. Y.) 27 How. Prac. 422, 447; *Coe v. Hobby*, 72 N. Y. 141, 145, 28 Am. Rep. 120; *Welcome v. Hess*, 27 Pac. 369, 370, 90 Cal. 507, 25 Am. St. Rep. 145; *Gluck v. City of Baltimore*, 32 Atl. 515, 516, 81 Md. 315, 48 Am. St. Rep. 515; *Dayton v. Craik*, 1 N. W. 813, 815, 26 Minn. 133.

A surrender is the yielding up of an estate for life or years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may be drowned by mutual agreement. *Springstein v. Schermerhorn* (N. Y.) 12 Johns. 357, 361; *Schleffelin v. Carpenter* (N. Y.) 15 Wend. 400, 404; *Brewer v. National Union Bldg. Ass'n*, 46 N. E. 752, 753, 166 Ill. 221; *Hays v. Goldman*, 72 S. W. 563, 564, 71 Ark. 251.

"Surrender" is the yielding up of an estate for life to him who has the immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. *Fisher v. Edington*, 80 Tenn. (12 Lea) 189, 194; *Dayton v. Craik*, 1 N. W. 813, 815, 26 Minn. 133.

"Surrender" is the yielding up of an estate for life or years to him who has the immediate reversion, wherein the estate becomes subdivided by mutual agreement between the two parties. *Churchill v. Lammers*, 60 Mo. App. 244, 248.

A surrender is a flowing of a lesser estate into a greater, like an estate for years into an immediate remainder in fee. *Witmark v. New York El. R. Co.*, 27 N. Y. Supp. 777, 778, 76 Hun. 302.

Where a transfer of the whole interest in an estate for life or for years is made to the person holding the immediate reversion or remainder in fee, the estate transferred is extinguished by merger, and the transfer operates as a surrender, even though the instrument was called a "lease," and, the sum reserved was called a "rent." *Scott's Ex'x v. Scott* (Va.) 18 Grat. 150, 159.

"Surrender" is a yielding up of an estate to the landlord, so that the leasehold interest

becomes extinct by mutual agreement between the parties. *Brown v. Cairns*, 77 N. W. 478, 481, 107 Iowa, 727; *Robertson Bros. v. Winslow Bros.*, 74 S. W. 442, 443, 99 Mo. App. 546; *Buck v. Lewis*, 46 Mo. App. 227, 232; *Huling v. Roll*, 43 Mo. App. 234.

"Surrender" applies to the termination of a renting term before it has expired by the acceptance on the part of the landlord of a surrender of the premises. *Excelsior Steam Power Co. v. Halsted*, 5 App. Div. 124, 125, 39 N. Y. Supp. 43.

A surrender is either in express words, by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, where the parties, without express surrender, do some act which implies that they have both agreed to consider the surrender made. *Robertson Bros. v. Winslow Bros.*, 74 S. W. 442, 443, 99 Mo. App. 546 (citing *Huling v. Roll*, 43 Mo. App. 234); *Brewer v. National Union Bldg. Ass'n*, 46 N. E. 752, 753, 166 Ill. 221; *Woodward v. Lindley*, 43 Ind. 333, 342; *Dayton v. Craik*, 26 Minn. 133, 1 N. W. 813.

"Surrender" is either in express words, by which the lessee expresses his intention of yielding up the premises, or else by operation of law. *Buck v. Lewis*, 46 Mo. App. 227, 232.

A surrender may be made by agreement of parties or by operation of law, and, when made, the estate of the lessee terminates, and the relation of landlord and tenant ceases. *Hays v. Goldman*, 72 S. W. 563, 564, 71 Ark. 251.

A surrender, such as will terminate a lease and the obligations of the parties thereunder, may be by agreement, express or implied, or by operation of law; but in any case the facts must suffice to establish an acceptance by the landlord or an intent upon his part to terminate the agency. Where a lessee removed from demised premises before the end of the term, testimony of the lessor that the shelving, etc., used by the lessee was merely covered with curtains, but was not used by the lessor, and that the floor space in the show window was used by the lessor, but not in such manner as to interfere with the use to which the lessee put it, is sufficient to sustain a finding that there was not a surrender and acceptance. *Requa v. Domestic Pub. Co.*, 32 N. Y. Supp. 125, 126, 11 Misc. Rep. 322.

The effect of a surrender on the part of a tenant is to pass the estate of the tenant to the landlord, and this results in the extinguishment of the rent reserved, which is not due at the time of the surrender. *Milling v. Becker*, 96 Pa. 182, 185.

A landlord leased a building for five years, and after the tenant had occupied the premises for about a year he abandoned the

same and sent the keys to the landlord. About two months later the landlord painted the front of the building, obliterated the signs of the tenant, and made repairs. Soon afterwards he relet the premises at a less rent for a period of five years, without notifying the tenants that he did it on their account. It was held that the landlord accepted the surrender of the lease by the tenant. *Welcome v. Hess*, 27 Pac. 369, 370, 90 Cal. 507, 25 Am. St. Rep. 145.

Sending a key to the owner, without more, is not such a surrender and acceptance as will discharge a tenant's liability for rent. *Newton v. Speare Laundering Co.*, 37 Atl. 11, 12, 19 R. I. 546.

Plaintiff had leases of four lots, executed before the construction of defendant's elevated railroad in a street on which the lots abutted; the leases requiring the lessee to erect buildings on the lots, and the lessor covenanting to renew the leases for two terms. The leases expired after the construction of the road, and plaintiffs, who had erected five buildings, took five leases for a renewal term, instead of four, in order to partition their interests, and surrendered the original leases. Held, that the estate created by the original leases was not thereby surrendered, but the subsequent leases were simply renewals. *Witmark v. New York El. R. Co.*, 27 N. Y. Supp. 777, 778, 76 Hun. 302.

Where a lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor takes possession himself or accepts rent from another, such change of possession by mutual agreement operates as a surrender of the lease. *Boyd v. George* (Neb.) 89 N. W. 271, 272.

A surrender of a term by agreement, whether express or implied, is the act, not of the law, but of the parties. *Felker v. Richardson*, 32 Atl. 830, 831, 67 N. H. 509.

Of insurance policy.

To "surrender" means to cancel or yield up. Such was held to be its meaning in a life policy stipulating that after the payment of three annual premiums the insured might surrender the policy within six months after default and receive a paid-up policy for the stated amount. *Wells v. Vermont Life Ins. Co.*, 63 N. E. 578, 28 Ind. App. 620, 88 Am. St. Rep. 208.

Plaintiff's first count in an action on a policy insuring chattels alleged a condition prohibiting a removal of the chattels, a waiver thereof, removal to another place with defendant's consent, and a loss. The second count alleged a surrender of the policy at defendant's request, that it might be modified to cover the goods in the new place, an agreement to insure until the policy was modified, and a loss before modification.

Held, that the word "surrender" meant a handing over of the document to the insurance company for the purpose of modification. *Goodhue v. Hartford Fire Ins. Co.*, 55 N. E. 1039, 1040, 175 Mass. 187.

SURRENDER BY OPERATION OF LAW.

"A surrender may arise either from the express agreement of the parties or by operation of law, and whenever a surrender is implied from acts of the parties it is a surrender by the operation of law." *Hart v. Pratt*, 53 Pac. 711, 712, 19 Wash. 560.

"Surrender by operation of law" may be derived from the acts of the parties, or effected by words manifesting the intention of the lessee to yield up the estate, or by acts of the parties which imply that both agree to consider the surrender as made. A surrender is implied and effected by operation of law when another estate is created by the reversioner, with the assent of the tenant, incompatible with the existing estate or term, as by the taking of a new lease by the lessee. *Copper v. Fretnoranaky*, 16 N. Y. Supp. 866, 867.

To constitute a surrender of a term by operation of law, overt acts of both parties inconsistent with the continuance of the term are essential. *Felker v. Richardson*, 32 Atl. 830, 831, 67 N. H. 509.

To constitute a "surrender by operation of law," there must not only be an abandonment by the tenant, but an acceptance thereof by the landlord as a surrender. It is only when the minds of the parties to a lease concur in a common intent to relinquish the relation of landlord and tenant, and execute this intent by acts which are tantamount to a stipulation to put an end thereto, that a surrender by act and operation of law arises. Where a lease authorized a landlord, if the premises became vacant during the term, to re-enter and relet the same, and apply the rent to the expense of re-entering and reletting, and of the rent due, a re-entry and reletting of the premises by the landlord on their vacation by the tenant was not a surrender by operation of law. *Jones v. Rushmore*, 50 Atl. 587, 588, 67 N. J. Law, 157.

A surrender in law arises where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant as to imply an intention that the lessor should be in the same situation as if an express surrender had been made. A surrender of a lease by operation of law may arise from any condition of facts voluntarily assumed by the parties, and incompatible with the continued existence of the relation of landlord and tenant between them. *McAdam, Landl. & T.* p. 1270. Where a tenant voluntarily vacates

the premises before the expiration of the term, and delivers the keys to the landlord at the latter's request, who retains them, and during the term advertises the premises for rent, an implied surrender arises by operation of law, and the tenant is not liable for future rent. *Ledsinger v. Burke*, 88 S. E. 313, 113 Ga. 74.

A surrender by a tenant to his landlord by operation of law is said to exist when the owner of a particular estate has been a party to some act having some other object than that of surrender, but which object cannot be effected while the particular estate continues, and the validity of which act he is by law estopped from disputing. Such surrender is said to be the act of the law, and takes place independently of the intention of the parties. *Brown v. Cairns*, 77 N. W. 478, 481, 107 Iowa, 727.

A surrender exists by act or operation of law when the parties, without any express surrender, do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. Where a tenant of premises made a contract for the purchase of the same, and made part payment, the agreement providing for the execution of a deed on payment of the balance, and thereafter refused to pay the balance of the purchase price until the title was approved, no demand being made for the rent and none being paid, there was a surrender of the lease, and the relation of landlord and tenant ceased. *Lewis v. Angermiller*, 35 N. Y. Supp. 69, 70, 89 Hun, 65.

A surrender by operation of law takes place where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. *Smith v. Pendergast*, 3 N. W. 978, 980, 26 Minn. 318.

A surrender in law was effected by the acceptance of a new lease of the premises from the lessor for the whole or a part of the time embraced in the former one, because it necessarily implied a termination and surrender of that lease. *Schieffelin v. Carpenter* (N. Y.) 15 Wend. 400, 404.

A surrender is implied, and so effected by operation of law, when another estate is created by the reversioner or remainderman, with the assent of the termor, incompatible with the existing estate or term. *Coe v. Hobby*, 72 N. Y. 141, 145, 28 Am. Rep. 120.

SURRENDER IN FACT.

A surrender in fact is one by express words fairly manifesting the intention of the lessee to yield up his interest. *Ledsinger v.*

Burke, 88 S. E. 313, 113 Ga. 74 (citing *McAdam, Landl. & T.* p. 1263).

SURRENDER VALUE.

See "Cash Surrender Value."

SURREPTITIOUSLY.

The word "surreptitiously," as used in Rev. St. § 4920 [U. S. Comp. St. 1901. p. 3394], requiring one who contests the validity of a patent on the ground of prior conception to show that the patentee has surreptitiously or unjustly obtained the patent, is not synonymous with the word "unjustly," as used in the statute; and therefore it is not necessary that actual fraud and theft of the idea by the patentee should be shown, for, though the word "unjustly" may include the idea of a thing done fraudulently and secretly, its ordinary meaning is contrary to justice or that which is right. *Yates v. Huson* (D. C.) 8 App. Cas. 93, 99.

Allegations in a bill that certain things were done surreptitiously is a mere statement of conclusion, not admitted by demurrer. It neither informs the conscience of the court of the facts of the case upon which it is asked to act, nor enables the defendant to meet the accusation of wrongdoing made against him. *Lumley v. Wabash R. Co.* (U. S.) 71 Fed. 21, 28.

SURROGATE.

The settlement of estates of deceased persons from very early times has devolved upon other than common-law courts. Our surrogate's court dates back to the act of March 16, 1778. Before the Revolution the powers and duties of the surrogate vested in the colonial Governor, who by virtue of his office was judge of the prerogative court, or the court of probates, as it was sometimes called. When the government of this province was committed to Gov. Nicolls, by the Duke of York, there was framed what was afterwards known as the "Duke's Laws." Under these laws the province was divided into three ridings, in each of which was a court of sessions, composed of the justices of the peace residing therein, who held a session twice a year. To this court was committed the probate of wills, the appointment of executors and administrators, and the appointment of guardians; but, if the estate exceeded £100, all proceedings upon the probate of wills and all records in cases of administration had to be transmitted to the secretary of the province, where they were required to be recorded, and where letters testamentary, of administration, and of the final discharge of executors and administrators were granted by the Governor under seal of the province. In 1686 instructions

were transmitted to Gov. Dongan, directing him to add to the jurisdiction of the Governor, as judge of the prerogative court, the ecclesiastical jurisdiction of the Archbishop of Canterbury; and three years later there was also added the ecclesiastical jurisdiction of the Bishop of London, so far as it related to testamentary matters or the administration of the estates of intestates. Subsequently, when the colony became more extensively settled, the Governor appointed deputies, to whom were delegated the power to act for him in such cases, and these deputies subsequently became known by the title of surrogates. *Malone v. Sts. Peter & Paul's Church of Brooklyn*, 64 N. E. 961, 963, 172 N. Y. 269.

The word "surrogate" where it is used in the text, or in a bond or undertaking given pursuant to any of the provisions of the chapter relating to surrogates' courts, includes every officer or court vested by law with the functions of surrogate. Code Civ. Proc. N. Y. 1899, § 2514, subd. 7.

SURROGATE'S COURT.

Distinct tribunals for the establishment of wills and administration of the assets of men dying with or without wills are variously called "prerogative courts," "probate courts," "surrogate courts," and "orphans' courts." *Robinson v. Fair*, 9 Sup. Ct. 30, 35, 128 U. S. 53, 32 L. Ed. 415.

A surrogate's court is a creation of the statute, of inferior and limited jurisdiction. Those claiming under the decree of a surrogate must show affirmatively his authority to make it and the facts which give him jurisdiction. In respect to accountings by testamentary trustees or guardians, a surrogate takes no incidental powers or constructive authority by implication which is not expressly given by statute. In *re Hawley*, 10 N. E. 352, 357, 104 N. Y. 250.

A surrogate's court is to carry out and give effect to the provisions of a will, and not to defeat it. In *re Cornell's Will*, 41 N. Y. Supp. 255, 258, 17 Misc. Rep. 468 (citing *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194).

SURVEY.

See "Chamber Survey"; "Including Survey"; "Inclusive Survey"; "Notorious Survey"; "Regular Survey."

"To survey" has several significations. It may mean to inspect, or take a view of; to view with attention; to view with a scrutinizing eye; to examine with reference to condition, situation, and value; to measure as land; and many others. "Survey" as a noun may mean an attentive or particular view or examination, with the design

to ascertain the condition, quantity, or value. *Fulton v. Town of Dover*, 6 Atl. 633, 638, 6 Del. Ch. 1.

In insurance.

In considering a condition of an insurance policy, which made the application, plan, and survey or description of the property a part of the contract and a warranty by the assured, the court said: "A careful study of the cases will show, what was likewise testified to by experts on the stand, that 'plan,' 'application,' and 'survey' were often used in the contracts as meaning the same thing. 'Survey' is the word employed most commonly, and it is not difficult to discover how it came to be used instead of 'application.' When a person wrote to a company for insurance upon his house or mill, his letter was an application, but not often a full and satisfactory one, and the company would send back a form for a more full application. This paper usually had a caption stating that it was to be the basis for the insurance, and contained printed questions, with directions how they should be answered. This paper was filled out and signed by the assured, or by his agent, or by the agent of the company, and was the final application; but, to avoid misunderstanding, it came to be called a 'survey,' as in many cases the original letter might be called an 'application.'" In the case at bar, the application was oral to the president of the insurance company, who said: "Send me a copy of the plan, and your statements, and I will insure." The assured sent a memorandum of the facts which he had stated and a map or plan showing the premises. These papers the court held did not constitute such an application, plan, survey, or description as was referred to in the conditions of the policy. *Albion Lead Works v. Williamsburg City Fire Ins. Co.* (U. S.) 2 Fed. 479, 483, 484.

Same—Marine insurance.

"A 'survey,' as the term is used in marine insurance," says Mr. Justice Story, "is a common public document, looked to by both underwriters and owners as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the ship and other property at hazard." In the case of *The Henry* (U. S.) 11 Fed. Cas. 1153, Judge Betts examines the office and nature of a survey. The wise precaution of the maritime law has pointed to one item of proof, which, if not necessary, will nevertheless be demanded, unless its absence be satisfactorily accounted for; that is, a precedent examination of the vessel by competent surveyors, and their report stating her condition and advising a sale. A survey by competent surveyors, containing a statement of the injury and a strong recommendation to sell, will be an important

element in the proofs in determining the character of the emergency, and especially the good faith of the master. *Hathaway v. Sun Mut. Ins. Co.*, 21 N. Y. Super. Ct. (8 Bosw.) 33, 68.

The word "survey," as used in a marine insurance policy, means a common public document, looked to, both by underwriters and owners, as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the ship and other property at hazard. In some policies, as, for example, when what is technically called the "rotten clause" is inserted, such a document seems indispensable, as the survey may amount to a discharge of the underwriters. *Potter v. Ocean Ins. Co. (U. S.)* 19 Fed. Cas. 1173, 1178.

"Survey," as used in the law of marine insurance, in its strict signification, as well as in the broader meaning which it may be supposed to have as applied to the subject-matter, can be taken to import only a plan and description of the present existing state, condition, and mode of use of the property. *Denny v. Conway Stock & Mutual Fire Ins. Co.*, 79 Mass. (13 Gray) 492, 497.

Of land.

A "survey of lands," under the Spanish government, as with us, meant and consisted in the actual measurement of land, ascertaining the contents by running lines and angles with compass and chain, establishing corners and boundaries, and designating the same by marking trees, fixing monuments, or referring to existing objects of notoriety on the ground, giving bearings and distances, and making descriptive field notes and plots of the work. *Winter v. United States (U. S.)* 30 Fed. Cas. 350 (citing *Ellicott v. Pearl*, 35 U. S. [10 Pet.] 441, 9 L. Ed. 475; *United States v. Hanson*, 41 U. S. [16 Pet.] 198, 10 L. Ed. 935).

The word "survey," as used in a statute relating to the fixing of boundary lines between counties, providing that the state engineer shall run out and establish such lines as nearly as may be in accordance with defective description, in company with the county surveyors, but provided that, if the county surveyors shall not appear and assist in making such survey after due notice, it shall not affect or invalidate such survey, does not of necessity mean an actual survey. *Hinsdale County v. Mineral County*, 48 Pac. 675, 678, 9 Colo. App. 368.

A survey in which all the corners are marked, and all the lines run and marked, except the closing line between the first and last corner stones, is a legal survey under the Utah statutes; and, if three sides of a quadrilateral survey are run, the fact that the street line connecting the extremity of the two side lines is not run does not ren-

der the survey insufficient. *Alford v. Devin*, 1 Nev. 207, 214.

A survey under a proprietary title is not a conveyance. It is an instrument sui generis in the nature of a partition; a customary mode in which a proprietor has set off to himself in severalty a part of the common estate. *Jennings v. Burnham*, 56 N. J. Law, 289, 291, 28 Atl. 1048.

Same—As grant or location.

"Survey," as used in a description in a trust deed conveying "the B. survey, lying in what is known as the I. pasture, in C. and A. counties," is synonymous with the word "land," or "grant," or "location." *Clark v. Gregory (Tex.)* 26 S. W. 244.

Same—As map or plat.

In a contract for the conveyance of land according to a certain survey, the words "survey" applies as well to the map or plat, showing the result of the actual examination of the ground, as to the examination itself. *Hahn v. Cotton*, 37 S. W. 919, 920, 136 Mo. 218.

Same—Underground survey.

"Survey" means to inspect or examine with reference to situation, condition, or value; to determine the boundaries, extent, position, etc. So that, as used in Code Civ. Proc. § 1682, providing that in actions relating to real estate the court may grant leave to enter on property to make a survey, does not limit the survey to the surface, but may allow an underground survey, where the defendant has tunneled from his land in the plaintiff's land in removing materials. *Howe's Cave Line & Cement Co. v. Howe's Cave Ass'n*, 34 N. Y. Supp. 848, 851, 88 Hun, 554.

Of logs.

Gen. St. § 2406, providing that no survey of any logs shall be received in any court in this state, except the survey of the surveyor general or his deputy, "survey" means the act of counting and measuring the logs, and ascertaining how many feet they contain, and does not mean the scale bill, or the record thereof, or any other written document or record. *Antill v. Potter*, 71 N. W. 935, 936, 69 Minn. 192.

Of railroad.

"Map and survey," as used in reference to the location of a railroad, means not only a delineation on paper or other material, giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt

where any portion of it is to be found. *San Francisco & S. J. Valley Ry. Co. v. Gould*, 55 Pac. 411, 412, 122 Cal. 601 (citing *Convers v. Grand Rapids & I. R. Co.*, 18 Mich. 466).

The word "survey" does not necessarily, *ex vi termini*, mean a map or profile. They are sometimes used as convertible terms, but not always. Books filed by a railroad in the office of the Secretary of State, containing a description in words and figures of the commencement of the road, the different stations, the courses and distances between such stations, and the number of stations to the termination of the road, are a survey, within the meaning of the company's charter, requiring that a survey of its route and location shall be deposited in the office of the Secretary of State. *Attorney General v. Stevens*, 1 N. J. Eq. (Saxt.) 369, 385, 22 Am. Dec. 526.

SURVEYOR OF HIGHWAYS.

A "surveyor of highways" is merely a ministerial officer of the town council, subject to their direction and control, with no authority to incur any indebtedness against the town, except, perhaps, in case of emergency, such as the removal of snow or other obstruction from the highways, and is clothed with very limited and well-defined powers and duties. *Sweet v. Conley*, 39 Atl. 826, 327, 20 R. I. 381.

SURVIVE—SURVIVING — SURVIVOR.

"Survivor" is usually applied to the longest liver of two or more partners or trustees, and has been applied in some cases to the longest liver of joint tenants and legatees, and to others having a joint interest in anything; but it has no application to persons related as principal and agent, and an assured, in an action against the company, is not prohibited from testifying as to conversations with defendant's agent, since deceased. *Reynolds v. Iowa & Nebraska Ins. Co.*, 46 N. W. 659, 660, 80 Iowa, 563.

In an action against a partnership, evidence of a conversation between plaintiff and a deceased partner is inadmissible, under Code 1873, § 3639, enacting that no party to an action shall be examined in regard to any personal transactions between him and the deceased person against the survivor of such deceased person. *Salysers v. Munroe*, 73 N. W. 606, 607, 104 Iowa, 74.

By the word "survivor," as used in Acts 1882, c. 160, prohibiting an interested person from testifying as to certain transactions, is meant any person who, by reason of his surviving the deceased, would become, as such survivor, interested in the subject of the controversy, as, for instance, a widow who claimed a share of her husband's es-

tate, when the question was whether her husband in his lifetime had given away such property, or whether it was her husband's at the time of his death. *Seabright v. Seabright*, 28 W. Va. 412, 459.

Where a trust deed conveys certain property to certain trustees, and to the survivor of them, or the assigns of such survivor, the term "the survivor or his assigns" necessarily imports the power to transfer by the survivor. *Peck v. Ingraham*, 28 Miss. (6 Cushm.) 246, 262.

The description of plaintiffs in the complaint and in the judgment as the "survivors" of a firm is mere description and nothing more. Calling them "survivors" does not make them any the less plaintiffs in their individual right and capacity. Describing a person as the "survivor" is merely describing, not the capacity in which he sues, but the mode in which his title is derived. As a description it is immaterial and surplusage. *In re Lawrence* (U. S.) 5 Fed. 349, 352.

The word "survivor," in a devise, must be taken in its plain, literal sense, and includes descendants of the immediate devisee contemplated by the testator. *Bayless v. Prescott*, 2 Ky. Law Rep. 262, 265, 266, 79 Ky. 252.

Where testator devised certain property to his daughter, the same to be equally divided after her death among her children and their heirs, and, if she should die without issue, it was to be divided among the survivors of his children, the word "survivor" was held to include children of a sister not surviving. *Appeal of Naglee*, 33 Pa. (9 Casey) 89, 91.

As referring to death of testator.

"Surviving," as used by a testator in directing that his real estate be divided into as many shares as there may be surviving children, refers to the death of the testator. *Appeal of Barker* (Pa.) 3 Atl. 377.

A testator, as to certain lands, declared that, should they not be sold by himself, "then I wish my executors to dispose of them to the best advantage, and, when in funds for the same I wish for them to divide the money among the whole of my surviving children, share and share alike, to them and their lawful heirs, forever." Held, that the testator, by the term "surviving," meant the children who survived him, and not those who were living when the funds arising from the sales were in the hands of the executors. *Ballard v. Connors* (S. C.) 10 Rich. Eq. 389, 392.

A will devising property to testator's wife for life, remainder to his "surviving brothers and sisters," is to be construed as meaning the brothers and sisters surviving

testator. *Stone v. Lewis*, 5 S. E. 282, 283, 84 Va. 474.

"Surviving," as used by a testator in a devise of real estate to a certain party for and during the term of her natural life, and at the time of her decease to her surviving children, equally, share and share alike, to hold to them, their heirs and assigns, forever, must be regarded as relating to the time of the testator's death, so that the children of such party living at that time took a vested remainder in fee. In re *Twaddell* (U. S.) 110 Fed. 145, 150.

"Surviving," as used in a will devising property to A. for life, remainder to the surviving children of W. and J., and their heirs, forever, the rents and profits to be divided among them in equal proportion, share and share alike, refers to the testator's death, and not to that of the tenant for life. *Long v. Prigg*, 8 Barn. & C. 231.

A will devising certain lands to the "surviving children" of certain brothers named meant only those who were surviving at the death of the testator. *Eberts v. Eberts*, 4 N. W. 172, 173, 42 Mich. 404.

"Survivor," as used in a will empowering the executors to sell all and any part of testator's land and pay his debts, the net residue after the payment of all such debts being given to such executors and to the survivor of them as joint tenants, means one who should survive the death of the testator. *Forster v. Winfield*, 23 N. Y. Supp. 169, 170, 8 Misc. Rep. 435.

The words "survivors or survivor," in a limitation following a prior gift, are understood in Pennsylvania as referring to the death of the testator (*Johnston v. Morton*, 10 Pa. 245), unless the intent to refer them to some other period is plain and manifest. In re *Martin's Estate*, 39 Atl. 841, 842, 185 Pa. 51 (citing *Woelpper's Appeal*, 126 Pa. 562, 17 Atl. 870).

The word "survivors," in a will whereby a testator devised his lands to his wife for her life, and then to his children and some grandchildren named, to be equally divided between them at the death of the wife, and declared that it was his will that the farm and improvements should be sold after the death of his wife, so that the proceeds should be equally divided among the survivors named in the will, refers to the time of the testator's death. *Nicoll v. Scott*, 99 Ill. 529, 540.

The phrase "surviving children and their heirs," in a will in which testator gives a life estate to his wife, and directs that the remainder shall be divided equally among his surviving children and their heirs, indicates that the testator intends the estate in remainder shall vest in interest at his death.

If it was his intent that only such children should take as survived his widow, why should he say that his estate is to be divided among "my surviving children and their heirs"? This expression indicates that the testator had in mind that, in case any of his children should die after his death before coming into the beneficial enjoyment of the estate, the heirs of such children should not be cut off. *Grimmer v. Friedrich*, 45 N. E. 498, 499, 164 Ill. 245.

The word "surviving," as used in a will whereby the testatrix bequeathed certain pecuniary legacies to relations, and decreed that her furniture be given to her sister, and all her wearing apparel, books, and pictures to the surviving families in equal portions, naming four families, and further gave the residue of her estate to the surviving members of her brothers' and sisters' families above named in equal parts, refers to those surviving the testatrix. *Hoadly v. Wood*, 71 Conn. 452, 456, 42 Atl. 263.

As referring to happening of other event.

The word "surviving," as used in a will devising real estate to testator's daughter, and directing that if the daughter died before the testator's grandchildren, or either of them, the property should go to the surviving grandchildren, has reference to the death of the daughter. *Pulse v. Osborn*, 64 N. E. 59, 30 Ind. App. 631.

Testator devised land to his wife, on her death to be equally divided between his children then surviving in equal shares. It was held that the word "surviving" means surviving the last tenant for life. *Acree v. Dabney*, 32 South. 127, 128, 133 Ala. 437.

Testator devised an estate for life to his three daughters, "and from and immediately after the decease of my said daughters, respectively, and as that event happens, I give and bequeath the estate and property of the daughters dying, which shall then be held by the said trustee, under this, my will, to be equally divided among the surviving brothers and sisters and the lawful issue of such as may be dead; provided, however, that if my said daughters, or either of them, should die leaving lawful issue, the share of such daughter so dying shall go and be equally divided among such issue and the lawful issue of such as may be dead." Held, that the clause "surviving brothers and sisters" referred, not to the death of the testator, but to the death of the daughters without leaving issue. *Woelpper's Appeal*, 17 Atl. 870, 873, 126 Pa. 562.

Testatrix devised "to my sister N.'s surviving children £30 each," and subsequently added: "I give to my sister N. interest of my funded property for her life, and after her decease such property to be equally divided

between her surviving children." Held, that in the first gift "surviving children" meant surviving the testatrix, but in the second gift meant children surviving the sister N. When a testator gives property to a person for life, after his death to his "surviving children," the meaning of that must be the children that survived when the interest that was given to the tenant for life becomes exhausted by the death of that party. *Neathway v. Reed*, 17 Eng. Law & Eq. 150, 152.

A will by which the testator devised his dwelling house to his wife for life, and added, "but on her decease I give and devise the same to my surviving children, to be divided equally between them," meant the children who survived the wife, and not those who survived the testator, who were designated as the remaindermen, since the word "surviving" would have been unnecessary, if the testator meant to give the remainder of the estate to all of his children. *Coveny v. McLaughlin*, 20 N. E. 165, 166, 148 Mass. 576, 2 L. R. A. 448.

Testator gave the income of a certain sum to his daughter for life, and after her decease, in case she should leave issue, the principal to go to such issue, but, if she should die without issue, to his "surviving children" and their legal personal representatives. Held, that the words "surviving children" meant the children surviving the daughter. *Taylor v. Beverley*, 1 Colly. 108, 114.

A will devising property to one of testator's children, and providing, if such beneficiary die before he reaches the age of 21, or without issue, the property so devised shall be equally divided among testator's surviving children, is to be construed as meaning testator's children who survive the death of such beneficiary. *Holcomb v. Lake*, 24 N. J. Law (4 Zab.) 686, 689.

A will devising to each of testator's daughters a certain tract of land in fee, and providing, "if either of my daughters before mentioned shall die without lawful issue, it is my will that the lands devised to such daughter or son shall be equally divided among my surviving sons and daughters," is to be construed as meaning testator's sons and daughters who should survive the one dying without issue, and not the ones who were living when he made the will, or who should survive him. *Seddel v. Wills*, 20 N. J. Law (Spencer) 223, 228.

Where a devise is made to testator's sons with the contingent remainder to the testator's "surviving children," in the event that neither of such sons marries, the remainder is to the children surviving at the time of the death of the first devisees unmarried. *Terril v. Sayre*, 3 N. J. Law (2 Penning.) 598, 604.

"Surviving children," in a will providing that on the death of either of his two sons unmarried, to whom he had given the remaining part of his homestead farm, the part so given should be equally divided among all the testator's surviving children, should be construed to mean the children living at the time of the contingency happening, that is, the death of a son, and not those living at the death of the testator. *Terril v. Sayre*, 3 N. J. Law (2 Penning.) 598, 604.

A will giving a life estate to testator's wife, remainder to testator's "surviving children," is to be construed as meaning the children surviving at the death of the wife. *Roundtree v. Roundtree*, 2 S. E. 474, 477, 26 S. E. 450.

A will by which testator gave a share of his estate to each of his daughters to be held in trust, and at her death to her children or to their issue, and in default of issue to the testator's "surviving children," means children surviving at the death of the daughter, and not at the death of the testator. *Appeal of Reiff*, 16 Atl. 636, 637, 124 Pa. 145.

Testator directed that, after the death of his widow, his residuary estate is "to be divided and devised as follows," and then said: "I give" \$1,200 to 3 persons named, "to be equally divided between them," and "I give and bequeath" to 8 other persons named "the sum of \$300, to be equally divided between them, and the survivors and survivor of them," and "the residue of my estate . . . I give and devise to" 24 persons named, "to be equally divided between them, and the survivors and survivor of them, it being one of the conditions of the devise, if any of the devisees named should be indebted to me, the principal amount of said debt to be deducted from his or her share, and said deduction to be made without regard to the date thereof"; he having previously, in his will, given legacies to be paid to survivors "at the time of distribution." Held that, in the disposition of the residuary estate, wherever the term "survivors or survivor" is used, it refers to survivors at the time of the distribution of that residuary estate; that is, at the death of the testator's widow. *Dutton v. Pugh*, 18 Atl. 207, 209, 45 N. J. Eq. (18 Stew.) 426.

Testator made certain specific devises and bequests to several of his children. He then gave a life estate to his wife in his real and personal property not specifically disposed of. He then declared that his real and personal estate, after the death of his wife, unless she chose to give up the estate before her decease, should be sold and divided among certain of his children, and

then declared that, if any of his children should die without lawful issue, then his, her, or their share should be equally divided among the survivors. Held, that the word "survivors" referred to the period when the estate should be divided after the happening of the event mentioned in the will, to wit, the death of the wife. *Williamson v. Chamberlain*, 10 N. J. Eq. (2 Stockt.) 373, 375.

The rule is that where there is a devise or bequest for life, followed by a devise or bequest to survivors, at the termination of the life estate, the word "survivors" in its natural and ordinary meaning refers to the survivors at the time of distribution; and unless, upon taking the whole will into consideration, the word is plainly used in some other sense, this ordinary and natural construction must prevail. *Ashhurst v. Potter*, 32 Atl. 698, 699, 53 N. J. Eq. 608.

A limitation over in a will to "my surviving legatees" after the termination of a fee conditional estate means the legatees surviving the first taker, on whose death without issue the survivors were to take, and not the legatees who survive the testator. *Selman v. Robertson*, 24 S. E. 187, 191, 46 S. C. 262.

While the word "survivor," when used in a will containing a devise to two persons or the survivor, is usually restricted to death of one of the beneficiaries occurring before that of the testator, the rule is not a fast one, and yields, like all arbitrary tests, to the intention of the testator. Thus in a will by a testatrix, 85 years of age, giving all the property to two grandchildren, who were sisters aged 11 and 9 years, and providing that, in case of the death of either without heir or heirs, such one's share should go to the survivor, the term "survivor" was construed to apply to the death of one of the beneficiaries occurring after testatrix's death, and therefore the estate of such beneficiary passed to the other beneficiary. *In re Cramer*, 69 N. Y. Supp. 299, 300, 59 App. Div. 541.

A will directing the trustees, on the happening of a certain event, to dispose of the property and divide the proceeds equally among the "surviving children" of certain persons, meant those surviving at the time of the distribution, and not at the time of the testator's death. *Slack v. Bird*, 23 N. J. Eq. (8 C. E. Green) 238, 239.

It is a settled rule of construction that the word "surviving," occurring in a settlement in a will, should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift, and, in the event of such a gift, the survivors are to be ascertained in like manner by reference to the period of the payment or distribution. So, where a gift to survivors is preceded by a life or

other prior interest, it takes effect in those who survive the period of distribution and possession, unless a special contrary intent is found in the will. *Blatchford v. Newberry*, 99 Ill. 11, 14, 45.

The word "survivor," used in a will by which a testator devised all his estate to two persons, in trust to take care of and manage the same, and declared that the trust should continue for 10 years after his death and no longer, and which then provided that at the end of the 10 years all of the estate then remaining and the income thereof should be distributed and vest in his three sons, naming them, and their heirs, and, in case either of the said three sons should die leaving no issue of their bodies, then the devise should go to the survivor of them, refers to the period when the trust ceases, and not to the time of the death of the testator. *Blanchard v. Maynard*, 103 Ill. 60, 66.

Where an estate is granted to persons described as "survivors," it does not vest until the time designated for the enjoyment of the estate, and the word "survivors" has in such case reference to that period. *Cheney v. Teese*, 108 Ill. 473, 482.

In a will by which testator gave to each of his daughters £5,000, the interest to be paid to such daughters for life, and if they had children the principal to be divided among them if they should attain 21, and if a daughter did not have children it was to be divided among her "surviving sisters," the quoted phrase meant such sisters as should survive children of another sister who died under 21, and not merely those who survived the mother of such children. *Carver v. Burgess*, 31 Eng. Law & Eq. 529.

The word "survivor," where an estate is by will conveyed to executors as executors, and the trust to them is in their official capacity, with a power surviving to the sole executor, means those who have accepted the trust. *Herrick v. Carpenter*, 52 N. W. 747, 749, 92 Mich. 440.

By his will testator gave his widow certain property for life, and three unmarried daughters were given a certain sum each; it being provided that if either of the daughters should die before marriage her portion should go to the survivors, and that if there should be any increase in the property it should be divided among testator's children and grandchildren. Other specific devises were made. Held, that the word "survivors" did not mean all of the children of testator surviving at the death of one of the daughters, but referred only to the unmarried daughters. *Dodge v. Sherwood*, 75 S. W. 417, 419, 176 Mo. 33.

The term "survivor," as used in a will whereby a testator devised to each of his

two daughters, and to the heirs of their body, forever, certain personal chattels, and provided that, if the daughters should die without having a lawful heir of their body to live, then he devised the said chattels to be equally divided "to the survivors," imports the idea of the longest liver, provided the other daughter should leave no children behind her, that is, none living at the time of her death; for, if she had left a child, that child or those claiming under it must have taken, but, as there was none living at her death, then she who should survive was the person to take. This, then, is not a limitation depending on a remote, but a very limited, contingency. One which was to happen in a very short period, during the life of a person then living, cannot be called a limitation after an indefinite failure of issue to a person not then in being. *Keating v. Reynolds* (S. C.) 1 Bay, 80, 87.

"Survivors" is a flexible term, and when used in a will, as applied to testator's children, does not necessarily mean surviving children only, but may, when molded by the context and spirit of the will, consistently with the literal import, comprehend all his surviving descendants who were intended to be beneficiaries. *Harris v. Berry*, 70 Ky. (7 Bush) 113. When a bequest is made to one of several children dying without issue, the testator should be understood to mean by "survivor" his other children, unless they also had died without issue, because his presumed object was that all who should have issue should be entitled to an equal interest, and that nothing but death without issue should disturb that equality. *Graves v. Spurr*, 17 Ky. Law Rep. 411, 413, 31 S. W. 483, 484, 485, 97 Ky. 651 (citing *Binney v. Richardson*, 35 Ky. [5 Dana] 429).

Where a testator directed his residuary estate to be equally divided among his brothers and sisters by name, or their "survivors," and he knew they had families, the intent was to give to the survivors of each—not to the survivors of the brothers and sisters, but to each individual and their survivors; and it was intended that each one named should take a part, and that that part, when the devisee was dead, should go to his or her family. *Appeal of Stoner*, 2 Pa. (2 Barr) 428, 431, 45 Am. Dec. 608.

As importing definite failure of issue.

A testator by his will gave to his two sons all his lands, live stock, bonds, etc., to be equally divided between them, and provided that, if either of his said sons should die without any lawful heirs of their own, then the share of him who may first die shall accrue to the survivor and his heirs. The will created an estate in fee simple in the sons, and by reason of the word "survivor" the share of the one who first died without issue passed over to the other son

by way of devise, since the term "survivor" imports a definite failure of issue. *Abbott v. Essex Co.*, 59 U. S. (18 How.) 202, 216, 15 L. Ed. 352.

As creating executory devise.

Under a will whereby the testator bequeathed to two sons, to them and their heirs and assigns, certain property, to be equally divided between them when they should arrive at the age of 21 years, and provided that, if either of them should die before arriving at that age, then the part or share of the one dying should go to the "survivor" of them, an estate in fee simple was created in the devisees, but by the clause providing for the passing of the property to the survivor the estate by reason of the word "survivor" was reduced to an executory devise. *Howell v. Howell*, 20 N. J. Law (Spencer) 411, 420.

As live after.

The primary meaning of the phrase "who shall survive me," as used in a will, taken by itself, is, of course, perfectly obvious, signifying the person or persons mentioned who shall be living at the time of the death of the testator. The primary meaning of the word "survive" is to live beyond the life or extent of, or to outlive; but it also has a secondary meaning, namely, to live after, and as used in the phrase, "if either of my said sons should die without leaving a child which shall survive him," the testator could not have used the word "survive" in its ordinary acceptation, but in the sense of "who shall live after him." There has been much discussion in the books as to the proper construction of the words "survive" and "survivor," when used in wills; but it is now settled by numerous decisions that the same rule of construction will be applied to these words as to any others, namely, that they shall be taken in their literal and ordinary import, unless there is something in the context or attending circumstances which shows that they were used in a different sense. *Bailey v. Brown*, 36 Atl. 581, 586, 19 R. I. 669.

The word "survive," in its popular signification, may mean "overliving a specified individual," or "living beyond a specified event," or it may mean "still living," or "living at some designated period of time." As used in a devise to the testator's daughter and her heirs generally, but if she should die without issue living at her death, "or if her child or children surviving her should die before arriving at the age of 21 years, then over" to the testator's other children, the words "surviving her" mean simply what would otherwise have been implied from the limitation itself, "if she died leaving issue." *Jordan v. Roach*, 32 Miss. 481, 613.

The word "surviving," as used in a devise to children in trust for their children, the share of any child dying without children to go to the surviving heirs, meant the then surviving heirs, not those who should be afterwards born and who survive a future contingency. In *re Malseed's Estate*, 15 Wkly. Notes Cas. 368.

"Survive," as used in a will declaring that, in case B. and C. should die leaving no heirs of either of their bodies, then all the lands, etc., "before given to them shall be and remain to the children of my brethren and sister who shall then survive," should not be construed to confine the dying without issue to the time of the death, on the ground that the word "survive" intends that the person who is to take should be living with the testator and outlive the rest of the children. *Hawley v. Inhabitants of Northampton*, 8 Mass. 3, 31, 5 Am. Dec. 66.

The word "survivor," as used in a will by which the testator gave the residue, after payment of all debts, to his executors and to the survivor of them, means one who should survive the death of the testator. *Forster v. Winfield*, 23 N. Y. Supp. 169, 170, 3 Misc. Rep. 435.

"Surviving sons," as used in the clause of a will providing that on the decease of either of testator's three sons, leaving lawful issue, the issue should take, and in default of issue the portion of a deceased son should be paid over to "my surviving sons," requires an actual survival. *Hendricks v. Hendricks*, 79 N. Y. Supp. 516, 518, 78 App. Div. 212.

Where a devise or bequest is made to several persons absolutely, the words "survivor or survivors" do not refer often to the date of the testator's death, and, of course, indicate that the property devised or bequeathed is to go to the person or persons who survive the testator. In *re Foley*, 10 N. Y. Supp. 12, 13, 2 Con. Sur. 298.

As outlive.

In its ordinary, as well as legal signification the word "survivor" means one who outlives another; one of two or more persons who lives after the others have deceased. By will a testator bequeathed to three persons, and the survivor of them, all his estate upon certain trusts, which were specified. Only one of the parties named qualified; the other two having declined the trust. The three to whom the bequest was made in trust were named as executors of the will, which provided that no further action should be had in the district court, or other court having jurisdiction of probate matters, than the registration and probating of the will. Under such circumstances the executor who qualified, the others being still

alive, must administer the estate as in other cases under the orders of the probate court. *Blanton v. Mayes*, 58 Tex. 422, 423, 425.

Others synonymous.

There has been much discussion as to the effect of provisions in wills in favor of "survivors." The controversy has been whether the word should have its literal and natural meaning, or whether it should prima facie be construed as equivalent to the word "others," in the absence of circumstances or something in the context showing that it was used in a strictly literal sense. There is a line of older cases, as in *Wilmot v. Wilmot*, 8 Ves. Jr. 10, holding to the latter view. Some eminent judges have also held that the words were convertible terms; but where the word "survivor" has been given the force of "other," thus letting in the issues of a deceased member of a class by inheritance from the parent, it has been usually done, as was the case in *Harris v. Berry*, 70 Ky. (7 Bush) 114, to avoid some consequences which it was quite certain the testator did not intend. It was necessary, in order to effect an intention appearing upon the entire will. The later cases, however, hold that the word "survivor," when unexplained by the context, is to be given its natural meaning, and interpreted according to its literal import. As this rule may often defeat the unexpressed intention of the testator, courts readily listen to any argument, drawn from the context or other provisions of the will, showing that "survivor" was used by him as synonymous with "other"; but, unless this appear, it may now be regarded as the settled rule that its literal meaning is to be given to it. *Gorham v. Betts*, 5 S. W. 465, 466, 86 Ky. 164.

"Survivors," as used in a will providing that on a certain contingency property was to be divided equally among the survivors of my children, was to be taken in its ordinary sense, and not construed to mean "others." The word in a will is to be construed in its natural sense, unless the will itself shows that it was used by the testator in a different sense. *Leeming v. Sherratt*, 2 Hare, 14, 24.

While it is true that, in order to properly carry out the intention of the testator, the word "survivors" in a will has sometimes been regarded as synonymous with "others," yet it is now established that the same rule of construction will be applied to the word "survivors" as to any other. It will be received in its natural and literal import, unless there is something in the context or attending circumstances tending to a different conclusion. To construe it as an equivalent to "other" is a construction which the court will sometimes be compelled to adopt, in order to accomplish the intention

which appears on the whole of the will. *Anderson v. Brown*, 35 Atl. 937, 939, 84 Md. 261.

The word "survivor," in a will, when unexplained by the context, will be construed in its natural sense; but if, when interpreted according to its literal sense, the tendency is to defeat the actual intention of the testator, courts will readily listen to the arguments drawn from the context for reading the word "survivor" as synonymous with the word "other." *Duryea v. Duryea*, 85 Ill. 41.

The word "survivors" held to be the equivalent of "others" in a will. In *re Devine's Estate*, 48 Atl. 1072, 1075, 199 Pa. 250; *Appeal of Nichols* (Pa.) 48 Atl. 1072, 1075; *Appeal of Bruner*, Id.; *Appeal of Williams*, Id.

It is said in *Lapsley v. Lapsley*, 9 Pa. (9 Barr) 130, where testator gave certain realty to his four sons for life, but provided that, if any of "my sons shall die without issue, their portions shall be divided equally between the surviving brothers," that the word "survivors" in such cases means "others." In *re Bacon's Estate*, 52 Atl. 135, 139, 202 Pa. 535.

"Survivors," as used by a testatrix in giving all her real and personal estate to her daughter and "her heirs, and half the navigation money for her natural life, and, in case she dies without issue, all to be divided between" four of the nephews and nieces, who are named, the part of one only for life, and to be divided between the survivors, means "others." *Barlow v. Salter*, 17 Ves. 478, 482.

Testator devised to each of his five children certain land for life, remainder to the children of each in tail, the share of any child dying without issue that could take as his immediate devisees to go to "the survivor or survivors" of his children during their natural lives, and after their decease to the children of such "survivor or survivors, . . . forever (and) of any of my children who may be dead, leaving children claiming their parent's share, to be equally divided between (the child or children of) my surviving child or children as aforesaid, and the child or children" of "any that may be dead, claiming the right of their parent or parents, share and share alike"; and then followed a devise over in case all his children should die without descendants. The next item declared an intention to create cross-remainders among his children, so that they and their children should continually inherit, and that no other person should take any part of the estate while any of his children or their lawful issue should remain. Held, that the parenthetical words should be inserted to elucidate testator's meaning,

and that the words "survivor" and "survivors" should be construed to mean "other" and "others," so that, on the death of the sole surviving child, the share of a child previously deceased without issue should be equally divided among all of testator's grandchildren then living per stirpes. *Cooper v. Cooper* (Del.) 31 Atl. 1043, 1046, 7 *Houst.* 488.

"Survivors," as used in a deed conveying property to trustees for the benefit of the grantor's wife for her life, and providing that after her death the property should be held in trust for the benefit and behoof of her children by the grantor, or the survivors of them which shall be living at the time of her decease, includes both the children of the grantor and their issue, and is not confined to children alone, and all the children of the grantor, as well as all the children of any deceased child, stand on the same footing. *Kemp v. Bradford*, 61 Md. 330, 333.

"Surviving children," as used in a will providing for the payment of the income and interest from the residue of his estate to his daughters and son, naming them, in equal proportion during their natural lives, and at the death of either of them without lawful issue his or her share to continue to be a part of the residuary estate, the income of which should be equally divided among the "surviving children," should be construed to mean "the others"—that is, the testator's own children living, and the children of his deceased children—and that he intended by his residuary bequest to put each branch of his family on a footing of exact equality, giving life interests to his children and the capital to their respective issue, per stirpes. "Where property is given to a plurality of persons, with a devise or bequest over, in certain events, of the shares of dying objects to the survivors, the word 'survivors' is construed 'others,' so that as well those who die before as those who survive the objects in question are entitled, provided, of course, that their death did not happen under circumstances which subjected their shares to the operation of the limitation over." *Carter v. Bloodgood's Ex'rs* (N. Y.) 3 *Sandf. Ch.* 193, 299.

The word "survivors," in a devise, "if either of the aforesaid legatees die without issue, the portion which she or they were entitled to is to go to the survivors equally," means the surviving devisees, to the exclusion of the children of a deceased devisee. *Best v. Conn*, 73 Ky. (10 *Bush*) 36.

The word "survivor," in the absence of any explanation by a testator in any part of his will, must be interpreted according to its literal meaning, and points to those who outlive the first devisee. *Bayless v. Prescott*, 79 Ky. 252, 256.

The word "survivors," in a statute for the settlement and distribution of estates

which provides that, if any of the children happen to die before he or she becomes of age, the portion of such child deceased shall be equally divided among the survivors, means the surviving children, as the distribution among children is the subject-matter of the whole proviso. *Runey v. Edmands*, 15 Mass. 291, 292.

Where testator gave property to trustees, to be divided, after the death of persons who had life interests in it, among A., B., C., D., and E., in equal shares, and directed that, if any of them should die without issue before their respective shares should become payable, the share of the one so dying should be equally divided among the survivor and survivors of them, the words "survivor and survivors" were to be construed in their natural sense, and not as equivalent to "other and others"; so that, A. having died leaving issue who were living at the time fixed for the distribution of the fund, and B. having died leaving a son, who died without issue before the period of distribution, and C. having died without issue before the period of distribution, no part of the shares of B. and C. went over to A.'s personal representative. *Crowder v. Stone*, 8 Russ. Ch. 217, 224.

"Survivors," as used in a will devising testator's residuary estate to his children equally, and providing that, in case of death, the share of the deceased child should go to his or her children, if any, and, in case of failure of issue, be divided among the survivors of the testator's children, equally, means the "survivors" absolutely and literally, and should not be construed as meaning "others." *Leeming v. Sherratt*, 2 Hare, 14, 15.

The phrase "children or survivors of them," in a will in which testator gave all his estate to his wife for life, and directed that all remaining after her death should be divided by his executors equally among his children or the survivors of them, was construed not to include a child of one of testator's children who had died prior to the death of testator's wife. *Sinton v. Boyd*, 19 Ohio St. 30, 36, 2 Am. Rep. 369.

The word "survivor," as used in a will providing that the above devises "to my children, being to them, their heirs and assigns, and, if any die without issue, then to the survivor or survivors of them in equal shares," did not include an heir of one of the children dying, but, on the death of one of the three without heirs, confines the survivorship to such children. *Guernsey v. Guernsey*, 36 N. Y. 267.

Testator left a remainder to be divided in equal shares, the income to be applied to the use of his children surviving him during the life of each severally, and on the death of each child to pay over the capital of the share of such child to his or her descendants,

and, if any should die without leaving descendants, then to pay over the capital of such child's share to his or her surviving brothers and sisters. Held, that the words "surviving brothers and sisters" did not and could not include the children of the deceased child. *Mullarky v. Sullivan*, 32 N. H. 762, 763, 132 N. Y. 408.

A testatrix bequeathed a sum upon trust for her daughter A. for life, and after her death for her children, with a gift over, in default of children, to "the other or others of them, the said B., C., D., and E., equally to be divided between them." Held, that the words "other or others" could not mean surviving children at the death of the life tenant, since that construction would entirely include the children of a daughter who died during the lifetime of a tenant for life, and hence the share which belonged to A. during her life should be divided into fourths and given to B., C., D., and E. *In re Hagen's Trusts*, 46 Law J. Ch. 665.

SURVIVABILITY.

"Assignability" and "survivability" of things in action are convertible terms. *Tanas v. Municipal Gas Co.*, 84 N. Y. Supp. 1053, 1058, 88 App. Div. 251.

SURVIVING HUSBAND.

"Surviving husband," as used in statutes and legal phraseology, has the same force and meaning and the same legal effect as "widower." *In re Ray's Estate*, 35 N. Y. Supp. 481, 482, 13 Misc. Rep. 480.

SURVIVING MEMBER.

"Surviving members," as used in Act May 18, 1887, providing that insurance companies on the assessment plan shall deposit with the Auditor a copy of its constitution and by-laws, which must show that all indemnities to beneficiaries are in the main provided for by assessments on all "surviving members," are the antithesis of deceased, and not of lapsed, members. A surviving member is one who has always paid up his assessments and is still a member of the company. Surviving members are those who have continued to be members of the company by keeping up their policies and paying their assessments. *Mutual Ben. Life Ins. Co. v. Marye*, 8 S. E. 481, 482, 85 Va. 643.

SURVIVING PARTNER.

As personal representative, see "Personal Representative."

SURVIVING WIFE.

A woman who has been divorced cannot be deemed a "surviving wife"; but, unless there has been a judicial decree dissolving the marriage relation, a wife who outlives

her husband is a surviving wife, no matter how bad her conduct may have been. *Wiseman v. Wiseman*, 73 Ind. 112, 116, 38 Am. Rep. 115.

"Surviving wife," as used in Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), providing that a surviving wife is entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law, etc., does not include a wife who has been divorced for the fault of the husband, who died without remarrying. *Fletcher v. Monroe*, 43 N. E. 1053, 1054, 145 Ind. 56.

SURVIVORSHIP.

See "With Benefit of Survivorship."

"Title by survivorship" exists only when the estate is held in joint ownership. *Denigan v. San Francisco Sav. Union*, 59 Pac. 390, 392, 127 Cal. 142, 78 Am. St. Rep. 35.

SUSPECT.

"Suspect," as used in a complaint on oath stating that the complainant had reasonable cause to suspect, and did suspect, that certain property was concealed in a certain place, and praying for a warrant to search for the same, cannot be construed to have the same meaning as "believe," as used in Rev. St. c. 142, § 1, providing that when complaint shall be made on oath that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular place, the magistrate, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant to search for the property. "The words 'suspect' and 'believe' are not technical words, and have not by the approved use of the language the same meaning. Suspecting is not believing. That may be a ground for suspicion which will not induce belief." *Commonwealth v. Certain Lottery Tickets*, 59 Mass. (5 Cush.) 369, 371.

The use of the word "suspect," in a complaint for search warrant, that the complainant has cause to suspect and does suspect, etc., is not a sufficient compliance with the statute, requiring the complainant to make oath or affirmation that he believes the stolen goods are concealed in some house or place described in the complaint. "Suspicion may be upon very slight grounds, and imports a less degree of certainty than belief." *Humes v. Tabor*, 1 R. I. 464, 470.

SUSPEND—SUSPENSION.

"Suspend" is defined to mean to interrupt; to cause to cease for a time; to stay

and delay; to hinder the proceedings for a time. *Virginia Fire & Marine Ins. Co. v. Aiken*, 82 Va. 424, 428.

The word "suspension" means the temporary intervention or cessation of labor. *Lethbridge v. City of New York*, 15 N. Y. Supp. 562, 59 N. Y. Super. Ct. 486.

A corporation has "suspended business," as that term was employed in Gen. St. 1899, § 1268, when it commences to wind up its affairs, ceases to hold meetings of stockholders and board of directors, and fails to transact the business for which it was incorporated. *Jones v. Slonecker*, 71 Pac. 573, 66 Kan. 286.

The word "suspended," in the books of a subordinate lodge of an insurance order, is not sufficient to show the suspension of a member of the order, as such member can only be suspended by some affirmative action of the lodge. *Scheu v. Grand Lodge I. O. O. F. (U. S.)* 17 Fed. 214, 215.

"Suspension," as used when speaking of the suspension of a priest of the Catholic church, is a judicial act imposing a sentence forbidding such priest to exercise the functions of a priest. A sentence of suspension follows a trial for an offense, from which the priest may appeal. *Stack v. O'Hara*, 98 Pa. 213, 232.

As discharge.

The word "suspend" ordinarily means a temporary cessation, but the connection in which it is used may give it a stronger meaning; and hence, as used in a notice to an inspector of masonry, etc., appointed by the commission for the construction of aqueducts, pursuant to Laws 1883, c. 490, that, "owing to lack of work, you are hereby suspended without pay until such time as your services may be required," given after notice that all inspectors were only to be paid for the time they were on duty on the work, will be construed to amount to a discharge. *Me-Namara v. City of New York*, 46 N. E. 507, 509, 152 N. Y. 228.

As discontinuance.

Under Act Feb. 28, 1861, which authorizes the postmaster under certain circumstances specified to discontinue the postal service on any route, a suspension during the late Rebellion, at the Postmaster General's discretion, of the route in certain rebel states, with notice to the contractor that he would be held responsible for a renewal when the Postmaster General should deem it safe to renew the service there, was held to be a discontinuance, so that under a mail carrier's contract with a government calling for a month's pay if the postmaster discontinued the service it was adjudged that he was entitled to the month's pay. *Reeside v. United States*, 75 U. S. (8 Wall.) 38, 42, 19 L. Ed. 318.

As dispense with rules.

Under Code, § 489, providing that a municipal ordinance shall be read on three different days, unless three-fourths of the council vote to dispense with the rules, an ordinance is valid, if passed by three-fourths vote upon a motion to "suspend" the rules; there being no substantial difference in the terms. *Town of Baird v. Baker*, 40 N. W. 818, 819, 76 Iowa, 220.

Dissolution of partnership distinguished.

The suspension and dissolution of a partnership are not synonymous; "suspension" meaning a mere cessation of its business operations for a period of time, while "dissolution" is the entire termination of the relation. Partnership results from contract, and its dissolution, when not brought about by death, bankruptcy, or some operation of law, rests in the same source—the will or action of the partners themselves. Thus, Story, in his work on Partnership (section 101), declaring that the general assignment of a partnership for the benefit of creditors would amount of itself to a suspension or dissolution of a partnership, did not mean that such an assignment would absolutely terminate the partnership, but that it would suspend its operations and perhaps ultimately result in its dissolution. *Williston v. Camp*, 22 Pac. 501, 503, 9 Mont. 88.

Extinguish distinguished.

The "suspension" of a right in an estate is a partial extinguishment thereof, or an extinguishment for a time. It differs from an extinguishment in this: A suspended right may be revived, while one extinguished is absolutely dead. *Dyer v. Dyer*, 23 Atl. 910, 911, 17 R. I. 547.

An agreement between the holder and payee of promissory notes, by which it was mutually agreed that the payee should pay £25 per annum by quarterly payments, and as long as he so paid the right of action on the notes should be "suspended," did not mean that the agreement should have the effect, from the moment of its being signed, of forever extinguishing the plaintiff's claim on the notes, or of ever maintaining an action for the recovery; but the agreement merely gave the payee a right of action for a breach thereof, if the holder sued while the payments were continued. *Ford v. Beech*, 11 Q. B. 852, 867.

As postpone.

A provision, in a contract for the sale of coke, that deliveries under the contract may be suspended in case of strikes, accidents, or other causes causing a stoppage in the works of the seller, relieves the seller from the obligation of his guaranty, when such causes have prevented him from fur-

nishing the guaranteed amount within the specified time, as the word "suspended" does not mean postponed only, and therefore the purchaser cannot demand delivery of coke after the expiration of the fixed period. The two words are not synonymous. *Hull Coal & Coke Co. v. Empire Coal & Coke Co.* (U. S.) 113 Fed. 256, 259, 51 C. C. A. 213.

As quash.

"Suspend" means to cause to cease for a time; to interrupt; to delay. Under Rev. St. 1889, § 2522, providing that, if there be pending against the same defendant two indictments for the same offense, the indictment first found shall be deemed to be suspended by the second indictment and shall be quashed, the second indictment does not ipso facto quash the first; but the operation of the section seems to leave the first indictment endowed with life, so that, if the second indictment is quashed, the first one revives. *State v. Melvin*, 66 S. W. 534, 536, 166 Mo. 565.

As remove.

"Suspended," as used in Comp. St. c. 18, art. 2, § 9, providing for the removal of county officers from office, and authorizing the court to supply the place of such an officer by an appointment for the term, when the accused is an officer of the court and is suspended, is not synonymous with "removed," as used in section 7 of the act, providing that, if the accused is found guilty, judgment shall be entered removing him from office. *State v. Meeker*, 27 N. W. 427, 429, 19 Neb. 444.

An order issued to a public officer, stating that his services are no longer needed, and that he is "suspended" from further duty after that date, amounts to an absolute removal from the position, and not a mere suspension from duty. *Donnell v. City of New York*, 22 N. Y. Supp. 661, 663, 68 Hun, 55.

"Suspension," as contemplated in Act Feb. 28, 1887 (Acts 1886-87, p. 1), authorizing the Governor to suspend assessors and appoint tax commissioners to perform the duties of assessors so suspended, and provided that such suspension shall continue indefinitely until the General Assembly restore such assessors to office, is the same in legal contemplation as a removal from office. *Nolen v. State*, 24 South. 251, 253, 118 Ala. 154.

"Suspension" from office is in no proper sense the same thing as a removal, and it cannot be held, by construction or otherwise, that the provisions of a constitution with regard to removals from office apply equally to suspensions therefrom, and a constitutional provision authorizing removal after written charges have been made, and a trial thereof had, and a finding of the jury on

the truth of the charges, does not deprive the Legislature of the power to provide that, where charges are made, the court may temporarily suspend the officer until the determination of such charges. *Poe v. State*, 10 S. W. 732, 739, 740, 72 Tex. 625.

Repeal distinguished.

See "Repeal."

SUSPENSION OF PAYMENT.

"Suspension of payment," as applied to commercial paper, means something more than a failure of the maker of such paper to seek the holder thereof and pay him. Business men understand very well what the term means. There is the idea in it of a failure to pay from an inability to do so. *In re Wolf* (U. S.) 30 Fed. Cas. 406.

SUSPENSION OF POWER OF ALIENATION.

The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a "suspension of the power of alienation." *Civ. Code Mont.* 1895, § 1220.

SUSPENSION OF SENTENCE.

"Suspension of sentence" means an interregnum of the period between conviction and final judgment. *People v. Webster*, 38 N. Y. Supp. 745, 746, 14 Misc. Rep. 617.

The distinction between a "reprieve" and a "suspension of sentence" is that a reprieve postpones the execution of the sentence to a day certain, whereas a suspension is for an indefinite time. *Carnal v. People* (N. Y.) 1 Parker, Cr. R. 262. Therefore, where a reprieve is granted by a Governor, it is the duty of the sheriff on the expiration of the time to execute the sentence without further orders by the court. *In re Buchanan*, 40 N. E. 883, 886, 146 N. Y. 264.

SUSPENSIVE CONDITION.

A suspensive condition is one in which the obligation depends on an uncertain event, and which is not to take effect until the event happens. *Moss v. Smoker*, 2 La. Ann. 989, 991.

The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event, or on an event which has actually taken place, without it being yet known to the parties. *Civ. Code La.* 1900, art. 2043. The effect of a suspensive condition is, as its name necessarily implies, to suspend the obligation un-

til the condition is accomplished, or considered as accomplished. The "suspensive condition" under the Louisiana Civil Code is the equivalent of the "condition precedent" at common law. *City of New Orleans v. Texas & P. R. Co.*, 18 Sup. Ct. 875, 171 U. S. 312, 43 L. Ed. 178.

SUSPICION.

Discovery distinguished, see "Discovery."

The word "suspicion" is defined as being "imagination of the existence of something without proof, or upon very slight evidence, or upon no evidence at all," and to hold that, when plaintiff's own case exposes him to suspicion of negligence, the burden is on the plaintiff, would place the burden of proof on plaintiff in all cases, on the question of contributory negligence, for an accident could rarely occur but that there would be some slight evidence of plaintiff's negligence. *Gulf, C. & S. F. Ry. Co. v. Shieder*, 30 S. W. 902, 905, 88 Tex. 152, 28 L. R. A. 538.

The trial court, in charging on the subject of corroboration of the testimony of an accomplice, stated that, if the facts outside of his testimony were sufficient to cast on him a grave suspicion of guilty knowledge, it was sufficient. The court, in reversing the case, said that "suspicion" is defined by standard lexicographers to be the "act of suspecting or the state of being suspected; imagination, generally of something ill; distrust; mistrust; doubt;" that the evidence ought to tend to show the guilt, and not a mere suspicion, whether grave or light; that the human mind is so constituted that where one is indicted for a grave offense the mere charge itself will excite a suspicion. Involuntarily it springs into action, and we look upon such a one with distrust and doubt. *McCalla v. State*, 66 Ga. 346, 348.

"Knowledge" and "suspicion" are not synonymous terms. Thus, where an employé's indemnity policy provided for notice of any act of dishonesty as soon as it came to the knowledge of the employer, notice was not required when the employer merely entertained suspicions as to the employé. *American Surety Co. v. Pauly* (U. S.) 72 Fed. 470, 477, 18 C. C. A. 644.

Where, in an action for libel, the words used were that the defendant had a suspicion that plaintiff and another had robbed his house, and therefore arrested them, the word "suspicion" was legally susceptible of involving a positive charge of felony. *Royce v. Maloney*, 5 Atl. 395, 400, 58 Vt. 437.

"Suspicion" is weaker than "belief," and "opinion" no stronger. The expression of a

suspicion that another has committed a crime is actionable. *Giddens v. Mirk*, 4 Ga. 364, 370.

SUSPICIOUS CHARACTER.

An ordinance of the city of San Antonio declares that all persons who entice any other person or persons to commit any irreputable act or deed, all persons found loitering about the city under suspicious circumstances or places and who are unable to give a proper account of themselves, all persons in the act of committing theft not amounting to a felony or misdemeanor, and all persons following any business by soliciting orders whereby the person or persons giving such orders are defrauded, shall be considered "suspicious characters." *McFaddin v. City of San Antonio*, 54 S. W. 48, 49, 22 Tex. Civ. App. 140.

SUSPICIOUS PERSON.

The words "suspicious person" are used to designate one against whom there is reasonable cause to believe that he has committed a felony, and whose arrest without warrant is authorized by Code Cr. Proc. § 177. The belief necessary to authorize such arrest is generally nothing more than a well-grounded suspicion. *People v. Russell*, 72 N. Y. Supp. 1, 2, 35 Misc. Rep. 765.

SUSTAIN.

A bond of a bank teller, conditioned to make good to said bank all damages "sustained" by it through his unfaithfulness or want of care, means any damages caused by his want of care, if by any degree of care on his part such damages could have been avoided. *Union Bank of Georgetown v. Forrest* (U. S.) 24 Fed. Cas. 559.

"Maintaining and sustaining" a railroad means keeping it in repair, supplying it with machinery, and such like acts; and thus a grant of a power to a corporation of "maintaining and sustaining" a railroad does not apply to projects for maintaining its business by schemes and enterprises not contemplated and expressed in clear, unambiguous terms by the charter itself. A power of maintaining and sustaining a railroad is included within a corporate grant of the power of laying, building, and making the road. *Central R. Co. v. Collins*, 40 Ga. 582, 624.

SUSTENANCE.

"Sustenance" is that which supports life; food; victuals; provisions; and, as used in a statute declaring that whoever shall deprive of necessary sustenance shall be guilty of misdemeanor, it means that

necessary food and drink which is sufficient to support life and maintain health; and where it appears that the defendant did furnish such food and drink, but merely refused to permit them to take medicine, a conviction cannot be sustained. *Justice v. State*, 42 S. E. 1013, 1014, 116 Ga. 605, 59 L. R. A. 601.

SWAMP.

In larger streams, such as the Santee and the Edisto, the "swamp" is spoken of distinct from the river; but in creeks with a margin of swamp the usage is universal in the state of South Carolina to speak of the creek and swamp as one, and in a call in a survey for "Dean swamp" the name is appropriate to the run, and not to the swamp. *Felder v. Bonnett* (S. C.) 2 McMul. 44, 47, 37 Am. Dec. 545.

The word "swamp," as contained in Act Cong. 1849, granting to the state of Louisiana certain lands to aid in reclaiming the swamp lands therein, without the addition of the word "overflowed," would have conveyed the lands so lacking in drainage as to be temporarily covered by water in the rainy seasons. *McDade v. Bossier Levee Board*, 83 South. 628, 631, 109 La. 625.

SWAMP AND OVERFLOWED LANDS.

"Swamp and overflowed lands," as used in a complaint to compel conveyance of certain land which the plaintiff claimed as swamp and overflowed lands purchased from the state, and which the defendant claimed as a pre-emption, should be construed as merely equivalent to the phrase "wet and unfit for cultivation." Land which is too wet for cultivation is "swamp and overflowed lands," whether the water flows over or stands upon it. In this sense the adjectives "swamp" and "overflowed," taken together, qualify the noun "land" in but one particular, and express but one fact concerning it; that is, it is too wet for cultivation. Hence a traverse of the allegations of the complaint that the land was "swamp and overflowed land" is sufficient, in alleging that the land is not too wet for cultivation. *Miller v. Tobin* (U. S.) 18 Fed. 609, 614.

"Swamp lands," as used in Act Cong. Sept. 20, 1850, granting swamp and overflowed lands to the states, as distinguished from "overflowed lands," may be considered to be such as require drainage to fit them for cultivation. *San Francisco Sav. Union v. Irwin* (U. S.) 28 Fed. 708, 712.

The "swamp and overflowed lands" granted to the state of Iowa by Act Cong. 1850, mean lands which by reason of swamp or overflow become unfit for cultivation. *Merrill v. Tobin* (U. S.) 30 Fed. 738-739.

"Swamp and overflowed lands," within Act Cong. March 7, 1857, confirming to the several states the swamp and overflowed lands, are lands on which, after the subsidence of the waters, grain or other staple crops cannot be raised. *Keeran v. Allen*, 33 Cal. 542, 546.

Land which is not susceptible of cultivation in grain or other staple products, by reason of overflow, is "swamp and overflowed land," within the meaning of Act Cong. Sept. 28, 1850, relating to the granting of swamp and overflowed lands; and the fact that a crop of grass may spring up after the overflow subsides does not prevent it from being swamp and overflowed. *Keeran v. Griffith*, 31 Cal. 461, 462, 466.

"Swamp and overflowed lands" are lands rendered unfit for successful cultivation by reason of the overflow. If lands by reason of the overflow were generally rendered unfit for the successful cultivation of the staple crops, they are swamp and overflowed lands, within the meaning of the act. The fact that staple productions, such as potatoes, corn, barley, or buckwheat, may be cultivated and raised on the land, is not all that is required; but such productions, or some of them, must be usually cultivated successfully. *Thompson v. Thornton*, 50 Cal. 142, 144.

"Swamp and overflowed lands," as used in an act of Congress granting to the state of California swamp and overflowed lands made thereby unfit for cultivation, includes only such legal subdivisions according to the congressional system of surveys the greater part of which was swamp and overflowed lands, and unless a tract constitutes the greater part of the legal subdivision according to such systems of surveys they do not come within the provisions of the statute. *Hogaboom v. Ehrhardt*, 58 Cal. 231, 233.

As overflowed annually.

It is not necessary that land should be overflowed annually to make it "swamp lands," under the act of Congress donating swamp and overflowed land to Arkansas and other states. *Keller v. Brickey* (Ill.) 3 Cent. Law J. 457.

Periodically overflowed land.

"Swamp and overflowed land," as used in Act Cong. July 23, 1866, § 4 (14 Stat. 219), which provides that in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the state of California as swamp and overflowed land represented as such on such approved plats, etc., does not include land subject

to periodical overflow, so as to include within the meaning of the section above referred to lands which are described in the plats as land subject to periodical overflow. *Heath v. Wallace*, 11 Pac. 842, 846, 71 Cal. 50.

SWAMP LAND ASSESSMENT.

A "swamp land assessment" is a charge imposed on property by authority of the Legislature, and hence is a liability created by statute, the enforcement of which is barred by the lapse of three years, under Code Civ. Proc. § 338, subd. 1. *People v. Hulbert*, 12 Pac. 43, 71 Cal. 72.

SWEAR—SWORN.

See "Duly Sworn."

The word "sworn" legally means "sworn to." *Commonwealth v. Bennett*, 89 Mass. (7 Allen) 533, 534.

"Swear," as used in an indictment for perjury, charging that the defendant did depose and swear, is not equivalent to an allegation that, being duly sworn, he did depose and say. "Swear" does not imply that defendant was duly sworn, for he may swear without being duly sworn. In one case the oath, so to speak, is self-imposed, and the swearer incurs no legal liability thereby; while in the other the oath is administered by a person having authority so to do, and the affiant takes it subject to the pains and penalties for perjury. *United States v. McConaughy* (U. S.) 83 Fed. 168, 169.

An indictment for perjury which charged that, defendant being lawfully required by the magistrate to make out in fact a written statement of his circumstances and being then and there duly sworn, "he did then and there swear in and by such written statement," meant that he made a written statement under oath, and the indictment was not insufficient, as not charging the making of a false oath. *Commonwealth v. Carel*, 105 Mass. 582, 585.

The words "or swear" may be rejected as surplusage, where the rest of the affirmation is correct. *State v. Shreve*, 4 N. J. Law (1 Southard) 297.

A charge that another "will swear, lie, cheat, or steal" may import that he lies, swears, cheats, and steals; and, if used in the latter sense, it is to be determined by the jury whether the language is actionable. *Dottarier v. Bushey*, 16 Pa. (4 Harris) 204, 209.

The term "swear" includes every mode authorized by law for administering an oath. *Laws N. Y. 1892, c. 677, § 14.*

When applied to public officers, who are required by the Constitution to take the

oaths therein prescribed, the word "sworn" shall refer to those oaths; and, when applied to any other officer, it shall, unless otherwise expressly provided, mean sworn to the faithful performance of his official duties. Rev. Laws Mass. 1902, p. 89, c. 8, § 5, subd. 22.

The word "sworn," when applied to public officials required by the Constitution to take the oaths therein prescribed, shall refer to those oaths; when applied to other officers, it shall mean sworn to the faithful discharge of the duties of their offices before a justice of the peace or other person authorized to administer oaths in such cases. Pub. St. N. H. 1901, p. 64, c. 2, §§ 24, 25.

The word "sworn," when applied to public officers required by the Constitution to take certain oaths, shall refer to those oaths; when applied to other officers, it shall mean to the faithful discharge of the duties of their offices before a person authorized to administer oaths. V. S. 1894, 14.

The words "sworn," "duly sworn," or "sworn according to law," used in a statute, record, or certificate of administration of an oath, refer to the oath required by the Constitution or laws in the cases specified, and include every necessary subscription to such oath. Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 20.

Affirm or affirmed.

By statute in many states it is provided that the words "swear" or "sworn" shall include the words "affirm" or "affirmed." Code Miss. 1892, § 1516; V. S. 1894, 13; Gen. St. N. J. 1895, p. 3195, § 35; Rev. St. Tex. 1895, art. 3270; Ky. St. 1903, § 451; Rev. St. Wis. 1898, § 4971; Comp. Laws Mich. 1897, § 50, subd. 11; Sand. & H. Dig. Ark. 1893, § 7218; Code W. Va. 1899, p. 132, c. 13, § 11; Pub. St. R. I. 1882, p. 77, c. 24, § 10; Gen. St. Conn. 1902, § 1; Mills' Ann. St. Colo. 1891, § 4185, cl. 7; Gen. St. Minn. 1894, § 255, subd. 10; Gen. St. Minn. 1894, § 1511; Code Va. 1887, § 5; Hurd's Rev. St. Ill. 1901, p. 1720, c. 131, § 1, subd. 12; Horner's Rev. St. Ind. 1901, § 1285; Rev. Codes N. D. 1899, § 1176; Comp. Laws N. M. 1897, § 2900; Ballinger's Ann. Codes & St. Wash. 1897, § 1658; Gen. St. Kan. 1901, § 7342, subd. 12; Code Iowa 1897, § 48, subd. 12; Rev. St. Utah 1898, § 2498; Rev. Laws Mass. 1902, p. 89, c. 8, § 5, subd. 22; Pub. St. N. H. 1901, p. 64, c. 2, §§ 24, 25; Code N. C. 1883, § 3765, subd. 5; Rev. St. Tex. 1895, art. 3270; Rev. St. Tex. 1895, art. 5064.

SWEARING.

See "False Swearing"; "Public Swearing."

Any words importing an imprecation of divine vengeance, or implying divine con-

demnation, are sufficient to constitute "swearing." The use of the word "damned" is profanity, without being used in connection with the name of the Deity. State v. Wiley, 24 South. 194, 76 Miss. 282, 71 Am. St. Rep. 531 (citing Holcomb v. Cornish, 8 Conn. 375).

SWORN ACCORDING TO LAW.

Rev. St. c. 1, § 3, provides that "whenever the expression 'duly sworn,' or 'sworn according to law,' is used or applied to any officer who is required to take and subscribe the oath prescribed in the Constitution, it shall be construed to mean that such officer has taken and subscribed the same, as well as the oath faithfully and impartially to perform the duties of the office to which he has been elected and appointed, and when applied to any person other than such officer it shall be construed to mean that such person has taken an oath faithfully and impartially to perform the duties assigned to him in the case specified." In the case of an assessor, where the records of the town recite that he was duly sworn, it is not necessary that the oath administered should have been set out in full; but such record is sufficient to show that he had taken the oath which qualified him to act. Bennett v. Treat, 41 Me. 226, 227.

The words "sworn," "duly sworn," or "sworn according to law," used in a statute, record, or certificate of administration of an oath, refer to the oath required by the Constitution or laws in the cases specified, and include every necessary subscription to such oath. Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 20.

SWORN COMPLAINT.

"Sworn complaint," as used in Rev. St. c. 27, § 40, requiring a sworn complaint for the search and seizure of intoxicating liquors, includes a complaint made on affirmation by one conscientiously scrupulous of taking an oath. State v. Welch, 8 Atl. 348, 349, 79 Me. 99.

SWORN FALSELY.

The words, "she swore a false oath, and I can prove it," spoken concerning a person, do not import a false swearing in a court of justice, so as to constitute the crime of perjury; and hence they are not actionable per se. Packer v. Spangler (Pa.) 2 Bin. 60.

The words, "he swore a false oath, and I can prove it," as addressed to a person, do not import perjury, or that the swearing was in some judicial proceeding. They might have been spoken in relation to some private and extrajudicial transaction. Hence the words are not actionable as slander, where

they were not spoken in a conversation concerning a particular judicial procedure. *Martin v. Melton*, 7 Ky. (4 Bibb) 99.

The words "sworn falsely," as used in Insolvent Act, § 49, which provides that no discharge shall be granted if the debtor shall have sworn falsely in relation to any material fact concerning his estate or debts, necessarily import a willful act done with a fraudulent intent, from which the element of fraud cannot be eliminated. A mistake in his verified schedule of liabilities, which is made in good faith, does not constitute such false swearing. *De Martin v. De Martin*, 24 Pac. 596, 85 Cal. 76.

To charge one with having "sworn falsely" does not of itself import a charge of perjury, and to render such words actionable it must be averred that they were spoken in reference to a judicial oath and to have been meant as a charge of perjury. *Barger v. Barger*, 18 Pa. (6 Harris) 489, 492.

The words "he has sworn falsely" are held not to be actionable per se, inasmuch as they alone do not necessarily include the idea of willful intention. "They may mean," says the court, "perfidiously, or merely not truly." "Swearing to that which is false," says Chancellor Kent, "does not imply that the party has in judgment of law perjured himself. It may mean that he has sworn to a falsehood, without being conscious at the time that it was false." *Schmidt v. Witherick*, 29 Minn. 156, 157, 12 N. W. 448.

SWORN TO A LIE.

The words "swore a lie," contained in an alleged libel, do not of themselves impute a charge of perjury, and hence are not actionable per se. *Knight v. Sharp*, 24 Ark. 603, 608.

A statement that a person "swore false and swore to a lie" does not imply that the person spoken of was guilty of perjury, and is not actionable. *Sheely v. Biggs*, 2 Har. & J. (Md.) 363, 364, 3 Am. Dec. 552.

The words "sworn to a lie," as used in an allegation that a person has sworn to a lie, are not actionable; for they do not necessarily imply that the party has in judgment of law perjured himself. They may mean that he has sworn to a falsehood, without being conscious at the time that it was a falsehood. It does not imply that it was sworn to before any court or competent officer. It may mean extrajudicial swearing. *Hopkins v. Beedle* (N. Y.) 1 Caines, 347, 348, 2 Am. Dec. 191.

SWEET CORDIAL

A sweet cordial is a plain spirit, flavored by an essential oil or other aromatic substance, and sweetened by some saccharine

matter. *United States v. Three Hundred Casks of Juniper Cordial* (U. S.) 28 Fed. Cas. 141.

SWELLS.

"Swells," as used in a contract for the sale of canned corn containing the clause "usual guaranty against swells," primarily refers to cans whose ends are forced outward by the gases engendered by fermentation, and it includes all cans whose contents are sour. *Sleeper v. Word* (U. S.) 60 Fed. 888, 889, 9 O. C. A. 289.

SWINDLE—SWINDLING.

"Swindling" is defined to be cheating and defrauding with deliberate artifice. *Wyatt v. Ayres* (Ala.) 2 Port. 157, 161.

Pen. Code 1895, art. 790, defines "swindling" to be the acquisition of any personal or movable property, money, or instrument in writing conveying or securing a valuable right by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same. *May v. State*, 15 Tex. App. 430, 436; *Blum v. State*, 20 Tex. App. 578, 591, 54 Am. Rep. 530; *Cline v. State*, 43 Tex. 494, 497. See, also, Pen. Code Tex. 1895, art. 943.

A fraudulent sale of goods, for the purpose of preventing them from being attached by the creditors, by the vendor, is a fraud in law, which in an action of slander will justify the application of the epithets "cheating" and "swindling." *Odiorne v. Bacon*, 60 Mass. (6 Cush.) 185, 191.

As actionable per se.

"Swindled," as used in a statement that a certain person had swindled the county and a person, out of certain sums of money, cannot be construed to imply that the money was obtained under false pretenses, and is not actionable per se, for it did not charge an indictable offense. *Well v. Altenhofen*, 26 Wis. 708, 709.

The term "swindling" does not import a crime known to the law, and hence words charging one with being a swindler are not actionable per se. *Chase v. Whitlock* (N. Y.) 3 Hill, 139, 140.

The term "swindling" does not import a crime. Imprisonment on a charge of swindling, by making false representations as to the solvency of another, is false imprisonment; the conduct described as swindling not being a punishable offense, but only the ground of a civil action. *Hall v. Rogers* (Ind.) 2 Blackf. 429, 430.

In *J'Anson v. Stuart*, 1 Term R. 753, it is said to be formerly held that the word

"swindling" was in general use, and that the court could not say they were ignorant of it. In the same case, Ashhurst, J., held it to imply crimes for which the person might be indicted, and Buller, J., said it contained as libelous a charge as can well be imagined. In *Berryman v. Wise*, 4 Term R. 366, there was no question but the word was actionable when applied to an attorney in his official character; and in the argument of the present case, it seemed to be agreed that it was a word which had come into use since St. 30 Geo. II, c. 24, and was generally understood to imply a charge of the crimes, or some of them, mentioned in that statute. One of the principal offenses mentioned in that statute, and the one to which the term "swindling" seems to be most appropriately applied, is that of "knowingly and designedly, by false pretenses, obtaining from any person money, goods," etc., "with intent to cheat or defraud any person of the same." This offense is substantially and accurately the common-law offense of cheating, which is described in 1 Hawk. P. C. 343, to be "deceitful practices, in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty." To charge a man with swindling seems, therefore, to be substantially to charge him with an offense for which he may be liable to a prosecution at common law. *Forrest v. Hanson* (U. S.) 9 Fed. Cas. 456.

Theft distinguished.

"Swindling" may be committed in either of two ways under Pen. Code 1895, art. 790: First, where the unlawful acquisition is accomplished by the means named, and the intent is to appropriate the property so acquired to the use of the party so acquiring; and, second, where the unlawful acquisition is accomplished by the means named, with the intent of destroying or impairing the rights of the party justly entitled thereto. In the one case the intent of the party is to benefit himself; in the other, to injure the right of some one else. It is true that the two intents and the two modes of accomplishing the crime may combine and occur in the perpetration of a single act. That they should, however, is not necessary to the completeness of either of the two modes. It follows, then, that the crime may be committed without destroying or impairing the rights of the party justly entitled to the property, and the swindle may be perpetrated in fact upon one who is not even justly entitled to the property; and this is a distinction between swindling and theft. *May v. State*, 15 Tex. App. 430, 436.

As authorizing arrest.

"Swindling" has no legal or technical meaning, and commonly implies a recourse to petty and mean artifices for obtaining money, which may or may not be strictly illegal.

No offense against the laws is charged by the term, and a notification to a police officer to keep track of certain parties "swindling" commission merchants does not authorize the arrest of the persons. *Cunningham v. Baker*, 16 South. 68, 71, 104 Ala. 160, 53 Am. St. Rep. 27.

As requiring intent to appropriate.

One of the essential elements of the crime of "swindling," as defined by Pen. Code 1895, art. 790, and the most important, is the intent with which the property is acquired. It must be with the intent to appropriate the same to the use of the party so acquiring it. Without an allegation to that effect an indictment for swindling does not charge the offense. *Stringer v. State*, 13 Tex. App. 520, 522.

As requiring actual deception.

In order to constitute "swindling," there must be an intent to defraud, an actual act of fraud committed, false pretenses, and the fraud must be committed or accomplished by means of the false pretenses made use of for the purpose; that is, they must be the cause which induced the owner to part with his property. An essential element of the offense of swindling is that the party injured must have relied upon, believed as true, and been deceived by the fraudulent representations or devices of the party accused. Prosecutor was applied to by defendant for a loan of \$5; the latter stating that he would give prosecutor a check on a certain bank to cover the \$5 and a previous loan. Prosecutor told defendant that he did not believe he had a cent in the bank, but that he would give defendant \$5 to catch him, and, if defendant had no money in the bank, he would prosecute him. Defendant had no money in the bank. Held not to constitute swindling, since the false pretense was not the inducement for the loan. *Thorpe v. State*, 50 S. W. 383, 40 Tex. Cr. R. 346.

As requiring false representation.

In order to constitute a swindle, there must be a representation of a past or present condition of things knowingly made by the party engaged in the swindling operation, which was false, calculated to deceive, and doing so in fact, and in reliance upon which property which is the subject-matter of the swindle is parted with. Where defendant was given \$5 to get changed, to take out the sum of 80 cents due her, and offered 20 cents back, claiming that only a \$1 bill had been given her, she was not guilty of swindling; there being no false representation. *De Young v. State* (Tex.) 41 S. W. 598.

SWINDLER.

The word "swindler" means no more than "cheat." Therefore, to charge one with

being a swindler, or with swindling, is not actionable. *Stevenson v. Hayden*, 2 Mass. 406, 408.

A swindler is one who obtains money or goods under false pretenses. *Well v. Altenhofen*, 26 Wis. 708, 711.

To charge a man with being a swindler or a cheat does not impute a crime, and is not slanderous. *Pollock v. Hastings*, 88 Ind. 248, 250.

The word "swindler" is an exotic, which came from Germany, and has but recently become naturalized in our language. In Todd's Johnson "swindler" is defined to be a sharper, or a cheat; and "to swindle" is to cheat, to impose upon the credulity of mankind, and thereby to defraud the unwary by false pretenses. Webster defines "swindler" as a cheat, a rogue, one who defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice. In Tomlins' Law Dictionary (edition of 1836) the word is defined as a cheat, or one who lives by cheating. Swindling is not a crime known to our law. To call one a swindler is about equivalent to saying he is a cheat, which has never been held actionable. Either of these charges may, under certain circumstances, imply that the accused is guilty of the crime of obtaining goods by false pretenses. But they do not necessarily mean so much. There are many ways in which a man may wrong another, in such a manner as to earn the title of "swindler" or "cheat," without subjecting himself to an indictment for a criminal offense. This question has been considered as settled ever since the decision in *Savile v. Jardine*, 2 H. Bl. 531. It was there held that the words charging the plaintiff with being a swindler were not actionable. *Eyre, C. J.*, said: "The word is only equivalent to 'cheat.' It cannot be carried further, and that is not actionable." He added: "Thief always implies felony, but cheat not always." *Buller, J.*, said: "Swindler means no more than cheat. When a man is said to be swindled, it means tricked or outwitted." That case was followed by the Supreme Court of Massachusetts in *Stevenson v. Hayden*, 2 Mass. 406. *Chase v. Whitlock* (N. Y.) 3 Hill, 139, 140.

The words "swindler," "swindling," etc., have been very lately adopted into the English language, and are as yet of indefinite meaning, and do not with certainty import an indictable offense. These terms were imported into this country from England, and into that from Germany. In their passage hither, when first used in the English language, and before they became naturalized here, they obtained a meaning, and what that meaning was we learn from the report of the case of *Savile v. Jardine*, by which it appears that the word "swindle" means no more than "cheat." "Cheat" has always

been held not to be actionable, and "swindler" means no more. *Stevenson v. Hayden*, 2 Mass. 406, 408.

The word "swindler," as applied to a person, does not charge a crime, so as to be actionable per se in slander. *Odiorne v. Bacon*, 60 Mass. (6 Cush.) 185, 191.

The term "swindling," or "swindler," does not charge an infraction of the criminal law, so as to be actionable per se in slander. *Pollock v. Hastings*, 88 Ind. 248, 250.

SWINE.

"Swine" is the original generic term for "hog" or "shoat." *State v. Godet*, 29 N. C. 210, 211.

Pen. Code 1895, art. 679, makes it an offense to kill, etc., any horse, mule, cattle, swine, or other domesticated animal, etc. Held, that the term "swine" includes and is synonymous with the word "hog," and hence an information under the statute alleging the killing of a hog was sufficient as a description of the animal. *Rivers v. State*, 10 Tex. App. 177, 179.

"Swine," as used in St. 1805, c. 100, exempting from the liability of attachment one swine, includes a swine butchered, but not cut up. *Gibson v. Jenney*, 15 Mass. 205, 206.

SWIPE.

"Swipe" means to pluck, to snatch, to steal, or to steal by snatching; and hence, where a defendant admitted that he "swiped" a watch, he was not entitled to an instruction that "swiped" did not mean "stole." *State v. Lee*, 70 N. W. 594, 595, 101 Iowa, 389.

SWISS MUSLINS.

"Swiss muslins" are bleached cotton goods which are woven upon a loom. The warp, or threads which run longitudinally, extend from one end of the piece to the other, and the filling, or threads that extend from side to side, run from edge to edge through the width of the piece. In addition to the plain loom, there is an attachment which produces the spots, dots, or other figures which ornament the goods, and which are woven at the same time with the rest of the cloth. *United States v. Albert* (U. S.) 60 Fed. 1012, 1013, 9 C. C. A. 832.

SWITCH.

See "Flying Switch."

See, also, "Side Track"; "Siding."

In electrical appliances.

A "switch," as the term is used in speaking of an electrical switch, is any de-

vice by which one line may be electrically connected with another. The form in common use on switchboards in the telephone exchanges consists of a socket set in the switchboard containing the terminals of the two sides of the subscribers' circuit, and this is used by means of a plug which contains the terminals of the two wires that are attached to it in a cord. The insertion of the plug in the socket makes the electrical connection between the subscriber's line and the wires attached to the plug, and these wires usually lead to another similar plug, or to the telephone of the operator. *Kinloch Telephone Co. v. Western Electric Co. (U. S.)* 113 Fed. 659, 660, 51 C. C. A. 362.

An "electric switch," in general terms, is a device for opening and closing a single circuit in some regular and systematic manner. The switch which is in ordinary commercial use involves two stationary terminals connected to the opposite branches of a circuit, and a removable bridging piece inserted between such two terminals to complete the continuity of the circuit, or withdrawn therefrom to interrupt the circuit. *Thomson-Houston Electric Co. v. Nassau El. R. Co. (U. S.)* 107 Fed. 277, 278, 46 C. C. A. 263.

In railroad.

A "switch," as the term is used in railroading, is defined as a "device for moving a small section of track, so that rolling stock may be run or shunted from one line to another," and "in railroads, in its simplest form, two parallel lengths of rail, joined together by rods, pivoted at one end, and free to move at the other end, forming a part of the track at its junction with a branch or siding." *Standard Dict., Cent. Dict.* As used in *Railroad Law*, § 7, subd. 3, authorizing a railroad to take lands for the construction of switches, etc., the term does not include a parallel line of track, to be used as another main line, parallel to the constructed road. *Erie R. Co. v. Steward*, 70 N. Y. Supp. 698, 700, 61 App. Div. 480.

A switch is but a mechanical contrivance or movable opening to pass the cars from one track to another. A power to construct side tracks implies a power to connect the side tracks with the main track by switches. *Georgia R. & Banking Co. v. Maddox*, 42 S. E. 315, 322, 116 Ga. 64 (citing *Cleveland & P. R. Co. v. Speer*, 56 Pa. [6 P. F. Smith] 325, 334, 94 Am. Dec. 84).

Freight yards containing 450 acres, operated as one yard, are not "turnouts" or "switches," as those terms are understood by railroad men in railway parlance. *People v. New York Cent. & H. R. R. Co.*, 51 N. E. 312, 314, 156 N. Y. 570.

SWITCH ROAD.

In construing an act granting a right of way for a switch road, and reserving to the

grantor "the right to make or cause to be made and built on his own lands such 'switch road' connection with the said line of switch, provided such connection shall in no manner obstruct or interfere with the use of said switch," the courts say that the words "connection" and "switch road" are used as synonymous terms. *Palfrey v. Foster*, 17 South. 425, 426, 47 La. Ann. 963.

SWITCH YARD.

The words "switch yard," as employed in connection with and descriptive of railway service, consists of side tracks upon either side of the main track, and adjacent to some principal station or depot grounds where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is the place where such switching is done as is essential to the proper placing of cars, either for deposit or for departure. *Baltimore & O. S. W. Ry. Co. v. Little*, 48 N. E. 862, 863, 149 Ind. 167.

SWITCHING.

The test of distinction between transportation service, relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates and switching or transfer service, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line, or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of freightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. *Dixon v. Central of Georgia Ry. Co.*, 35 S. E. 369, 372, 110 Ga. 173.

SWIVEL

A "swivel" is defined by *Ainsworth* in his Dictionary as something used in or on another body so as to turn round in or upon it. *Denise v. Swett*, 22 N. Y. Supp. 950, 953, 68 Hun. 188.

SYCOPHANT.

The word "sycophant" comes from the Greek words meaning "fig informer," but it would scarcely be contended to-day that a man could not properly be called a sycophant unless he had dealings in figs. In short, words by use are sometimes degraded, sometimes ennobled; sometimes narrowed in meaning, sometimes broadened. *People v. Cogswell*, 113 Cal. 129, 137, 45 Pac. 270, 271, 35 L. R. A. 269.

SYLLABUS.

The "syllabus" is never made up of findings of fact, but is limited to points of law determined. Sometimes the findings of fact are referred to for the purpose of explaining the point of law adjudicated, and only for such purpose. The opinion, and not the syllabus, shows the findings of fact necessary to the adjudication, for the information of the circuit court; and this court only makes the more important points of law a part of the syllabus, for the general information of the legal profession and public, and not for the government of the circuit court in the further progress of the case. The opinion furnishes it the rule for its further action. If it be doubtful, and the syllabus does not clear away the doubt, he is justified in independent action; otherwise, it must be obeyed. *Koonce v. Doolittle*, 37 S. E. 644, 645, 48 W. Va. 592.

SYMBOLICAL DELIVERY.

"Symbolical delivery" is a substitute for actual delivery, when the latter is impracticable, and leaves the real delivery to be made afterwards. As between the parties, the whole title passes by such delivery, when that is their intention; but when the transaction is a mere pledge, placing the title at the control of the pledgee for the mere purpose of securing the debt without actually transferring the title, no title passes, for the reason that that is not what the parties intended. *Winslow v. Fletcher*, 4 Atl. 250, 255, 53 Conn. 390, 55 Am. Rep. 122.

A stock of goods in a store is "symbolically delivered" by giving to the purchaser the key of the door of the house in which they are kept or stored. *Miller v. Lacey* (Del.) 30 Atl. 640, 641, 7 Houst. 8.

SYMPATHETIC STRIKE.

The term "sympathetic strike" is otherwise known in this country as a boycott. *Booth v. Brown* (U. S.) 62 Fed. 794, 795.

SYMPATHY.

In a statute disqualifying any person who had manifested his adherence or sympathy with those engaged in carrying on the Rebellion was not used in its most general sense, but as meaning something more than feeling, and must be understood to import some conduct of a treasonable nature. *State ex rel. Wingate v. Woodson*, 41 Mo. 227, 234.

SYMPHONY.

A "syphony" is a work of an operatic character, intended or designed to be inter-

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preted by musical instruments alone. It cannot be considered a dramatic work, or a dramatic composition, within the meaning of the copyright law. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1135 (cited and approved *The Mikado Case* [U. S.] 25 Fed. 183).

SYNDIC.

At common law in England an agent appointed by a corporation for the purpose of obtaining letters of guardianship and the like was called a syndic, to whom such letters were issued. *Minnesota Loan & Trust Co. v. Beebe*, 41 N. W. 232, 233, 40 Minn. 7, 2 L. R. A. 418.

The word "syndic" in the civil law corresponds very nearly with that of assignee under the common law. *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468, 471.

SYNOD.

A "synod" is a "convention of bishops and elders within a district including at least three presbyteries. The synod have a supervisory power over presbyteries, but, unlike presbyteries, are not essential to the existence of the general assembly; the only connection between the general assembly and the synod being that the former has a supervisory power over the latter." *Commonwealth v. Green* (Pa.) 4 Whart. 531, 560.

The word "synod" signifies simply a meeting of the few adjoining presbyteries. A synod is in no sense an ecumenical council, which is a council of all, and not of a part. *Groesbeeck v. Dunscomb* (N. Y.) 41 How. Prac. 302, 344.

SYNONYMOUS.

The word "synonymous" means conveying the same or approximately the same meaning. *Hoffine v. Ewing*, 84 N. W. 93, 95, 60 Neb. 729.

"Synonymous words" are words expressing the same thing, conveying the same or approximately the same idea. *Fritz v. Williams* (Miss.) 16 South. 359, 360 (citing *Webst. Dict.*)

SYNOPSIS.

"Synopsis" means to cut short, diminish, reduce; a brief or partial statement, less than the whole; an epitome. *Barker v. Barker*, 22 Pac. 1000, 1001, 43 Kan. 91.

SYRINGE.

A syringe is a kind of pump, so that the application of the principles and appliances already used in pumps to a syringe does not

constitute prior invention. *Tagliabue v. Sondermann* (U. S.) 67 Fed. 551, 552.

SYRUP.

"Syrup" is defined by Webster as "a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar." The Standard Dictionary defines the term generally as "a thick, sweet liquid," and specifically as "a saturated solution of sugar and water, often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages," and adds: "Syrups are commonly named from their source of flavoring." The word "syrup" is necessarily qualified by that of the substance, or one or more of the substances, which distinguish it to the taste, or in its medicinal property. The words "Syrup of Figs" or "Fig Syrup," being descriptive, cannot be sustained as a valid trade-mark or trade-name, as applied to a syrup, one of the characteristic ingredients of which is the juice of the fig. *California Fig Syrup Co. v. Stearns* (U. S.) 67 Fed. 1008, 1011.

The Century Dictionary describes "syrup" to be "a solution of sugar in water, made according to an official formula, whether simple, flavored, or medicated with some special therapeutic or compound." It is defined by Webster as "a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar." The Standard Dictionary defines syrup generally "as a thick, sweet liquid," and specifically as "a saturated solution of sugar in water, often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages." This authority further states that "syrups are commonly named from their source of flavoring." *California Fig Syrup Co. v. Frederick Stearns & Co.* (U. S.) 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56.

SYSTEM.

Of common schools.

"System," as used in Const. art. 9, § 4, which provides that the Legislature shall establish a uniform system of public free schools throughout the state, means an organized plan, an institution, something established for the use and benefit of the people, so long as the want of public education will continue. *Peay v. Talbot*, 39 Tex. 335, 346.

"The word 'system' is defined by the Encyclopædic Dictionary as a plan or scheme according to which things are connected or combined into a whole; an assemblage of facts or of principles and conclusions, scientifically arranged or disposed according to certain mutual relations, so as to form a

complete whole, as a system of philosophy, a system of government," etc. It is so used in Const. art. 8, § 1, authorizing the General Assembly to provide for the organization of the common schools, and directing that body to devise a system of common schools. *State v. Ogan*, 63 N. E. 227, 228, 159 Ind. 119.

Of electric lighting.

Where a municipal ordinance provided that a system of electric conductors and poles provided with street lamps be built in the streets of a village, located upon such streets as hereinafter specified, the use of the word "system" implies that the wires are connected with the power house. *Ewart v. Village of Western Springs*, 54 N. E. 478, 481, 180 Ill. 318.

Of government.

Const. § 171, declares that in any county that shall have adopted a system of government by the chairman of the several township boards, the question of continuing the same may be submitted to the electors of such county at a general election in such a manner as may be provided by law, and, if a majority of all the votes cast on such question shall be against such system of government, then such system shall cease, and the affairs of said county shall be transacted by the board of county commissioners, as is now provided by the laws of the territory of Dakota. Held, that the words "system of government," as used in such section, were synonymous with the words "fiscal concerns and affairs," as used in the preceding sections 170 and 171, and as so used meant the transaction of all the business of the county and the performance of such duties as by law has been placed on county commissioners. *Martin v. Tyler*, 60 N. W. 392, 396, 4 N. D. 278, 25 L. R. A. 838.

"System," as used in Const. art. 4, § 21, authorizing the Legislature to establish a uniform system of municipal governments, means plan, arrangement, method—simply rules and regulations for the organization and government of municipal corporation. *Ex parte Wells*, 21 Fla. 280, 305; *McConihe v. McMurray*, 17 Fla. 238, 269; *Town of Enterprise v. State*, 10 South. 740, 746, 29 Fla. 128.

Const. art. 11, § 4, which directs that the Legislature shall establish a "system of county and town governments," which shall be as nearly uniform as practicable throughout the state, refers to town organizations, which in their general features are like those of other states where the town government had been established when the Constitution was adopted. *Ex parte Wall*, 48 Cal. 279, 318, 17 Am. Rep. 425.

"System," as used in Const. art. 4, § 23, declaring that the Legislature shall establish but one system of town and county government, which shall be as nearly uniform as possible, is not synonymous with "plan," in

the sense to mean a mere mode in which powers conferred upon counties are distributed among the various offices established by law for county government, without relation to the number of persons composing county boards, etc., but means that the number of persons composing county boards, etc., shall be the same in each county. *State v. Riordan*, 24 Wis. 484, 488.

Of numbering.

The fact that a single block has been subdivided into lots does not constitute a system of numbering. *Davis v. Pacific Imp. Co.*, 70 Pac. 15, 16, 137 Cal. 245.

Of pleading.

The provision in the act of 1840 regulating proceedings in civil suits, declaring that

the adoption of the common law shall not be so construed as to adopt the common-law system of pleading, but the proceedings in all civil suits, shall, as heretofore, be conducted by petition and answer, the clause "petition and answer" is used in opposition to the common-law system of pleading, not to signify the stages of pleading to which these words give name, but to designate the system to which they belong. These words, then, were not intended as a restriction or limitation of the pleadings to the answer, but as the designation of a system of pleadings, and used not to denote a prescribed formulary, but as indicative of their intention to retain the then existing system, in opposition to the common-law and chancery systems of pleading in England. *Underwood v. Parrott*, 2 Tex. 168, 179.

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TABLE.

See "Billiard Table"; "Gambling Table."

TACIT.

"Tacit" is said of that which, although not expressed, is understood from the nature of the thing, or from the provision of the law. Civ. Code La. 1900, art. 3556, subd. 30.

TACIT ACCEPTANCE.

Acceptance is tacit, when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir. Civ. Code La. 1900, art. 988.

TACIT HYPOTHECATION.

The term "tacit hypothecation" is often applied to a maritime lien, which is not, strictly speaking, a Roman hypothecation, though it resembles it. It somewhat resembles what is called a "privilege" in that law; that is, a right of priority or satisfaction growing out of the proceeds of a thing in a concurrence of creditors. The Nestor (U. S.) 18 Fed. Cas. 9, 13.

TACIT MORTGAGE.

The law alone in certain cases gives to the creditor a mortgage on the property of his debtor, without it being requisite that the parties should stipulate it. This is called "legal mortgage." It is called "tacit mortgage," because it is established by the law without the aid of any agreement. Civ. Code La. 1900, art. 3311.

TACKING.

The entire scope of the doctrine of "tacking" is not to determine whether the occupant of the land has been in possession thereof for any fixed period of time, but is to determine whether the claimant out of possession has in fact or in law been in possession within the statutory period, so as to entitle him to maintain his action. In other words, it is merely a uniform rule adopted by the court to determine whether the claimant, out of possession when his action was commenced, has been in possession at any time within the 20-year period. If no privity has been found to exist between the successive disseisors, and the last occupant has not held adversely for the full statutory period, the bar is not complete, as the law presumes that the land returns to the true owner at each change of possession, when there is no

privity between the several occupants. When, however, there is privity of possession, and it has continued for the full statutory period, the bar is complete, for the very plain reason that the claimant out of possession has not in that event been in possession within the statutory period. *J. B. Streeter, Jr., Co. v. Fredrickson*, 91 N. W. 692, 694, 11 N. D. 300.

"Tacking it on as a rider" is a legislative phrase, designating the practice of putting a measure of doubtful strength on its own merits into the general appropriation bill, in order to compel members to vote for it, or bring the wheels of government to a stop. *Commonwealth v. Gregg*, 29 Atl. 297, 161 Pa. 582.

TACKLE.

See "Ship's Tackle, Apparel, and Furniture."

TAKE

See "To Be Taken."

"Take," according to Webster's Dictionary, is used as the synonym of "require" or "be necessary." *King v. Kent's Heirs*, 29 Ala. 542, 555.

One of the definitions of the word "take," as defined by Webster, is to move or direct the course; to proceed; to go. *State v. Johnson*, 22 S. W. 463, 466, 115 Mo. 480.

To take an article signifies merely to lay hold of, grab, or seize it, with the hands or otherwise. *Gettinger v. State*, 14 N. W. 403, 404, 13 Neb. 308; *State v. Chambers*, 22 W. Va. 779, 790, 46 Am. Rep. 550.

The word "take" is broad enough to include "seize"; but that is not its ordinary sense, and it has no such technical meaning. *Butts v. Woods*, 16 Pac. 617, 620, 4 N. M. (Johns.) 187.

To "take" signifies to lay hold of, and, when applied to land, implies to gain or receive into possession; to seize; to deprive one of the possession; to assume ownership. *Wulzen v. City and County of San Francisco*, 35 Pac. 353, 356, 101 Cal. 15, 40 Am. St. Rep. 17.

The words "taking" and "converting" are not appropriate in speaking of real property. One may readily be understood when he says that an action may be sustained for "taking" personal property, or for "converting" it, or for "taking and converting" it; but the words would convey no legal idea

when applied to real estate. There is a broad sense in which the word "detaining" might be applied to real estate, of which the expression "forcible entry and detainer" is an illustration. The words "taking, injuring, detaining, and converting," all used in the same sentence in an action, providing that an action for the taking, injuring, detaining, and converting of property must be brought within a certain time, apply to personal property only. *Merritt v. Carpenter* (N. Y.) 3 Abb. Dec. 285, 289.

Arrest synonymous.

"Take," as contained in a warrant issued by a Governor, authorizing the agent of another state to take and receive into custody a fugitive from justice, is synonymous with "arrest," and authorizes such arrest. *Commonwealth v. Hall*, 75 Mass (9 Gray) 262, 267, 69 Am. Dec. 285.

As change of possession.

"Taken," as used in the charter providing that the owner or occupier of any house, lot, or tenement where water shall be taken, shall each be liable for the payment of the price fixed by the board of public works for the use of water, means at the place where it is delivered for use, and not at the place where it is measured. In its usual signification the word "taken" implies a transfer of possession, dominion, or control. A thing is not taken unless such a change of status is effected. In trespass, trover, or replevin, the taking is not accomplished until the goods are within the power or control of the defendant. A devisee takes under a will only when the possession and control of the deviser has ceased. Where the city placed a meter for measuring water on a person's land, but after being so measured it flowed through the main and was delivered for use at other places than on such land, the water was not taken where the meter was located, but where it was delivered for use. *Jersey City v. Morris Canal & Banking Co.*, 41 N. J. Law (12 Vroom) 66, 67.

Control and management implied.

"Takes a vessel on shares," as used in a statement that a master takes a vessel on shares, implies that he fully controls the management of the vessel for the time being. *Marshall v. Boardman*, 35 Atl. 1024, 1025, 89 Me. 87, 56 Am. St. Rep. 392.

Detention or delay.

Act Cong. July 8, 1886, authorizing the presentation of claims for "property taken and impressed into the service of the United States," construed not to mean the mere detention and delay of property; and hence the statute does not authorize damages therefor. *United States v. Irwin*, 8 Sup. Ct. 1033, 1035, 127 U. S. 125, 32 L. Ed. 99.

As eat or swallow.

The word "take," in a provision in an accident policy that its insurance does not cover injuries resulting from poison or anything accidentally taken, means to eat as food, to swallow. *Maryland Casualty Co. v. Hudgins* (Tex.) 76 S. W. 745, 747, 64 L. R. A. 349.

Felony imported.

"Taken," as used in an instruction in a prosecution for larceny in which the court stated that the only testimony in the case touching the time when the watch was taken was that tending to show that it was taken near the door, and that of the defendant that he picked it up in front of a counter, does not imply an opinion of the judge that there had been a felonious taking. *People v. Perry*, 4 Pac. 572, 573, 65 Cal. 568.

The words "take," in a statement that another has taken things, does not, standing alone and by the mere force of the expression, import that he has fraudulently taken goods, and therefore is not per se slanderous. *Harris v. Burley*, 8 N. H. 256, 258; *Brown v. Brown*, 14 Me. (2 Shep.) 317, 318; *Hinesley v. Sheets*, 48 N. E. 802, 803, 18 Ind. App. 612, 63 Am. St. Rep. 356.

The word "take," in a charge that another has taken tea, etc., does not necessarily import a crime, and therefore an allegation in a slander suit that defendant charged the plaintiff with having stolen tea, etc., is not supported by proof that defendant only charged the plaintiff with having taken it. *Coleman v. Playsted* (N. Y.) 36 Barb. 26, 28.

The use of the word "take," in connection with the other language in a charge that another person did take defendant's straw to feed the cattle of the former, etc., were construed to imply a taking in a secret and blamable manner, and to convey an imputation of theft, which would render the language slanderous. *McKennon v. Greer* (Pa.) 2 Watts, 352, 353.

The word "take," in a charge that "you did take it," does not of itself import a felony, and is not actionable per se; but, if spoken and understood to refer to a recent stealing of bank notes, it is slanderous. *McGowan v. Manifee*, 23 Ky. (7 T. B. Mon.) 314, 18 Am. Dec. 178.

The words "take and steal," in a complaint charging that the defendant did feloniously take and steal certain articles, was construed to be sufficient designation of the crime of larceny, though the words "steal, take, and carry away" are the proper technical words to be used. *Green v. Commonwealth*, 111 Mass. 417, 418.

Force and violence implied.

Under a statute making it a felony to take and carry away a negro by force and violence, an indictment charging that defendant did take and carry away is insufficient, as such words do not of themselves imply force and violence. *Hamilton v. Commonwealth (Pa.)* 3 Pen. & W. 142, 146.

Promise to pay imported.

"Take," as used in a subscription to take so many shares of corporation stock, is but an agreement "to receive the shares and get them into the subscriber's possession, which could only be effected by paying for them. One who agrees to take a thing which is the subject of price or compensation *ex vi termini* agrees to pay for such thing the price attached, or whatever it is worth." *Sagory v. Dubois (N. Y.)* 8 Sandf. Ch. 466, 493.

As receive.

As used in St. Geo. IV, c. 95, § 30, enacting that, if any collector of tolls shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, he shall be liable to a penalty, the word "take" denotes no more than "receive," without any notion of force or compulsion. *Stamp v. Sweetland*, 8 Q. B. 13, 21.

The word "take" has very many shades of meaning. The precise meaning which it is to bear in any case depends upon the subject in respect to which it is used. In Gen. St. §§ 3003, 3005, providing that a pawnbroker shall not take more than 25 per cent. per annum for loans on chattels, means that the pawnbroker, in order to be liable to the penalty, must take the unlawful interest in such a manner that he gets it into his possession. He must take it in the sense of receiving it. The pawnbroker must have parted with it. "To take" means, in its general sense, to get into one's possession or power; to acquire; to obtain; to procure. *Hallenbeck v. Getz*, 28 Atl. 519, 520, 63 Conn. 385.

As steal.

"Taken," as used in a verdict finding the defendant guilty of larceny, and stating that "we find the value of the ore taken to be" a certain amount, must be understood to have been used in its ordinary English significance, and clearly refers to the ore stolen. *Bergdahl v. People*, 61 Pac. 228, 231, 27 Colo. 302.

The word "take," as used in St. 22 & 23 Car. II, c. 25, giving to a justice of the peace jurisdiction over offenders who "steal, take, or kill fish," means stealing; and an indictment for taking and killing fish which does not allege that the same belonged to another is insufficient. *Rex v. Mallinson*, 2 Burrows, 679, 682.

To constitute probable cause for a prosecution for theft, it is not sufficient that such circumstances existed as would cause such suspicion and belief that the party prosecuted had taken the articles alleged to be stolen; the "taking" of an article not being necessarily synonymous with the stealing of it. *Stone v. Stevens*, 12 Conn. 219, 229, 30 Am. Dec. 611.

As take by descent.

"Take," as used in Civ. Code, § 671, providing that any person, whether citizen or alien, may take, hold, or dispose of property within the state, is broad enough to include the taking by descent, as well as by purchase, and is used to indicate the taking or acquisition of property in either of the modes mentioned. There is no reason for confining the meaning of "take" to acquisition by purchase. *Billings v. Hauver*, 4 Pac. 639, 640, 65 Cal. 593.

As take by process in invitum.

"Taken," as used in Rev. St. p. 136, § 1, providing that the estate to which it relates should not be liable to be attached or in any way "taken" for the debts of the husband, means taken in invitum. A taking of property by mechanic's lien is not a taking within the meaning of the statute; for a mechanic's lien essentially resembles a mortgage, rather than an attachment, which is not a process in invitum. *Briggs v. Titus*, 13 R. I. 136, 138.

As wrongful taking.

Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], which provides for the punishment of any person who shall "take the mail or any letter or packet therefrom or from any postoffice," etc., "with or without the consent of the person having the custody thereof" and open, embezzle, or destroy any such mail, means a wrongful and unlawful taking; hence, a taking of mail by virtue of the authority of the rightful owner and a subsequent embezzlement of the contents would not constitute an offense against the United States under this section. The taking, to constitute an offense under this act, must be with a criminal intent. In *re Burkhardt* (U. S.) 33 Fed. 25, 27.

TAKE CARE.

"Take care," within the meaning of an instruction, in an action by a servant against his master for personal injuries, that the employer must take care that the machinery is safe and suitable, involves the idea of an act of duty imposed, the failure to perform which, when an injury occurs, is such negligence as raises a liability for the damages resulting. Such an instruction is not erroneous. *Guthrie v. Louisville & N. R. Co.*, 79 Tenn. (11 Lea) 372, 379, 47 Am. Rep. 286.

TAKE CARE OF.**Debts.**

In an agreement whereby a party agrees to take care of indebtedness existing on the property, the use of the words "take care" does not import an obligation to pay off and discharge the liens, but to take care of them. *McBride v. Wakefield*, 78 N. W. 713, 714, 58 Neb. 442.

The phrase "take care of matured paper," as applied to matured negotiable paper, means to take up by a payment or renewal, or to secure an extension of the time of payment. *Yale v. Watson*, 55 N. W. 957, 958, 54 Minn. 173.

Person.

"Take care of," as used in an undertaking whereby one agrees to support and take care of another, is to be construed according to the various circumstances of the party, and does not necessarily imply that the person to be supported is not to use any exertions to support himself. *Bull v. McCrea*, 47 Ky. (8 B. Mon.) 422, 425.

In St. 1808, p. 382, authorizing the county court to appoint some person a conservator to "take care of and oversee" idiots and their estate, the words "to oversee" authorize the conservator to superintend, and the expression "to take care of" makes it his duty to assume the requisite charge in order to the preservation and profit of the estate. *Treat v. Peck*, 5 Conn. 280, 284.

The words "to take care of," in a will bequeathing a mulatto girl to testator's daughter Betsy, and providing, "I allow my daughter Mary to take care of my said daughter Betsy, and at her decease I allow my daughter Mary to have the said mulatto girl," etc., are equivalent to support and maintenance, as well as personal attention. All are included under the direction to take care of; for one cannot be said to be taken care of who is waited on with great care, but who is neither fed nor clothed, nor can one be taken care of, who is unable to feed herself or put on her clothes, by placing before her food and raiment. The direction in the will to take care of the complainant enjoins on the legatee both personal attention to and support of her. *Cabeen v. Gordon* (S. C.) 1 Hill, Eq. 51, 56.

TAKE CHARGE OF.

See "Charge."

TAKE EFFECT.

"Take effect," as used in the provision of a will as follows: "It is my wish, and I hereby so direct, that none of the legacies, bequests, and devises in any of the clauses

of this, my will, shall be executed or take effect until," etc., is used synonymously with, and as an equivalent to, the word "executed." *Jones v. Habersham*, 2 Sup. Ct. 336, 339, 107 U. S. 174, 27 L. Ed. 401.

The term "take effect," in Const. art. 1, § 25, providing that no law shall be passed, the taking effect of which shall be made to depend on any authority, except as provided in the Constitution, is used synonymously with "be in force," or "go into operation." *Malze v. State*, 4 Ind. 342, 348.

TAKE EFFECT AT MY DEATH.

The words "take effect at my death," when used in an instrument attested as a deed, and in all respects in the form of a deed, are to be treated as merely designed to postpone the possession or enjoyment by the grantee until after the death of the grantor, and do not render the instrument a will. *West v. Wright*, 41 S. E. 602, 115 Ga. 277.

TAKE HIS OWN LIFE.

A life policy, exempting the company from liability if the insured "takes his own life," is limited to the deliberate act of the insured in ending his own existence, or committing any unlawful malicious act, the consequence of which is his own death. The insured must be of years of discretion and in his senses when committing such act, as "it would be unreasonable to interpret it as including death by accident or by mistake, though the direct or immediate act of the insured may have contributed to it." *Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 448, 46 Am. Rep. 332.

TAKE INTO CONSIDERATION.

A notice by town supervisors that they will meet at a certain time and place to "take into consideration" an application to lay out a highway is not a compliance with the statute which requires them to "give notice of the time and place at which they will meet to decide on an application." *State v. Castle*, 44 Wis. 670, 675. The notice did not mean that they would there "decide" on the petition, but that they would take it into consideration, or deliberate on it, which they might do without deciding anything. *Babb v. Carver*, 7 Wis. 124, 126.

TAKE MEASURES FOR.

A contract in which one of the parties agrees to "take measures for" the formation of a company with a certain capital to use certain patents and to deliver to the patentee a certain amount of the paid-up stock

thereof cannot be construed to mean take effectual measures for the formation of a company, but only to make reasonable efforts for the formation thereof. *Cooke v. Barr*, 39 Conn. 296, 304.

TAKE ON BOARD.

The term "take on board," in Rev. St. § 4253, providing that if the master of any vessel at a foreign port shall take on board any greater number of passengers, etc., means a coming on board openly in the usual way, and "all passengers who do so, not clandestinely and without the master's consent, express or implied, are taken on board by him. It is not necessary that he should see them come, and he may, and usually does, commit that duty to his subordinates; but, as no one has a right to come on board without his consent, a passenger found there is presumed to have been taken on board by him, until the contrary is shown." *United States v. Thomson* (U. S.) 12 Fed. 245, 248.

Where, by a contract for the conveyance of goods from Liverpool to Australia, the goods were to be "taken on board" at the ship's expense, the term implied that whatever care was required to be taken to ship the goods safely and securely was understood and intended to be taken by and at the expense of the ship. *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 163.

TAKE PROPER MEANS.

See "Proper Means."

TAKE REFUGE.

See "Refuge."

TAKE UP.

A "take up" is a device used on knitting machines for taking up or rolling the completed fabric. *Holmes v. Plainville Mfg. Co.* (U. S.) 9 Fed. 757, 758.

Animals.

"Take up," as used in a city ordinance that the city marshal shall "take up any cow or cattle running at large," means to pen or confine, and hence vests the marshal with complete authority to inclose cows so taken in a pen or pound for violation of the ordinance. *Jaquith v. Royce*, 42 Iowa, 406, 411.

"Taking up" an animal, such as a horse, etc., in Texas, among stockmen, has a well defined meaning, and apprehends that the animal is running loose on the range. *Willson's Cr. St. art. 680a*, making it an offense to "take up" and use any horse, etc., without

the consent of the owner, relates to animals running at large; so that one who takes a horse which is saddled and hitched to a tree, and uses it without the consent of the owner, cannot be prosecuted under such statute. *Cochran v. State*, 35 S. W. 968, 969, 36 Tex. Cr. R. 115.

Note.

"Take up," in an allegation in a pleading that plaintiffs, who were indorsers, were compelled to take up said note, means that, the note not being paid when due, in compliance with the contract of indorsement they paid the amount to the holder, and that he surrendered the note to them, and does not mean that the note was absolutely paid. *Hartzell v. McClurg*, 74 N. W. 626, 54 Neb. 316.

TAKEN.

"Taken," as used in Gen. St. c. 234, § 5, declaring that every person who shall be guilty of playing faro, etc., shall be taken and held to be a common gambler, does not mean that the offender is a common gambler, so as to require the offense to be thrice repeated, on the ground that a man cannot be a common offender until he has offended at least three times, but only means that he shall rank as a common gambler in point of criminality. *State v. Melville*, 11 R. I. 417, 418.

"Taken," though properly the past tense of the verb "take" should not always be regarded in its strict grammatical sense, but, as used in a stipulation that any and all testimony taken in another case involving the same questions could be used, should not be construed to mean that testimony only which was taken prior to the stipulation, but all the testimony taken in such case. *Saffold v. Horne*, 18 South. 433, 437, 72 Miss. 470.

Appeal taken.

An appeal is "taken" when notice of intention to appeal is served, or, in other words, whenever a legal condition is performed which terminates the running of the statute limiting the time for taking it. *Saverrance v. Lockhart*, 45 S. E. 83, 84, 66 S. C. 539.

As used in Acts 1885, p. 159, § 4, declaring that, if an appeal from the county court to the district court be not taken on the same day on which the judgment is rendered, a party appealing shall serve on the appellee within five days after the appeal is taken a notice in writing stating that such appeal has been taken, means the filing and approval of an appeal bond; and an appeal is not taken merely because one is prayed and allowed. *Law v. Nelson*, 24

Pac. 2, 14 Colo. 409; *Straat v. Blanchard*, 24 Pac. 561, 562, 14 Colo. 445.

As used in Rev. St. § 1008 [U. S. Comp. St. 1901, p. 715], providing that no judgment, decree, or order of a Circuit or District Court in any civil action at law or 'in equity should be reviewed in the Supreme Court on writ of error or appeal, unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree, or order, "taken" means when the appeal is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court, which is done by filing the papers, viz., the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond, and the citation. *Credit Co. v. Arkansas Cent. R. Co.*, 9 Sup. Ct. 107, 128 U. S. 258, 32 L. Ed. 448.

Unlawful interest taken.

Rev. St. c. 35, § 4, providing that, when it shall appear that "unlawful interest has been taken or reserved," it shall be lawful for the debtor to become a witness, etc., refers to a usurious contract for the loan of money, whereby there has been reserved or taken a greater rate of interest than is allowed by law at the inception of the contract, and not to the payment of unlawful and usurious interest on a lawful contract. *Brickett v. Minot*, 48 Mass. (7 Metc.) 291, 294.

TAKEN AS ORDERED.

The phrase "to be taken as ordered," in a contract to furnish paper at a certain price, to be taken as ordered, amounted to an undertaking on the part of the buyer to take at the price named the quantity specified. *Excelsior Wrapper Co. v. Messinger*, 93 N. W. 459, 461, 116 Wis. 549.

TAKEN AS TRUE.

"Taken as true," as used in an instruction that what defendant has testified to against his interest is to be taken as true, is saying no more than that they are presumed to be true, or are conclusive, for the purposes of the case in hand. *State v. Brooks*, 12 S. W. 633, 634, 99 Mo. 137.

TAKEN IN THE ACT.

As used in Pen. Code, art. 567, providing that homicide is justifiable when committed by the husband on the person of any one taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated, does not mean that the husband must discover or see the wife and the adul-

terer in the very act of adulterous intercourse in order to fulfill the term "taken in the act of adultery," as such positive proofs of the commission of the crime are not required and are rarely attainable; and, as the crime of adultery itself may be established and proven by circumstantial evidence, the law does not hold the husband to a greater or higher degree of proof than required to establish the fact of adultery, and the law always estimates a man's right to act on reasonable appearances, and where the acts of the parties, and their words, coupled with their acts, presented appearances of a character such as would have created the reasonable apprehension and conviction in a person of ordinary mind that the parties taken were in the act of adultery, and the circumstances were such that any reasonable and sensible man would have concluded that they were in an act of adultery, or were about to commit or just had committed the act, it would be sufficient to justify the homicide. The adultery referred to in the statute does not mean the adultery which is defined as a specific offense by the Code, but means ecclesiastical adultery, or adultery as it is known in common parlance—that is, a violation of the marriage bed—no matter whether the adultery consist of but one or more acts, or whether the parties lived in habitual carnal intercourse or not. *Price v. State*, 18 Tex. App. 474, 480, 51 Am. Rep. 322.

TAKEN OUT OF THE STATE.

An agreement in the sale of a negro that he should be "taken out of the state" meant that he should be domiciliated out of the state, and the words were not satisfied by merely taking the slave out with the intention of bringing him back, or with the knowledge that he would be returned. *Nowell v. O'Hara* (S. C.) 1 Hill, 150, 152.

TAKEN TOGETHER.

As used in Rev. Codes, § 3900, providing that in construction of several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, they are to be "taken together," this phrase does not mean that they are to be joined, and thereby to become a single contract, but they are to be taken together for the purpose of interpreting, either the transaction to which they relate, or the several contracts themselves. *First Nat. Bank v. Flath*, 86 N. W. 867, 870, 10 N. D. 281.

TAKING (In Abduction).

2 Rev. St. p. 664, § 12, providing that any person who shall take away any female

under the age of 14 years without the consent of her father, mother, or guardian, for the purpose of concubinage or marriage, shall be punished, etc., means some positive act by which the female is taken away from her home, or from the person having the legal charge of her, sufficient to amount to an abduction. *People v. Parshall* (N. Y.) 6 Parker, Cr. R. 129, 132.

"Taking," as used in a statute prohibiting abduction and providing that any person who shall be guilty of taking away any unmarried female for improper or indecent purposes, without the consent of and against the wishes of her parent or guardian, shall be guilty, etc., does not mean necessarily a taking by force or against the will of the female abducted, but the statute was satisfied and the offense complete if the taking was accomplished by improper solicitations and inducements. *People v. Marshall*, 59 Cal. 386, 388. It may be accomplished by persuasion, enticement, or device. *State v. Jamison*, 35 N. W. 712, 713, 88 Minn. 21.

A girl under the age of 16 was persuaded by the prisoner to leave her father's house and proceed to an appointed place, on the understanding that he would meet her there and take her with him to America. This she accordingly did, was joined by the prisoner, and proceeded with him to London, where he was apprehended. Held, that this was a "taking" out of the possession of the father, within St. 9 Geo. IV, c. 31, § 20, providing that any person who shall unlawfully take or cause to be taken any unmarried girl under the age of 16 years out of the possession and against the will of her father or mother shall be guilty of a misdemeanor. *Reg. v. Manktelow*, 20 Eng. Law & Eq. 601, 602.

Where defendant went to the house of B., and placed a ladder against the window, and held it for B.'s daughter to descend, which she did and then eloped with defendant, it was a "taking from the possession" of her father, within the meaning of St. 9 Geo. IV, c. 31, § 20, relating to the taking of girls under 16 years of age, though the girl herself proposed to defendant that he should bring the ladder and that she would elope with him. *Reg. v. Robins*, 1 Car. & K. 456, 457.

Under a statute providing that the "taking away" of any female under the age of 18 years from her father for the purpose of concubinage shall be a felony, that the female was induced to leave home, and the furnishing of money to defray her expenses, and the direction of her course in different trips, which she made at the defendant's solicitations, constituted a taking away within the meaning of the statute. *State v. Johnson*, 22 S. W. 463, 466, 115 Mo. 480.

TAKING (In Eminent Domain).

The word "taking," in the constitutional provision relative to the taking of private property for public use, applies only to an active taking, and is to be construed in its natural significance. *West Branch & S. Canal Co. v. Mulliner*, 68 Pa. (18 P. F. Smith) 357, 360.

Constitutions which provide that private property shall not be taken for public use without just compensation are but declaratory of the common law, and contemplate the physical taking of property only. *Less v. City of Butte*, 72 Pac. 140, 141, 28 Mont. 27, 61 L. R. A. 601, 98 Am. St. Rep. 545.

"Taken," as used in Const. art. 1, § 17, providing that no person's property shall be taken or damaged for public use without adequate compensation, etc., is held to mean an actual taking in the physical sense of the word. This construction seems to be favored largely from the fact that anything other than an actual taking is fully provided for in another part of the section. *Rische v. Texas Transp. Co.*, 66 S. W. 324, 327, 27 Tex. Civ. App. 33.

As used in the fifth amendment of the federal Constitution, declaring that private property shall not be taken for public use without just compensation, "taken" means "the appropriation by any method." *People v. Daniels*, 22 Pac. 159, 162, 6 Utah, 288, 5 L. R. A. 444.

The phrase "taking for public use" is defined to be the actual seizing or direct taking of specific property for public use. In *re Dorrance St.*, 4 R. L. 230, 245.

A taking of property for a public use "means a taking altogether; an entire change of ownership." In *re Opinion of Justices*, 13 Fla. 699, 701.

By the "taking" of property, within the scope of the constitutional provision, is meant such an appropriation of it as deprives the owner of his title, or of a part of his title. *Cushman v. Smith*, 34 Me. 247, 265.

"Taking," as used in the Constitution, providing that "private property shall not be taken or damaged for public purposes without just and adequate compensation first being paid," means a physical, tangible appropriation of the property of another. *Hurt v. City of Atlanta*, 28 S. E. 65, 67, 100 Ga. 274.

Private property is "taken for public use" when it is appropriated to the common use of the public at large. *Craighill v. Lambert*, 18 Sup. Ct. 217, 218, 168 U. S. 611, 42 L. Ed. 599.

Under constitutions which provide that property shall not be "taken or damaged" without compensation, it is universally held

that it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation. *Less v. City of Butte*, 72 Pac. 140, 141, 28 Mont. 27, 61 L. R. A. 601, 98 Am. St. Rep. 545 (citing *Root v. Butte, A. & P. Ry. Co.*, 20 Mont. 354, 51 Pac. 155).

A statute authorizing the taking of private property for public use, which makes such provision for reasonable compensation as will be certain and adequate, though such compensation is not required to be paid before the taking of the property, fully satisfies the requirements of the Constitution of Massachusetts that no part of the property of any individual can with justice be taken from him without his own consent or that of the representative body of the people. *Sweet v. Rechel*, 16 Sup. Ct. 43, 45, 159 U. S. 380, 40 L. Ed. 188.

Property is "taken," within the provision of the Constitution prohibiting the taking of private property for public use without due compensation, when it passes from the possession and control of the owner, and not when the title ultimately passes to the corporation. *Martin v. Tyler*, 60 N. W. 392, 397, 4 N. D. 278, 25 L. R. A. 838 (citing *Davis v. San Lorenzo R. Co.*, 47 Cal. 517, which overrules *Fox v. Western Pac. R. Co.*, 31 Cal. 538).

The word "taken," as used in Bill of Rights, art. 1, declaring that no person's property shall be taken for a public use without adequate compensation being made, means a final transfer of title to property or its permanent subjection to an easement. A taking, in contemplation of the Constitution, can only be legally had or accomplished by paying the award or depositing the amount of damages and costs adjudged. Until that is done, the land being the land of the owner, any enhancement of its value is his, and of right should belong to him, just as he would also suffer any loss from a depreciation in value since the commencement of condemnation proceedings. *Gulf, C. & S. F. Ry. Co. v. Lyons*, 2 Willson, Civ. Cas. Ct. App. § 139.

Where there was no proceeding in condemnation instituted by government, no attempt in terms to take and appropriate the title, and no adjudication that the fee had passed from the landowner to the government, there was no taking of land within the meaning of the fifth amendment of the federal Constitution, requiring compensation on the taking of land for public use. *United States v. Lynah*, 23 Sup. Ct. 349, 356, 188 U. S. 445, 47 L. Ed. 539.

Consequential injury.

Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, though their conse-

quence may impair its use, are universally held not to be a taking within the meaning of the constitutional provision prohibiting the taking of private property for public use without just compensation. Such acts do not entitle the owner of such property to compensation from the state, or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to find the decisions, will find them collected in *Cooley, Const. Lim.* p. 542, and notes. *Northern Transp. Co. of Ohio v. City of Chicago*, 99 U. S. 635, 644, 25 L. Ed. 336; *Green v. State*, 14 Pac. 610, 612, 73 Cal. 29; *Holyoke Water Power Co. v. Connecticut River Co.* (U. S.) 20 Fed. 71, 79.

"Taking," as used in the Constitution in the clause requiring compensation to be made for the taking of land for public use, means taking the property altogether, and not a consequential injury to it, which is no taking at all. In *re Philadelphia & T. R. Co.* (Pa.) 6 Whart. 25, 26, 38 Am. Dec. 202; *Selden v. City of Jacksonville*, 10 South. 457, 458, 28 Fla. 558, 14 L. R. A. 370, 29 Am. St. Rep. 278.

The proper construction of the word "taken," as used in Const. art. 1, § 21, enacting that no man's property shall be taken by law without just compensation, makes it synonymous with "seize, injure, destroy, or deprive of." It is evident that the Legislature had no power to authorize in any case either direct or consequential injury to private property without compensation to the owner. *Evansville & C. R. Co. v. Dick*, 9 Ind. 433, 436.

A taking or deprivation of property, which is prohibited by the Constitution, unless due compensation is made, includes anything that affects or limits the free use and enjoyment of one's property, or of the easements or appurtenances thereto. *Myer v. Adam*, 71 N. Y. Supp. 707, 710, 63 App. Div. 540.

"Taking," as used in the Constitution relating to the taking of private property for public use, is not limited to the absolute conversion of property and applied to land only, but includes cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. *Pearsall v. Eaton County Sup'rs*, 42 N. W. 77, 74 Mich. 558, 4 L. R. A. 193.

"Taking," as used in Gen. St. 1878, c. 34, relating to the taking of land for railway purposes, should be construed in a comprehensive sense, and implies, not merely the appropriation of the particular strip of land denominated the "right of way," considered by itself and alone, but also the facts, circumstances, and direct effects accompany-

ing or flowing from such appropriation. *Wilmes v. Minneapolis & N. W. Ry. Co.*, 13 N. W. 39, 40, 29 Minn. 242.

Where a city did not actually take possession of property, but made a great public improvement in the vicinity, which incidentally produced injury, such act was not a "taking for public use," within the meaning of the Constitution requiring compensation therefor. *Alexander v. City of Milwaukee*, 16 Wis. 247, 253.

The impairment of the utility of a person's property by the direct invasion of the bounds of his private dominion is a taking of his property, in the sense of the Constitution, prohibiting the taking of private property without recompense, though the owner has not less of material things than he had before. Whether the farmer's fields be flooded, so that they cannot be cultivated, or the bleacher's stream polluted, so that his fabrics are stained, or one's dwelling filled with smells or noise, so that it cannot be occupied with comfort, is equally the taking away of one's property. *Pennsylvania R. Co. v. Angel*, 7 Atl. 432, 434, 41 N. J. Eq. (14 Stew.) 316 (cited in *Bloom v. Koch*, 50 Atl. 621, 626, 63 N. J. Eq. 10).

Property is "taken," within the constitutional meaning, where it is destroyed or materially impaired by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to. *Adams v. Chicago, B. & N. R. Co.*, 39 N. W. 629, 631, 39 Minn. 286, 1 L. R. A. 493, 12 Am. St. Rep. 644.

Under the old Constitution of Illinois, the words "taken for public use," in the provision requiring compensation for property so taken, meant any physical injury to private property by reason of the erection, construction, or operation of the public improvement, whereby the appropriate use or enjoyment of the property was materially interrupted. *Rigney v. City of Chicago*, 102 Ill. 64, 74.

A franchise is "taken," within the meaning of the Constitution, providing that private property shall not be taken for public use without just compensation, where the party to whom such franchise belonged is deprived of the power or means of exercising it; but it is not taken when its emoluments are diminished by an improvement which does not destroy or impair such power or means. Such a diminution is, of course, a damage, and may or may not constitute a valid cause of action, but does not bring the case within the constitutional prohibition. *In re Hamilton Ave.* (N. Y.) 14 Barb. 405, 411.

Same—Additional use of streets.

The authority to use a public highway for the purpose of a railroad, retain-

ing the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a "taking" of private property from the owner of the fee of the adjacent lands as is contemplated by the Constitution, prohibiting the taking of private property without compensation. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right or title of the owner interfered with. If the Legislature authorizes the company to take the highway and appropriate it to its own use, by destroying the ordinary and legal right of the public to use it as a highway, then compensation must be provided, because then the rights of the public in it cease, and the use of it reverts to the person who holds the fee in the land, and the Legislature authorizes to be taken something which belongs to the landowner, to wit, the use of the land. *Morris & E. R. Co. v. City of Newark*, 10 N. J. Eq. (2 Stockt.) 352, 358.

The building and operation of a street railroad is not a taking of private property for public use. *Eichels v. Evansville St. Ry. Co.*, 78 Ind. 261, 269, 41 Am. Rep. 561; *West Jersey R. Co. v. Cape May & S. L. R. Co.*, 34 N. J. Eq. (7 Stew.) 164, 166; *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. (5 O. E. Green) 61, 78; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. (2 C. E. Green) 75, 77, 86 Am. Dec. 252; *Conshohocken Ry. Co. v. Pennsylvania R. Co.*, 15 Pa. Co. Ct. R. 445; *Maris v. Union Pass. Ry. Co.* (Pa.) 30 Leg. Int. 153; *Dooly Block v. Salt Lake Rapid Transit Co.*, 33 Pac. 229, 9 Utah, 31, 24 L. R. A. 610; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409, 428.

The use of a city street for a railroad is not a taking of private property without compensation, within the meaning of the Constitution. *New Albany & S. R. Co. v. O'Dally*, 12 Ind. 551, 552; *Faust v. Passenger Ry. Co.* (Pa.) 3 Phila. 164, 170; *New Mexican R. Co. v. Hendricks*, 30 Pac. 901, 6 N. M. 611; *Houston & T. O. R. Co. v. Odum*, 53 Tex. 343, 351; *Yates v. Town of West Grafton*, 12 S. E. 1075, 34 W. Va. 783; *In re Philadelphia & T. R. Co.* (Pa.) 6 Whart. 25, 46, 36 Am. Dec. 202; *People v. Kerr* (N. Y.) 37 Barb. 357, 394; *City of Newark v. Kerr* (N. Y.) 38 Barb. 369, 374; *Drake v. Hudson River R. Co.* (N. Y.) 7 Barb. 508; *Morris & E. R. Co. v. City of Newark*, 10 N. J. Eq. (2 Stockt.) 352, 358; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 19 Pac. 661, 664, 40 Kan. 301, 2 L. R. A. 59; *Same v. Peterson*, 19 Pac. 666, 40 Kan. 310.

The erection of telephone poles along the streets of an incorporated city, town, or village, with the consent of the council thereof, is not such a "taking" of private property for public use as will authorize the abutting owner to enjoin the prosecution of such

work until his damages are paid or secured. *Maxwell v. Central District & Printing Telephone Co.*, 41 S. E. 125, 126, 51 W. Va. 121.

The construction of a viaduct to carry the street at a higher level, for the benefit of the public, is a street use, and not a taking of public property. *Sauer v. City of New York*, 83 N. Y. Supp. 27, 28, 40 Misc. Rep. 585.

Same—Easements of light, access, and support.

In the elevated railway cases in New York it has been determined that there is a "taking," within the meaning of the constitutional provision prohibiting the taking of private property without compensation, by the act of the railroad in obstructing the easements of light and air to an adjoining property owner, though no part of his land is actually taken in the construction of the road; such decisions being based on the theory that the owner has a kind of property in such easement. *Bohm v. Metropolitan El. Ry. Co.*, 29 N. E. 802, 805, 129 N. Y. 576, 14 L. R. A. 344.

An injury to and a "taking" of private property are distinct things. Every taking in law is an injury of some kind, though every injury does not include a taking. Property is taken by an entry upon and occupation of it, as in the ordinary case of location. It is injured by obstructing access, as in *Pennsylvania R. Co. v. Duncan*, 5 Atl. 742, 111 Pa. 352, or drainage, as in *Pennsylvania S. V. R. Co. v. Ziemer*, 17 Atl. 187, 124 Pa. 560. *Garrett v. Lake Roland El. Ry. Co.*, 29 Atl. 830, 832, 79 Md. 277, 24 L. R. A. 396 (citing *Jones v. Erie & W. V. R. Co.*, 25 Atl. 134, 137, 151 Pa. 30, 17 L. R. A. 758, 31 Am. St. Rep. 722).

The word "taking," in the clause of the state Constitution forbidding the taking of property except for compensation, and in the charter of a railroad company, does not apply to its act in making a large excavation for the bed of its railroad in the land adjoining the plaintiffs, and so near his building and so deep as to weaken his foundation and render it unsafe to use, or the raising in the street opposite to and near the front of said building an embankment of much greater height than the street was, and thereby obstructing the passage to and from plaintiffs' building, darkening the windows, obstructing the air, and rendering the building unfit for occupation. *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294, 308.

There may be such a direct obstruction or injury to private property as would, within the spirit of the Constitution, prohibiting the taking of private property without just compensation, amount to a "taking," although the corpus of the property itself was not touched or disturbed, as, for example,

where all access to the property is destroyed, or where a part of the street abutting on the property is taken, although the part actually appropriated is beyond the center line of the street. *Rochette v. Chicago, M. & St. P. Ry. Co.*, 20 N. W. 140, 141, 32 Minn. 201.

Where the result of the order of railroad commissioners closing a highway was to leave a house and lot which adjoined the crossing without any mode of ingress or egress, except by the permission of the owner's neighbors, or by trespassing on the railroad location, the property of the owner of such house and lot was "taken" in the strictest sense. *Cullen v. New York, N. H. & H. R. Co.*, 33 Atl. 910, 912, 66 Conn. 211.

It has been uniformly held, since the *Story Case*, 90 N. Y. 122, 43 Am. Rep. 146, that a partial destruction of easements by an elevated railroad is a taking of property within the meaning of the Constitution. *Sadler v. City of New York*, 81 N. Y. Supp. 308, 315, 40 Misc. Rep. 78.

Same—Flowing land.

The constitutional provisions, where only the "taking" of private property is to be compensated, have frequently been held to include any direct physical obstruction or injury to the abutting premises, even if there be no actual appropriation of the land itself, as where by excavation or embankment water was caused to overflow the same; a kind or class of injuries for which, in the absence of constitutional and statutory enactment, a remedy existed at common law. *City of Denver v. Bayer*, 2 Pac. 6, 10, 7 Colo. 113 (citing *Toledo W. & W. Ry. Co. v. Morrison*, 71 Ill. 616; *Hooker v. New Haven & N. R. Co.*, 14 Conn. 146, 36 Am. Dec. 477).

The flowing of land against the owner's consent and without compensation is a "taking" of his property in violation of that provision of the Constitution which prohibits the taking of property without compensation. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 321; *Hooker v. New Haven & N. Co.*, 15 Conn. 312; *Nevins v. City of Peoria*, 41 Ill. 502, 510, 89 Am. Dec. 392; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 231, 236, 3 Am. Rep. 50; *Arimond v. Green Bay & M. Canal Co.*, 31 Wis. 316; *Eaton v. Boston, C. & M. R. R.*, 51 N. H. 504, 535, 12 Am. Rep. 147; *City of Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304; *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. (13 Wall.) 166, 180, 20 L. Ed. 557; *Jones v. United States*, 4 N. W. 519, 48 Wis. 385; *King v. United States (U. S.)* 59 Fed. 9; *Winn v. Village of Rutland*, 52 Vt. 481; *Miller v. City of Morristown*, 47 N. J. Eq. (2 Dick.) 62, 20 Atl. 61; *Id.*, 48 N. J. Eq. (3 Dick.) 645, 25 Atl. 20; *Weaver v. Mississippi & R. R. Boom Co.*, 28 Minn. 534,

11 N. W. 114; *Conniff v. City and County of San Francisco*, 7 Pac. 41, 44, 67 Cal. 45. But, in order for such flooding to be a taking, it is necessary that there be an actual, physical invasion amounting to a practical ouster. *High Bridge Lumber Co. v. United States*, 69 Fed. 320, 326, 16 C. C. A. 460.

When real-estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a "taking," within the meaning of the Constitution, prohibiting the taking of property for public use without just compensation. *City of Baltimore v. Merryman*, 39 Atl. 98, 99, 86 Md. 584; *Weaver v. Mississippi & R. R. Boom Co.*, 11 N. W. 114, 115, 28 Minn. 534; *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.*, 11 South. 642, 643, 96 Ala. 571, 18 L. R. A. 166; *Vanderlip v. City of Grand Rapids*, 41 N. W. 677, 681, 73 Mich. 522, 3 L. R. A. 247, 16 Am. St. Rep. 597.

The injury to land by water flowing through the waste weirs of a canal over the land of the intervening landowners, and on plaintiff's land, is so equivalent to a taking within the meaning of constitutional provisions requiring compensation for land taken for public purposes, that plaintiff will be entitled to recover damages for such injuries; and the fact that the company acted as authorized and without negligence is no defense. *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 174, 36 Am. Dec. 477.

To maintain a boom, which, in the usual course of things, will have the effect of working more or less damage to a person's lands and the crops thereon growing, once or twice in the course of seven or eight years, is just as much a "taking" or appropriation of such person's property as it would be if the like effect occurred every year, or every two years, or during those months each year when the boom is in use. *McKenzie v. Mississippi & R. R. Boom Co.*, 13 N. W. 123, 124, 29 Minn. 288.

Same—Grading streets.

The consequential injury occasioned by the grading of a street is not a "taking" of private property for public use, within the prohibition of the Constitution. *Macy v. City of Indianapolis*, 17 Ind. 267, 269; *Weis v. City of Madison*, 75 Ind. 241, 250, 39 Am. Rep. 135; *Smith v. City of Eau Claire*, 47 N. W. 830, 78 Wis. 457; *Smith v. Village of White Plains*, 22 N. Y. Supp. 450, 67 Hun. 81; *Selden v. City of Jacksonville*, 10 South. 457, 458, 28 Fla. 558, 14 L. R. A. 370, 29 Am. St. Rep. 278; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294, 309.

Under the constitutional provision that private property shall not be taken for public use without just compensation, a city is

liable for damages to abutting property occasioned by a change in the grade of a street. *Moore v. City of Atlanta*, 70 Ga. 611, 613; *City of Elgin v. Eaton*, 83 Ill. 535, 536, 25 Am. Rep. 412. Contra, see *Dickerman v. New York, N. H. & H. R. Co.*, 44 Atl. 228, 229, 72 Conn. 271; *Garraux v. City Council of Greenville*, 31 S. E. 597, 53 S. C. 575; *Methodist Episcopal Church v. City of Wyandotte*, 3 Pac. 527, 530, 31 Kan. 721.

Where an abutting owner is deprived of the practical use of his buildings by reason of a change of grade there is a taking of the property of the individual. In *re Comesky*, 81 N. Y. Supp. 1049, 1051, 83 App. Div. 137.

"Taken," as used in Bill of Rights, § 12, providing that private property shall not be taken without just compensation, means a trespass on or a physical invasion of the property. Property which is merely injured by consequential damages resulting from a change of grade of an adjacent street or other improvement thereof, not constituting a diversion of the street from street purposes, is not taken or appropriated. *Selden v. City of Jacksonville*, 10 South. 457, 458, 28 Fla. 558, 14 L. R. A. 370, 29 Am. St. Rep. 278.

Deprivation of possession.

A "taking" under the right of eminent domain means the exclusion of the owner from use and possession of the property taken, and the actual assumption of the possession by the party authorized to take, and there would naturally be some proceeding in its nature judicial for the finding of the damages thereby occasioned. *Nolan v. City of New Britain*, 38 Atl. 703, 707, 69 Conn. 668 (citing *Woodruff v. Catlin*, 54 Conn. 277, 297, 6 Atl. 849).

Land is not "taken" for a public use, within the meaning of a statutory provision requiring compensation to be paid for all land so taken, unless the land is taken into the actual possession of the state or the grantee of its power of eminent domain. *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 474, 60 Am. Dec. 283.

When, and so far, as the owner of land is prevented from exercising practical dominion over and the right to use his land at his own free will and pleasure, it is "taken" from him. Where a person takes exclusive possession and occupation of land, by covering it with a solid wall of masonry many feet high, he takes it from the owner in the most thorough and effective manner, although the legal title remains in the owner. The legal title is not at all involved in an unlawful taking of land, but the question is rather of practical dominion over and the right to use it at the owner's free will and pleasure, so long as he does not injure his neighbor or the public. *Traute v. White*, 19 Atl. 196, 197, 46 N. J. Eq. (1 Dick.) 437.

Const. art. 1, § 14, declares that private property shall not be taken or damaged for public use without just compensation. Held, that the word "taken," as used in such section, meant the change of possession from the owner to the public, and that the property was taken, within such provision, when the possession passed from the control of the owner, and not when the title ultimately passed to the public or corporation entitled to exercise the right of eminent domain. *Martin v. Tyler*, 60 N. W. 392, 397, 4 N. D. 278, 25 L. R. A. 838.

The "taking" of property for public use means, in Act N. J. 1893, that taking in the large and more comprehensive sense, whereby the owner is deprived of the beneficial ownership and possession of his land, and such possession passes by the condemnation proceedings to the condemned party. *Nicoll v. New York & N. J. Tel. Co.*, 40 Atl. 627, 628, 62 N. J. Law, 156.

As used in a mortgage excepting from its terms all that part of a lot already taken and graded, the word "taken" will not be construed as meaning only that fully taken by completed condemnation proceedings, but, in connection with the word "graded," will be held to mean such part as had been taken possession of and graded; and hence, where a part of the lot had been graded, but not fully taken by condemnation proceedings, it was excepted from the mortgage. *Lawrence v. London & Northwest American Mortg. Co.*, 74 N. W. 892, 71 Minn. 535.

Deprivation of use.

In *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. (18 Wall.) 166, 20 L. Ed. 557, it is said that a serious interruption to the common and necessary use of property may amount to a "taking," within the meaning of constitutional provisions. *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.*, 11 South. 642, 643, 96 Ala. 571, 18 L. R. A. 166.

A statute imposing a penalty on any person who shall take, carry away, or remove any stones, gravel, or sand from any of the beaches in a certain town, passed for the purpose of protecting the harbor, and extending as well to the owners of the soil as to strangers, is not a "taking" of private property and appropriating it to public use, within the meaning of Declaration of Rights, art. 10, so as to render it unconstitutional and void, although no compensation is therein provided for the owners. *Commonwealth v. Tewksbury*, 52 Mass. (11 Metc.) 55, 56.

The destruction of the use of a private right of way across land adjoining the highway, by the location of a culvert and guard rails on such public highway, is a "taking" of private property for public uses. *De Lauder v. Baltimore County Com'rs*, 50 Atl. 427, 429, 94 Md. 1.

The term "taking," as used in a constitutional provision prohibiting the taking or damaging of private property for public use without compensation, does not include the legal vacation of city streets and alleys. *City of East St. Louis v. O'Flynn*, 10 N. E. 395, 396, 119 Ill. 200, 59 Am. Rep. 795.

Diminution of value.

A partial destruction or diminution of value is a "taking" of private property. *Glover v. Powell*, 10 N. J. Eq. (2 Stockt.) 211, 229; *Rigney v. City of Chicago*, 102 Ill. 64, 74.

The mere injury to the value of land occasioned by the placing of a railroad embankment so near it as to impair its market value is not a "taking" within the meaning of the statute. *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 474, 60 Am. Dec. 283.

The word "take," as used in the Constitution relating to the taking of private property for public use, has been interpreted to mean a taking altogether, a seizure, a direct appropriation; and therefore property is not taken when it is merely depreciated in value, or incumbered, or incidentally injured. *Sharpless v. City of Philadelphia*, 21 Pa. (9 Harris) 147, 166, 59 Am. Dec. 759.

Easement.

A statute requiring a canal company, before ceasing work, to proceed along the line and procure releases for necessary lands and materials, which releases shall operate so as to vest in said state a full and complete right "to enter upon, use, and take" the same at any and all times, and authorizing the board, in consideration of any privileges granted by individuals to the state of right of way, to contract with said individuals on behalf of the state to erect across said canal any bridge or bridges for the benefit of such individuals and the public, indicates an easement, and not a fee simple absolute, and therefore the board has power to contract for an easement. *Indianapolis Water Co. v. Kingan & Co.*, 58 N. E. 715, 718, 155 Ind. 476.

The act incorporating a canal company, and providing that, whenever lands, waters, and materials should not be attained by voluntary donation or fair purchase, it should be lawful for the corporation, by any of their officers, and each and every agent, superintendent, or engineer by them employed, to "enter upon, take possession of, and use" all such lands, real estate, and streams as might be necessary for the purpose of constructing and maintaining the canal and works connected therewith, does not confer a right to take the fee in land thus occupied, but that right is confined to use and occupation only, unless it be enlarged by the deed or gift of the owner. There was in the company but

a possession and use, in other words, a right of way, and that for a single purpose, the construction and maintenance of a canal; and, when the canal was abandoned, the use and occupation of the land reverted to the owner of the land. *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23, 33.

Exclusive appropriation.

"Taken," as used in Const. Bill of Rights, art. 12, providing that no man's property shall be taken without compensation, does not necessarily mean an exclusive appropriation, a total assumption of possession, a complete ouster, or an absolute or total conversion of the entire property; but a physical interference with the land, which substantially abridges the right of the user, including the corresponding right of excluding others from the use, takes the owner's property to so great an extent as he is deprived of this right. *Eaton v. Boston, C. & M. R. R.*, 51 N. H. 504, 512, 12 Am. Rep. 147.

The word "taken," in Const. art. 1, § 11, providing that the property of no person shall be taken for public use without just compensation therefor, in its application to the condemnation of land for railway use, means the exclusion of the owner from the use and possession, and the actual assumption of exclusive possession by the railroad corporation, at the termination and as the result of judicial proceeding. *New York, N. H. & H. R. Co. v. Long*, 37 Atl. 1070, 1072, 69 Conn. 424 (citing *Woodruff v. Catlin*, 54 Conn. 277, 279, 6 Atl. 849, 854).

In relation to the right of eminent domain, it has been held necessary to the idea of a "taking" that there must be an exclusive appropriation; a physical, tangible appropriation of the property of another; a taking the property altogether. This is the doctrine announced in *Hurt v. City of Atlanta*, 100 Ga. 274, 28 S. E. 65, and some other cases. But the rule more frequently held, and we think the more enlightened rule; is that this limitation of the term "taking" to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property. So that an attempt by a private corporation to invade the right of an abutting owner in the street, by placing in the street in front of the lot permanent erections which will in any appreciable degree impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking. *Callen v. Columbus Edison Electric Light Co.*, 64 N. E. 141, 144, 66 Ohio St. 166, 58 L.

R. A. 782. See, also, *In re Opinion of Justices*, 13 Fla. 699, 701.

Where the construction of a railroad is authorized by competent authority, and there is no invasion of or physical interference with the property of an abutting owner, there is no "taking," within the meaning of the Constitution, forbidding the taking of property for public use without just compensation. *Poole v. Falls Road Electric Ry. Co.*, 41 Atl. 1069, 1071, 88 Md. 533.

Filing of award in condemnation.

For the purpose of fixing the value of the property, land is to be deemed "taken" for a public use as of the date of the filing of the award by the commissioners in condemnation proceedings. *City of Minneapolis v. Wilkin*, 15 N. W. 668, 669, 30 Minn. 145.

Injury distinguished.

See "Injury to Property."

Occupation preliminary to condemnation.

The word "taking," within the meaning of Const. art. 1, § 21, declaring that private property shall not be taken for public use without just compensation, does not include a temporary exclusive occupation of the land of an individual as an incipient proceeding to the acquisition of a title to it, or an easement in or for a public use, although such occupation may be more or less injurious to the owner. Such temporary occupation, however, will become unlawful, unless the parties authorized to make it acquire within a reasonable time from its commencement a title to the land, or at least an easement in it. *Nichols v. Somerset & K. R. Co.*, 43 Me. 356, 361; *Cushman v. Smith*, 34 Me. 247, 265.

The occupation of land by a corporation for its own purpose, pending proceedings for condemnation, is a "taking" of the property, within the meaning of the Constitution, prohibiting the taking of private property for public use without compensation. *Callahan v. Dunn*, 20 Pac. 737, 739, 78 Cal. 366 (citing *Davis v. San Lorenzo R. Co.*, 47 Cal. 517, 523; *San Mateo Waterworks v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. Stockton & I. R. Co.*, 53 Cal. 208).

The entering on land, and making the necessary surveys and examinations thereof, for the purpose of determining the most advantageous route, place, or places for a proper line, course, road, and way whereon to construct a single or double railroad or way is not in ordinary acceptance or legal contemplation the "taking of land," within the Constitution, requiring compensation to be made for the taking of land for public use; for there is no exercise of exclusive control or authority over the soil. A mere

passing over for the purpose of examining and surveying the most feasible route for the road, and for the lands necessary to be taken on which to construct a road, cannot be said to be taking the land thus examined and surveyed; but when the examinations and surveys are completed, and the defendants in pursuance thereof have selected the lands intended for the objects of the incorporation, or when they enter into the possession of and use the lands thus selected in the construction of their road, regardless of and in defiance of the rights and possession of the owner in fee, then it may be said in common parlance and in legal sense that the defendants have taken the plaintiff's land. They are using it as their own, in exclusion of the plaintiff's right to use it. Although the legal fee may not be in them, yet they are exercising all the attributes of absolute ownership. They tear down houses and outhouses, they cut up gardens, meadows, fields, and farms, they reduce hills and fill up valleys, they tear down fences, cut up and use the soil, as best answers their purposes, and do every act in relation thereto which the absolute owner of the fee could do. The taking of land does not mean the taking of the fee of the land. *Bloodgood v. Mohawk & H. R. R. Co.* (N. Y.) 18 Wend. 9, 34, 31 Am. Dec. 313.

Police regulations.

A regulation adopted for public safety under the police power of the state is not a "taking" of private property without just compensation, although conformity to such regulations involves expense. *Morris & E. R. Co. v. City of Orange*, 43 Atl. 730, 732, 63 N. J. Law, 252 (citing *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109).

The term "taking," within the meaning of the federal Constitution, does not apply to an appropriate regulation of the use of property. Thus, in the absence of any contract rights, before municipal ordinances, prohibiting a railroad from using steam on a portion of the railroad track on a certain street is not a taking within the prohibition of the Constitution. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 528, 24 L. Ed. 734.

Tiedeman's Limitation of Police Power, § 122, says: "Arbitrary interference, by government or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is inhibited by the Constitution." *First Nat. Bank v. Sarilla*, 28 N. E. 434, 437, 129 Ind. 201, 13 L. R. A. 481, 28 Am. St. Rep. 185.

Proceedings preliminary to appropriation.

The taking by the city of Boston, under St. 1872, c. 177, § 1, of "all the water of

Sudbury river, * * * for the purpose of furnishing a supply of pure water for the city," above a dam erected by it or in process of erection, and the filing in the registry of deeds of a description of the stream taken, within 60 days from the time of such taking, as provided by St. 1846, c. 167, § 1, is not such a taking as will enable a riparian owner above the dam to claim damages against the city, in the absence of any actual injury to his water rights. *Dwight Printing Co. v. City of Boston*, 122 Mass. 583, 585.

The grant to a telephone company to place its poles in the highway does not constitute the taking of land within the statute. *Nicoll v. New York & N. J. Tel. Co.*, 40 Atl. 627, 628, 62 N. J. Law, 156.

An order of a city council laying out a section of a stream as a sewer, followed by the construction of sewers, through which the water is afterwards discharged, is a "taking" of the waters of the stream, within St. 1867, c. 106, and St. 1871, c. 304, requiring that actions for damages shall be commenced within two years from the time of the taking of the water. *Worcester Gaslight Co. v. County Com'rs*, 138 Mass. 289, 291.

Same—Location of road.

"The taking and appropriation of land by a railway company means the location of a railway by survey. Though actual construction has not commenced for a long period of time thereafter, there is a 'taking and appropriation' at the time of the location by survey." *Pittsburgh, V. & C. Ry. Co. v. Commonwealth*, 101 Pa. 192, 196.

When a road is located, the land is not "taken," in the technical sense of that term. No authority is given any person or corporation to take land for a highway. The highway is located or laid out over the land directly by public authority. *Wright v. Woodcock*, 29 Atl. 953, 954, 86 Me. 113, 25 L. R. A. 499.

Land is not "taken," within the meaning of Pennsylvania Constitution, requiring that compensation shall be made for land taken for public use, by the mere location of a street on the plans of a city. *Bush v. City of McKeesport*, 30 Atl. 1023, 1024, 166 Pa. 57.

"Taking," as used in Rev. St. c. 39, § 60, providing that, if any railroad corporation shall by virtue of its charter have taken any lands or other property for the purpose of their railroad, the owner of any such land or other property may, at any time within three years from the time of taking the same, demand in writing of the treasurer or principal agent of the corporation a plan or description in writing of the land or other property so taken, means the filing of the location of the road as required by the statute, and not the making of the road; for, if the latter had been intended, no plan or de-

scription of the road would be necessary or usual. The commencement of making the road would be a sufficient notice of its location. *Charlestown Branch R. Co. v. Middlesex County Com'rs*, 48 Mass. (7 Metc.) 78, 83.

Seizure under attachment.

A seizure of property under attachment is not a "taking of property," in the sense of the rule of justice which forbids the taking of property, except according to the law of the land; but it is a divestiture of possession, one of the elements of a complete title. *First Nat. Bank v. Swan*, 23 Pac. 743, 745, 3 Wyo. 356.

Taking for fence.

There is a "taking" of private property, within the meaning of the Constitution, prohibiting the taking of private property for public purposes without compensation, where the Legislature proposes to exercise the right of eminent domain by making a public pasture on the lands of freeholders living within a proposed inclosure, and in order to accomplish that purpose authorizes the occupation of so much land as might be necessary to the building of the inclosure fence. *Fort v. Goodwin*, 15 S. E. 723, 726, 86 S. O. 445.

Taking for highway.

The "taking" of land under the right of eminent domain occurs when the land within the highway is condemned for that public use. *Gilpin v. City of Ansonia*, 35 Atl. 777, 778, 68 Conn. 72.

An appropriation of land for a street is a "taking," within the meaning of Const. art. 1, § 16, providing that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner. *Lewis v. City of Seattle*, 32 Pac. 794, 798, 5 Wash. 741.

Taxation.

The phrase "taking for public use," in the constitutional provision prohibiting a taking of property for public use without just compensation, "is defined to be the actual seizing or direct taking of specific property for public use, as distinguished from incidental injury to it when not taken on the one hand, or the levying of taxes in the form of money or labor, or even of specific goods, on the other, for the public service. It is not the thing required, whether money or service, or a specific article of land or personalty, which constitutes the difference; but the manner of taking it." An assessment of benefits against property for public improvements is not a "taking," within the meaning of such provision. *In re Dorrance St.*, 4 R. I. 230, 245.

The levying and collection of taxes is not the "taking" of private property for pub-

lic use, within the meaning of Const. art. 1, § 6, providing that no private property shall be taken for public use without just compensation; but that provision applies to the taking of property under the exercise of the right of eminent domain. *Howell v. City of Buffalo*, 37 N. Y. 267, 270; *In re Opinion of Justices*, 13 Fla. 699, 701.

Using or enlarging irrigation ditch.

The using or enlarging of an irrigating ditch without the owner's consent is as much a "taking or damaging" of private property within the meaning of the Constitution, prohibiting the taking or damaging of private property for public use without compensation, as would be the appropriating the right of way therefor in the first instance. *Tripp v. Overocker*, 1 Pac. 695, 697, 7 Colo. 72.

Construction of wharf.

The building by the state, or its grantees, of wharves upon shores of navigable waters, does not constitute either a "taking or damaging of private property for public use," within the Constitution. *Eisenbach v. Hatfield*, 26 Pac. 539, 544, 2 Wash. St. 236, 12 L. R. A. 632.

TAKING (In Larceny).

See "Fraudulent Taking."

Asportation.

To take an article signifies merely to lay hold of, grab, or seize it, with the hands or otherwise. Thus, where the defendants laid hold of and with a sledge broke in pieces a cast iron balance wheel, *animo furandi*, there was a taking of it within the contemplation of the criminal law. *Gettinger v. State*, 14 N. W. 403, 404, 13 Neb. 308.

The term "taking," as used in the rule that in every larceny there must be an actual taking, means a felonious severance of the goods from the possession of the owner. To take an article signifies to lay hold of, or to grasp it, either with the hands or otherwise. The man who laid his hand upon the horse in the close, or grasped a package in the bed of a wagon, or seized the sack in the boot of the coach, or laid hold of the article fastened to the counter by the string, with intent to steal these several articles, was guilty of a felonious taking thereof, although neither of them were wholly removed from the places where they were respectively laid hold of, grasped, or seized. But this felonious taking does not constitute the offense of larceny, but the property so taken must also be carried away. *State v. Chambers*, 22 W. Va. 779, 790, 46 Am. Rep. 550.

"Taking," as the term is used in the law of larceny, under Pen. Code, art. 726, providing that, to constitute a taking, it is not necessary that the property be removed

any distance from the place of taking, nor is it necessary that any time shall elapse between the taking and the discovery thereof, applies to the act of accused in unlocking a bureau drawer and taking only \$6 of \$51 contained therein, and renders him guilty of taking the entire amount, if he is caught with his hand in the drawer. *Harris v. State*, 14 S. W. 390, 391, 29 Tex. App. 101, 25 Am. St. Rep. 717. See, also, *Hardman v. State*, 12 Tex. App. 207.

At common law a carrying away, or asportation, was necessary, in connection with the fraudulent taking; but under the Code it is not necessary that the property be removed any distance from the place of taking, but it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it. Nor is it necessary that any definite length of time should elapse between the taking and the discovery thereof; but, if a moment elapses, the offense is complete. *Madison v. State*, 16 Tex. App. 435, 440.

A "taking," within the meaning of the rule that there must be a taking of property to constitute larceny, is shown by the fact of shooting a cow in the woods, and in taking possession and handling the carcass, so as to progress half way in skinning it, and leaving the carcass only when frightened by the bark of a dog and the approach of men. *Lundy v. State*, 60 Ga. 143.

"Taking and carrying away," as used in reference to a charge of larceny, does not mean that the property must be taken and carried away, in order to constitute larceny; but any removal, however slight, of an article which is not attached either to the soil, or any other thing not removed, is sufficient. Therefore, if a thief has the absolute control of the thing but for an instant, and he removes it ever so little space, the larceny is complete; and hence, if a person thrust his hand into the pocket of another with intent to steal, his pocketbook, and seizes such pocketbook and lifts it to the top of the pocket, and, on being detected, releases his grasp thereon and leaves the pocketbook hanging partly out of the pocket, such taking and removal was sufficient to constitute larceny. The guilt of the party does not depend on the length of the time he held absolute possession and control of the property, nor on the distance to which he may have removed the same, nor whether he released his grasp because he repented of his act, or was interrupted or prevented by any cause whatever from carrying the property away; for the crime was completed by the very first act of felonious removal of the pocketbook, and the severance of the property from the possession of the owner and the thief's control of it for an instant of time was sufficient.

State v. Chambers, 22 W. Va. 779, 797, 46 Am. Rep. 550.

Felonious taking.

"Taking," as the term is understood in the law of larceny, means a felonious taking; and thus the taking up of an animal as an estray, without an intention to steal it, is not such a taking, though the finder afterwards wrongfully appropriates the animal to his own use. *Beatty v. State*, 61 Miss. 18, 21.

"Taking," within the meaning of the term as used in the law of larceny, means wrongful taking. If the property comes into the possession of the person accused of theft by lawful means, his subsequent appropriation of it is not theft, as there is no felonious taking. *Pitts v. State*, 3 Tex. App. 210, 211.

"Taking," as used in 4 Stat. 107, § 22, making it criminal for any person to steal or take away from any mail or post office a letter, etc., means "a clandestine taking, not a taking through mistake or with an innocent intent. It must be a taking with a criminal intent." *United States v. Pearce* (U. S.) 27 Fed. Cas. 480, 481 (citing *United States v. Marsells* [U. S.] 28 Fed. Cas. 1168; *In re Burkhardt* [U. S.] 33 Fed. 27).

"Taking," as used in defining larceny, means "a taking without a consent of the owner and with the intention to deprive him of his property. Such taking need not necessarily be by force, or without the knowledge of the owner; but where the owner's consent is obtained to a surrender of possession for some temporary and legitimate purpose, and the taker intends to permanently deprive the owner of his property and convert the same to his own use, the consent is a nullity, out of which no legal possession nor right of possession against the owner can arise, and is a taking and carrying away within the meaning of the definition." *State v. Woodruff*, 27 Pac. 842, 47 Kan. 151, 27 Am. St. Rep. 285.

"Taking," as the term is used in the law of larceny, means a taking without right and with an intention of converting the property to a use other than that of the owner and without his consent. *State v. Campbell*, 18 S. W. 1109, 108 Mo. 611.

The taking necessary to constitute larceny means a fraudulent and secret taking, so as not only to deprive the owner of his property, but also to leave him without knowledge of the taker. *State v. Ledford*, 67 N. C. 60, 62.

"Taking," within the meaning of the term as used in the law of larceny, means a taking against the will of the owner. *Dodge v. Brittain*, 19 Tenn. (Meigs) 84, 86; *Hite v. State*, 17 Tenn. (9 Yerg.) 198, 205. There-

fore there is no larceny if the thing alleged to have been stolen be sent by the owner for the purpose of entrapping the taker. *Dodd v. Hamilton*, 4 N. C. 471, 473.

"Taking," within the meaning of the term as used in the law of larceny, is a taking in such a manner as to constitute a trespass, and therefore, to constitute the larceny of a slave, it must appear that the accused obtained possession of the slave without the consent of the owner. *Kemp v. State*, 30 Tenn. (11 Humph.) 320, 321.

"Taking," within the rule that there must be a taking of property to constitute a theft, even though it is provided by statute that asportation of the property is not essential to complete the crime, means a fraudulent taking. *Lott v. State*, 20 Tex. App. 230, 231; *Madison v. State*, 16 Tex. App. 435, 440. See, also, *Tanner v. Commonwealth* (Va.) 14 Grat. 635, 640.

"Taking," within the meaning of the term as used in the law of larceny, is shown by the act of a passenger on a railway train in throwing from a car a bale of cotton belonging to another with intent to convert the same. *Price v. State*, 41 Tex. 215, 216.

Possession by accused.

To constitute a taking, the property must in some manner come into the possession of the party accused of the theft, either actually or constructively. *Minter v. State*, 9 S. W. 561, 28 Tex. App. 217.

Possession by owner.

A taking of property, such as to constitute larceny, must be from the actual or constructive possession of the owner. *Hite v. State*, 17 Tenn. (9 Yerg.) 198, 205; *People v. McDonald*, 43 N. Y. 61, 63.

The term "taking," within the meaning of the rule that there must be a taking to constitute the crime of larceny, means a taking involving a trespass; and to constitute such a trespass the subject-matter must at the time of the taking be in the possession of the persons rightfully entitled thereto. *Morehead v. State*, 28 Tenn. (9 Humph.) 635, 636.

The term "taking," in the law of larceny, necessarily imports that the property taken is in the possession of another; but in this connection it is necessary to discriminate between what constitutes in law a possession of property and what amounts only to its care and charge. Thus a servant has charge of the property of his master, but not the possession thereof, and if he appropriates the property it is a taking from the possession of the master and larceny. *People v. Call* (N. Y.) 1 Denio, 120, 123, 43 Am. Dec. 655.

Take under claim of ownership.

The term "taking," within the meaning of the rule that there must be a taking to constitute larceny, includes the act of a person claiming ownership and possession of an animal owned by another and selling it to a third person. *State v. Hunt*, 45 Iowa, 673, 675.

"Taking," within the meaning of the rule that there must be a taking of property in order to constitute larceny, is not shown by the fact that defendant falsely claimed an animal which was running on the range as his property, and sold it to a third person. *Hardeman v. State*, 12 Tex. App. 207; *Madison v. State*, 16 Tex. App. 435, 440.

The term "taking," as used in the law of larceny in Texas, which by statute has provided that asportation of the stolen goods is not a necessary element of the crime of theft, includes the act of defendant in pointing out certain animals on the range and falsely claiming that he owns them, and selling them to the witness. *Doss v. State*, 2 S. W. 814, 21 Tex. App. 506, 57 Am. Rep. 618.

"Taking," within the meaning of the term as used in the law of larceny, imports a trespass in connection therewith. One who states to a pound keeper that a certain animal in the pound is his, and sells it to the pound keeper, is not guilty of such a taking, though the pound keeper removes the animal from the pound in reliance on such a purchase, and therefore the seller cannot be convicted of larceny. *People v. Gillis*, 21 Pac. 404, 405, 6 Utah, 84.

Taking by third person.

"Taking," within the meaning of the law of larceny, is not necessarily a taking by the hands of the thief himself; but it is sufficient if the thief procured an innocent person to take the property for him. *Cummins v. Commonwealth*, 5 Ky. Law Rep. 176.

There is a taking of property, within the meaning of the law of larceny, when the property is taken by a third person upon defendant's advice and procurement, and delivered it to the defendant. *Sanderson v. Commonwealth* (Ky.) 12 S. W. 136.

Trespass imported.

"Taking," within the meaning of the term as used in the law of larceny, imports a taking in the nature of a trespass. *State v. Braden*, 2 Tenn. (2 Overt.) 68; *Lawrence v. State*, 20 Tenn. (1 Humph.) 228, 234, 34 Am. Dec. 644; *Hite v. State*, 17 Tenn. (9 Yerg.) 198, 205; *Robinson v. State*, 41 Tenn. (1 Cold.) 120, 121, 78 Am. Dec. 487; *Morehead v. State*, 28 Tenn. (9 Humph.) 635, 636; *Porter v. State* (Tenn.) Mart. & Y. 226; *Kemp v. State*, 30 Tenn. (11 Humph.) 320,

321; *People v. Gillis*, 21 Pac. 404, 405, 6 Utah, 84; *People v. McDonald*, 43 N. Y. 61, 63; *State v. Friend*, 50 N. W. 692, 693, 47 Minn. 449.

The term "taking," in the law of larceny, imports a trespass, and there is no such a taking when a bailee converts the particular article bailed; but where a trunk is left in possession of a bailee, and the latter opens it and extracts money therefrom, there is a taking which renders him guilty of larceny. *Robinson v. State*, 41 Tenn. (1 Cold.) 120, 121, 78 Am. Dec. 487.

Same—Lost property.

The act of the finder of bank notes in converting them to his own use with the full knowledge of who is the owner thereof does not constitute a taking, as there is no trespass in obtaining possession of the notes. *Porter v. State* (Tenn.) Mart. & Y. 226.

Taking possession of lost property is not such a taking, though it is with felonious intent; but taking a package from a place where it has been inadvertently left by the owner constitutes such a taking. *Lawrence v. State*, 20 Tenn. (1 Humph.) 228, 234, 84 Am. Dec. 644.

The term "taking," as used in the law of larceny, includes a taking of lost property with the present intention to appropriate it. *Tanner v. Commonwealth* (Va.) 14 Grat. 635, 637.

TAKING BAIL.

See "Bail."

TAKING BY FORCE.

"Taking by force," in the sense of the law as applied to the action of trespass, is taking without right or permission, in violation of the lawful possession of another. *North Bridgewater v. Howard*, 33 Mass. (16 Pick.) 206, 208.

TAKING DOWN TESTIMONY.

The phrase "taking down testimony," as used in section 4696b of the Code, and in Act Oct. 12, 1885, providing for the compensation of official stenographic reporters, embraces the whole process of reproducing the testimony of a witness in ordinary and intelligent writing, when necessary to comply with the law, including both the stenographic notes taken by the reporter and the translation of these notes and writing out the same in ordinary language. Where there is no conviction, so as to make it legally necessary to record the evidence, the process of taking down is complete without writing out the stenographic notes, and hence in such cases the compensation of the reporter should be limited to the time occupied in making

his notes. *Henderson v. Parry*, 21 S. E. 144, 93 Ga. 775.

TAKING POISON.

"Taking poison," as used in a life insurance policy insuring against death from injuries through external violence and accidental means, unless it is caused from taking poison, suicide, etc., means the voluntary, intentional taking of poison, and does not include cases of accidental poisoning. *Travelers' Ins. Co. v. Dunlap*, 43 N. E. 765, 160 Ill. 642, 52 Am. St. Rep. 355.

"Taking of poison," as used in an accident policy, providing that the insurer shall not be liable for death caused by the taking of poison, will be construed to include the accidental taking of poison. *Hill v. Hartford Acc. Ins. Co.* (N. Y.) 22 Hun, 187, 189.

TALC.

"Talc" is defined as a mineral, and it is composed chiefly of silica, magnesia, and water. *Jenkins v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

TALES.

A "tales" is a supply of such men as are summoned on the first panel in order to make up a deficiency. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 678, 19 Am. St. Rep. 547 (quoting Black. Com.).

TALES JUROR.

"Tales jurors" are persons called for no other purpose than to serve on a petit jury. They may also be designated by the term "petit jurors." *State v. McCrystol*, 9 South. 922, 924, 43 La. Ann. 907.

A "tales juror" is one added to a deficient panel, so as to supply the deficiency. *Louisville, N. O. & T. R. Co. v. Mask*, 2 South. 360, 361, 64 Miss. 738.

TALESMAN.

A "talesman" is a juror summoned to fill up a panel for the trial of a particular cause. The provision of 2 Rev. St. p. 437, § 54, only authorizes the summoning of talesmen for the single case ready and moved for trial. Talesmen can, therefore, only be summoned for a single trial, and not for a circuit. *Shields v. Niagara County Sav. Bank* (N. Y.) 5 Thomp. & C. 585, 587.

When, by reason of challenges or any other cause, it is rendered necessary to supply any deficiency on a regular jury, or to form one or more juries, as the occasion may require, such jurors are made "talesmen." Talesmen must not be compelled to serve

longer than the day for which they were respectively summoned, unless detained longer on the trial of an issue or the execution of a writ of inquiry submitted to the jury of which they are respectively members, or unless they are resummoned as talesmen. *Linehan v. State*, 21 South. 497, 501, 113 Ala. 70.

TALLAGIUM.

"Tallagium," or "tallagium," coming of the French word "tailler," to share or cut out a part, metaphorically is taken when the king or any other hath a share or part of the value of a man's goods or chattels, or a share or part of the annual revenues of his lands, or puts any charge or burden upon another; so that "tallagium" is a general word, and doth include all subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charges put or set upon any man. *People v. City of Brooklyn* (N. Y.) 9 Barb. 535, 551 (citing 2 Co. Inst. 532).

Sir Edward Coke, in his comment on the statute de tallagio non concedendo says that "the word 'tallagium' is a general word, and doth include all subsidies, taxes, tenths, fifteenths, impositions, and other burdens or charges put or set on any man." *Inhabitants of Bernards Tp. v. Allen*, 39 Atl. 716, 718, 61 N. J. Law, 228 (citing 2 Co. Inst. 533).

TALLIAGE.

Lord Coke defined the word "talliage" to mean burdens, charges, or impositions put or set upon persons or property for public uses. *State ex rel. Garth v. Switzler*, 45 S. W. 245, 248, 143 Mo. 287, 40 L. R. A. 280, 65 Am. St. Rep. 653 (citing 2 Co. Inst. 532); *Lake Shore & M. S. Ry. Co. v. City of Grand Rapids*, 60 N. W. 767, 769, 102 Mich. 374, 29 L. R. A. 195.

TALLIES OF LOAN.

The words "tallies of loan" was originally used in England to describe exchequer bills, which were issued by the officers of the exchequer when a temporary loan was necessary to meet the exigencies of the government, and charged on the credit of the exchequer in general, and made assignable from one person to another. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 328, 9 L. Ed. 709, 928.

TALLOW.

The word "tallow," as used in the revenue act, does not include "stearin"; the latter being a manufacture of "tallow," and not tallow in its natural condition. *Fairbanks v. Spaulding* (U. S.) 19 Fed. 416.

TAMPER.

"Tamper," as used in Acts 1891, c. 102, § 25, as amended by Acts 1893, c. 267, providing that after an election is over, when the ballots have been sorted and counted and the result declared and recorded, all the ballots shall in open meeting be sealed in a package, which package shall be forthwith delivered to the city, town, or plantation clerk, to be preserved by him as a public record for six months, and forbidding him to extract from or in any manner tamper with such package, does not mean open, though the word "tamper," in a criminal statute, at least, has the limited meaning of improper interference, as for the purpose of alteration and to make objectionable or unauthorized changes. *Keefe v. Donnell*, 42 Atl. 845, 848, 92 Me. 151 (citing Cent. Dict.).

TANNING.

The art of "tanning" is to change a raw skin into leather. The Century Dictionary defines tanning as "the art or process of converting hides and skins into leather." *Tannage Patent Co. v. Donallan* (U. S.) 93 Fed. 811, 817.

TANTAN.

The game of "tantan" is one of pure chance, and when played for anything of value comes within the inhibition of the statute against gambling. *In re Lee Tong* (U. S.) 18 Fed. 253, 257.

TAPERING BRUSH.

A brush differing from a common one in no other respect than in the circumstance that the hair or bristles were purposely made of unequal lengths is improperly described in a patent as a "tapering brush," there being no converging to a point. *Rex v. Metcalf*, 2 Starkie, 249.

TAPERING SOCKET.

A "tapering socket" is one which is adapted to receive a tapering screw. *Allison v. New York & Brooklyn Bridge* (U. S.) 29 Fed. 517, 521.

TAPIOCA.

"Tapioca," as a commercial term, includes tapioca flour, which is used to a slight extent in the thickening of soups, but mostly by calico printers and carpet manufacturers to thicken colors and in the manufacture of a substitute for gum arabic or other gum. *In re Townsend* (U. S.) 56 Fed. 222, 223, 5 C. C. A. 488.

TARE.

"Tare," as used in Act March 2, 1799, § 58 (1 Stat. 671), providing that a certain allowance should be made for "tare" on articles subject to duty by weight, is the amount allowed for the outside or covering of the article imported, whether it be box, barrel, bag, bale, mat, etc., and in a commercial sense and usage has a separate and distinct meaning and application from "draft," which is an allowance to the merchant, when the duty is ascertained by weight, to insure good weight to him. *Napier v. Barney* (U. S.) 17 Fed. Cas. 1149.

TARIFF.

"As defined by the law dictionaries, the word 'tariff' is a cartel of commerce; a book of rates; a table or catalogue. drawn usually in alphabetical order, containing the names of several kind of merchandise, with the duties or customs to be paid for the same as settled by authority or agreed on between the several princes and states that hold commerce together." This definition is practically the same as that given by Webster, Worcester, and the Standard Dictionaries. *Ft. Worth & D. C. Ry. Co. v. Cushman*, 50 S. W. 1009, 1010, 92 Tex. 623.

TARIFF RATE.

Rev. St. art. 4560d, provides that if no part of a railroad passenger ticket be used the holder shall be entitled to receive the full amount thereof, and if only a part is used he shall be entitled to the remainder of the price after deducting the tariff rate between the points for which the ticket was actually used. Held, that the words "tariff rate" referred to the rate per mile which the law authorized railroad companies to charge for transportation of passengers within the state, and, where an excursion ticket sold at reduced rates was only partially used, the sum to be deducted was the regular rate, and not the excursion rate, per mile. *Ft. Worth & D. C. Ry. Co. v. Cushman*, 50 S. W. 1009, 1010, 92 Tex. 623.

TAVERN.

The word "tavern" is defined, in the statute prohibiting gambling at taverns, as including every house of public resort. A tavern is a public, as well as an ordinary, place, within the meaning of the statute, which prohibits playing in an ordinary race field or any other public place. *Worthan v. Commonwealth* (Va.) 5 Rand. 669, 675; *Linkons v. Commonwealth* (Va.) 9 Leigh, 608, 611.

A "tavern," under the act of 1849 (11 St. at Large, p. 557), relative to licensed

taverns, is not only a place where wine is sold and drinkers are entertained, but where a provision is made also for the lodging of wayfaring people. *State v. Heise* (S. O.) 7 Rich. Law, 518, 520.

Barroom synonymous.

The word "tavern" has been judicially defined in the case of *State v. Chamblyss* (S. C.) Cheves, 220, 34 Am. Dec. 593, to be a house in which a license to sell liquors in small quantities to be drunk on the spot had been granted. The word "tavern" is practically synonymous with "barroom" or "drinking shop." In *re Schneider*, 8 Pac. 289, 290, 11 Or. 288.

House of entertainment synonymous.

"Tavern," as used in Act Ga. 1791, requiring a license for keeping a tavern or house of entertainment, is synonymous with "house of entertainment," and means the common inns of the common law. *Bonner v. Welborn*, 7 Ga. 296, 306.

A tavern is a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation. *Comer v. State*, 10 S. W. 106, 107, 28 Tex. App. 509.

Inn or hotel synonymous.

"Tavern" is synonymous with "inn." They are both houses of public entertainment. *Town of Crown Point v. Warner* (N. Y.) 8 Hill, 150, 156.

"Tavern," as defined by Webster, "is a house licensed to sell liquor to be drunk on the spot. In some of the United States 'tavern' is synonymous with 'inn' and 'hotel,' and denotes a house for the entertainment of travelers as well as the sale of liquors, licensed for that purpose." *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law (3 Har.) 480, 484, 38 Am. Dec. 525; *People v. Jones* (N. Y.) 54 Barb. 311, 316 (citing Webster Dict.); *Hall v. State* (Del.) 4 Har. 132, 140; *Bonner v. Welborn*, 7 Ga. 296, 334, 337; *People v. Jones* (N. Y.) 1 Cow. Cr. R. 381, 384; *Werner v. Washington* (U. S.) 29 Fed. Cas. 705, 707.

"Tavern," as used in Sess. Acts 1867, p. 63 (St. Louis City Charter) § 18, authorizing the city to "license, tax, and regulate auctioneers, grocers, retailers, and taverns," applies to all hotels and houses that entertain and accommodate the public for compensation. Webster defines a tavern to mean a public house where entertainment and accommodation for travelers and other guests are provided, an inn, or a hotel, usually licensed to sell liquors in small quantities. At common law any person was an inn or tavern keeper who made it his business to entertain travelers and passengers and provide lodging and necessities for them and

their horses, and when they were licensed they usually had the privilege of selling liquors. In this country, "hotel" and "public house" are used synonymously with "tavern," and while they entertain the traveling public and keep guests and receive compensation therefor they do not lose their character, though they may not have the privilege of selling liquors. The words "hotel" and "house" are usually and commonly used to denote a higher order of public houses than the ordinary tavern or inn. *City of St. Louis v. Siegrist*, 46 Mo. 593, 595.

The terms "inn" and "tavern," as used in the statute regulating taverns, are synonymous. The legal definition of an inn is the same as what is understood in this country by a hotel. An inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary abode. *Cromwell v. Stephens* (N. Y.) 3 Abb. Prac. N. S. 26. This is the same definition applied to the term "hotel" by the liquor tax law. In *re Brewster*, 80 N. Y. Supp. 666, 667, 39 Misc. Rep. 689.

In the construction of statutes, the word "tavern" includes "inn." Rev. Code Del. 1893, c. 5, § 1, subd. 11.

Licensed grocery.

"Tavern," as used in 1 N. R. L. p. 178, § 8, prohibiting the keeping of a shuffle board, etc., in an inn or tavern, includes a grocery licensed in the city of New York. *Cuscadden's Case* (N. Y.) 2 City Hall Rec. 53.

Licensed house for sale of liquor.

A license to keep a "tavern" in the licensee's brick house applied to a frame room adjoining it, which was used as the barroom. *Gray v. Commonwealth*, 39 Ky. (9 Dana) 300, 35 Am. Dec. 136.

"Tavern," in Kentucky, means a licensed house of entertainment, and only such may retail spirits. *Braswell v. Commonwealth*, 68 Ky. (5 Bush) 544.

"Tavern" means "a house licensed to sell liquor in small quantities, to be drunk on the spot," and "denotes a house for the entertainment of travelers, as well as for the sale of liquors." This is the American sense in which the word is used, according to Webster; so that a license to keep a tavern is a license to retail liquor. *State v. Chamblyss* (S. C.) Cheves, 220, 226, 34 Am. Dec. 593.

A license in general terms to keep a "tavern" authorizes the tavern keeper to vend spirituous liquors in his barroom or tavern to his guests or others in small quantities, to be drunk in the tavern or elsewhere. *Commonwealth v. Kamp*, 53 Ky. (14 B. Mon.) 385.

A license to "keep a tavern" under authority of Act June 1, 1831, should be construed to include a license to retail liquors, as well as to keep a tavern. *Hirn v. State*, 1 Ohio St. 15, 19.

Lodging house.

The term "inn," "tavern," or "hotel," does not properly designate a mere lodging house, although the keeper thereof may send out and procure cooked food for his guests. A house which does not contain the means of preparing food for the table in the ordinary way has not the necessary accommodation to entertain travelers, and is not an inn within the meaning of Act 1857 in reference to the licensing of innkeepers. *Kelly v. City of New York* (N. Y.) 54 How. Prac. 327, 331.

Private room.

In construing a statute which prohibits playing cards in a public place, and expressly named taverns and inns as public houses, but declares that a private room in an inn or tavern is not within the meaning of a public place, unless such rooms are commonly used for gaming, the court said: "Mr. Bishop says an inn, tavern, or hotel is a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation. *Bish. St. Cr.* (2d Ed.) § 297. Mr. Webster defines 'inn' as a place of shelter, habitation, residence, abode; a house for the lodging and entertainment of travelers, as a tavern. He defines 'tavern' as a public house where entertainment and accommodation for travelers and other guests are provided. To make a guest room in a hotel (that is, one appropriated to public use as such) a private room, it must have been taken by a guest or lodger seeking rest for a day or night, or a residence for a time, or one desiring to use it for a temporary habitation; that is, a place of abode. Unless so appropriated by a guest, it is a part of the public house, known as 'tavern' or 'inn.' The term 'public house,' as used in the gaming statute, does not mean a place solely devoted to the public, as distinguished from private. A house may be said to be a public house either in respect to its proprietorship or its occupancy and uses; and so a guest room in a hotel is a part of the public hotel or tavern, in that it is for the use of the public business of the house in the entertainment of its guests, and only becomes private after it is appropriated by a guest"—and held that a room in an inn provided for the accommodation of guests, which was en-

gaged temporarily for the purpose of private gaming, and not for a guest's habitation or abode, was not a private room, but a part of the public place. *Comer v. State*, 10 S. W. 108, 107, 26 Tex. App. 509.

Restaurant.

A restaurant, where meals are furnished, is not an inn or tavern. *People v. Jones* (N. Y.) 1 Cow. Cr. R. 381, 384.

TAVERN KEEPER.

As an innkeeper.

"Tavern keeper" is synonymous with "innkeeper." It means a person who makes it his business to entertain travelers and passengers, and provide lodging and necessities for them and their horses and attendants. *Commonwealth v. Shortridge*, 28 Ky. (3 J. J. Marsh.) 638, 640.

"Tavern-keeper" and "innkeeper" are synonymous. "Inns" and "taverns" are both houses of public entertainment. A person who makes it his business to entertain travelers and passengers, and provide lodging and necessities for them, their horses, and attendants, is a common "innkeeper"; and it is no way material whether he have any sign before his door or not. Though it be the entertainment of passengers that makes a man an "innkeeper," yet, if a person, having put up a sign before his door, afterwards pull it down, he thereby discharges himself of the burden of an "innkeeper"; but if, after he takes it down, he continues to entertain travelers, it is as much a common "inn" as before. At common law any person may erect an inn for the public accommodation without a license, as the keeping of it is not a franchise, but a lawful trade, open to every citizen. *The Town of Crown Point v. Warner* (N. Y.) 3 Hill, 150, 156.

As keeper of boarding or lodging house.

At common law any person might be a tavern keeper; but, as every tavern keeper must be licensed, the words have a special meaning, and do not include one who keeps a mere boarding house or lodging house, or even one who keeps a house for lodging strangers for the season. *Southwood v. Myers*, 66 Ky. (3 Bush) 681, 685.

As keeper of house of entertainment.

A person who makes it a business to keep a house of entertainment for travelers is a "tavern keeper," though he keeps no liquor in his house for any purpose. *Curtis v. State*, 5 Ohio (5 Ham.) 324.

Keeper of restaurant.

A tavern keeper is a person who receives and entertains as guests those who choose to visit his house, and it would not include one who merely keeps a restaurant

where meals are furnished. *People v. Jones* (N. Y.) 54 Barb. 311, 316.

As person selling intoxicating liquor.

The word "tavern keeper," as used in Rev. St. § 1564, providing that "if any tavern keeper or other person shall sell, give away, or barter any intoxicating liquors on Sunday, or on the day of the annual town meeting, or the annual fall election, such tavern keeper or other person so offending shall be deemed guilty of a misdemeanor," clearly means a person a part at least of whose business is to sell intoxicating liquors. *Jensen v. State*, 19 N. W. 374, 375, 60 Wis. 577.

As person obtaining license.

A tavern keeper is one who obtains a license to keep a tavern and for whom it is kept, though another person as his agent may actually keep it. *Commonwealth v. Burns*, 27 Ky. (4 J. J. Marsh.) 177, 181.

TAX—TAXATION.

See "Ad Valorem Tax"; "Annual Taxes"; "Back Taxes"; "Business Tax"; "Capital Stock Tax"; "Capitation Tax"; "City Tax"; "Collateral Inheritance Tax"; "County Tax"; "Delinquent Tax"; "Direct Tax"; "Excessive Tax"; "Faculty Tax"; "Franchise Tax"; "General Tax"; "Income Tax"; "Indirect Tax"; "Inheritance Tax"; "License Tax"; "Municipal Tax"; "Occupation Tax"; "Personal Tax"; "Poll Tax"; "Privilege Tax"; "Property Tax"; "Public Tax"; "Road Tax"; "Sinking Fund Tax"; "Special Tax"; "Specific Tax"; "State Tax"; "Succession Tax"; "Void Tax."

See "Double Taxation"; "Duplicate of Taxes"; "Duplicate Taxation"; "Local Taxation"; "Nontaxable"; "Ordinary Yearly Taxes"; "Subject of Taxation."

All taxes, see "All."

"Taxes" are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. *Day v. Buffington* (U. S.) 7 Fed. Cas. 222, 228; *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U. S. (20 Wall.) 655, 664, 22 L. Ed. 455; *Pittsburg, C. & St. L. Ry. Co. v. State*, 16 L. R. A. 380, 383, 49 Ohio St. 189, 30 N. E. 435 (citing 2 Bouv. Law Dict. 705); *Illinois Cent. R. Co. v. City of Decatur*, 13 Sup. Ct. 293, 294, 147 U. S. 190, 37 L. Ed. 132; *City of Chicago v. Baptist Theological Union*, 2 N. E. 254, 256, 115 Ill. 245; *San Francisco Gaslight Co. v. Brickwedel*, 62 Cal. 641, 644; *Dranga v. Rowe*, 59 Pac. 944, 945, 127 Cal. 506 (citing *Perry v. Washburn*, 20 Cal. 318); *Houghton v. Austin*, 47 Cal. 646, 654; *Trenholm v. City of Charleston*, 3

S. O. (3 Rich.) 347, 349, 16 Am. Rep. 732; Hanson v. Vernon, 27 Iowa, 28, 47, 1 Am. Rep. 215; Reelfoot Lake Levee Dist. v. Dawson, 36 S. W. 1041, 1044, 1045, 97 Tenn. 151, 84 L. R. A. 725; Leedy v. Town of Bourbon, 40 N. E. 640, 641, 12 Ind. App. 486; McClelland v. State, 37 N. E. 1089, 1092, 138 Ind. 321; Mitchell v. Williams, 27 Ind. 62, 63; City of Baltimore v. Green Mount Cemetery, 7 Md. 517, 535; Bonaparte v. State, 63 Md. 465, 470; Deal v. Mississippi Co., 18 S. W. 24, 26, 107 Mo. 464, 14 L. R. A. 622; Hale v. City of Kenosha, 29 Wis. 599, 605; Lake Shore & M. S. Ry. Co. v. City of Grand Rapids, 60 N. W. 767, 769, 102 Mich. 374, 29 L. R. A. 195; Hallenbeck v. Hahn, 2 Neb. 377, 403; Friesleben v. Shallcross (Del.) 19 Atl. 576, 592, 9 Houst. 1, 8 L. R. A. 337; People v. City of Brooklyn (N. Y.) 9 Barb. 535, 551. Or to defray the necessary expenses in administering the government. Sheehan v. Good Samaritan Hospital, 50 Me. 155, 158, 11 Am. Rep. 412. Or to accomplish some governmental end. Crawford v. Bradford, 2 South. 782, 784, 23 Fla. 404; United States v. Baltimore & O. R. Co., 84 U. S. (17 Wall.) 322, 326, 21 L. Ed. 597; City of Santa Barbara v. Stearns, 51 Cal. 499, 501; Ex parte Cooper, 3 Tex. App. 489, 493, 30 Am. Rep. 152.

"Taxes" are defined as being the enforced proportional contribution of persons and property, levied by authority of the state for the support of the government and for all public needs. Yeatman v. Foster County, 51 N. W. 721, 723, 2 N. D. 421, 33 Am. St. Rep. 797; State v. Montague, 15 South. 589, 590, 34 Fla. 32; Taylor v. Boyd, 63 Tex. 533, 541; Languille v. State, 4 Tex. App. 312, 321 (quoting Blackw. Tax Titles, 1); People v. Lawler, 77 N. Y. Supp. 840, 843, 74 App. Div. 553; In re Hun, 39 N. E. 376, 377, 144 N. Y. 472; Hewitt v. Traders' Bank, 51 Pac. 468, 469, 18 Wash. 326; Jack v. Welenetl, 3 N. E. 445, 446, 115 Ill. 105, 56 Am. Rep. 129; Foster v. Stevens, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166; Moog v. Randolph, 77 Ala. 597, 605; Palmer v. Way, 6 Colo. 106, 115; Morgan's L. & T. R. & S. Co. v. State Board of Health, 6 Sup. Ct. 1114, 1117, 118 U. S. 455, 30 L. Ed. 237. In return for such contribution the state affords protection to life, liberty, and property, and this is essential to civilization and the very existence of the state. Union Refrigerator Transit Co. v. Lynch, 55 Pac. 639, 640, 18 Utah, 378, 48 L. R. A. 790. The citizen pays from his property the portion demanded, in order that by means thereof he may be secure in the enjoyment of the benefits of organized society. The power is unlimited in its reach as to subjects. In its very nature it acknowledges no limit. It is not an arbitrary power, nor can it be exercised capriciously. It is hedged about and restricted by constitutional limitations and

fixed general rules. Gay v. Thomas, 46 Pac. 578, 581, 5 Okl. 1.

Taxes are the enforced proportional contributions from persons and property levied by the states for the support of government and of public improvements. McRae v. Cochise County (Ariz.) 44 Pac. 299, 300, 33 L. R. A. 851, 56 Am. St. Rep. 579 (citing Perry v. Washburn, 20 Cal. 318).

A tax is understood to be a charge, a pecuniary burden, for the support of the government. Michigan Cent. R. Co. v. Slack (U. S.) 17 Fed. Cas. 263, 265 (citing United States v. Baltimore & O. R. Co., 84 U. S. [17 Wall.] 326, 21 L. Ed. 597).

A "tax" is defined to be a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state. Hamilton v. Dillin (U. S.) 11 Fed. Cas. 832, 835.

A "tax" is a charge or burden imposed by authority, as a levy of any kind made on property for the support of the government. King v. Fountain County, 49 Ind. 13, 20.

A "tax" is an impost levied by authority of government upon its citizens or subjects for the purpose of the state. McClelland v. State, 138 Ind. 321, 332, 333, 37 N. E. 1089, 1092 (citing City of Camden v. Allen, 26 N. J. Law [2 Dutch.] 398).

A "tax" is a contribution which the law requires individuals to make for the support of the government. Dunn v. Winston, 31 Miss. 185, 187.

A "tax" is generally understood to mean the imposition of a duty or impost for the support of the government. Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62, 70, 16 Am. Rep. 395.

Taxes are the regular, uniform, and equal contribution which all citizens are required to make for the support of the government. City of New London v. Miller, 22 Atl. 499, 501, 60 Conn. 112.

A "tax" is a rate or sum of money assessed on the person, property, etc., of a citizen. State v. Hipp, 38 Ohio St. 199, 226; Pullman Southern Car Co. v. Nolan (U. S.) 22 Fed. 276, 279. By the government for the use of a nation or state. City of Baltimore v. Green Mount Cemetery, 7 Md. 517, 535 (citing Webst. Dict.); Citizens' Savings & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 653, 664, 22 L. Ed. 455.

A tax is an exaction made for the purpose of carrying on the government, directly or through the medium of municipal corporations, which are but parts of the machinery employed in the operation of the government. Trustees of Illinois & M. Canal v. City of Chicago, 12 Ill. (2 Peck) 403, 406; City of Chi-

cago v. Baptist Theological Union, 2 N. E. 254, 256, 115 Ill. 245.

The term "taxes," it is said, includes all contributions imposed by the government upon individuals for the service of the state. The individual, and not his property, pays the tax. *Green v. Craft*, 28 Miss. (6 Oushm.) 70, 75 (cited in *State v. Camp Sing*, 18 Mont. 128, 150, 44 Pac. 516, 521, 32 L. R. A. 635, 56 Am. St. Rep. 551).

The word "taxes" in its most extended sense includes all contributions imposed by the government on individuals for the services of the government; but the word "taxes" as used in the federal Constitution, authorizing Congress to impose taxes, imposts, duties, and excises, is used in its more confined or restricted sense, and means taxes which are neither duties, imposts, or excises. *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 328.

"A tax is a portion of the property of the citizen required by the government for its support in the discharge of its various functions and duties, and may be imposed when either person or property is found within its jurisdiction." *Graham v. St. Joseph Tp.*, 35 N. W. 808, 810, 67 Mich. 652.

A tax is a forced contribution, and can only be sustained on the theory of good government. *Atchison, T. & S. F. Ry. Co. v. Territory* (N. M.) 72 Pac. 14, 15; *Rio Grande, M. & P. R. Co. v. Same, Id.*; *Silver City, D. & P. R. Co. v. Same, Id.*

The word "taxes," in its ordinary sense, embraces all those regulations and impositions or burdens laid by the government upon property and persons for the purpose of raising revenue for its general needs. *District of Columbia v. Sisters of Visitation* (U. S.) 15 App. Cas. 300, 306.

The characteristics of a tax are a public burden imposed by law, a description of the property and persons by whom it is to be borne, the contingency on the happening of which it is to be imposed, and the apportionment of it in pursuance of law. *Woodbridge v. City of Detroit*, 8 Mich. 274, 282.

The term "taxes" includes all contributions imposed by the government on individuals for the support of the state. The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law. No person is a taxpayer until he has been so declared by the proper authorities. An assessment must be as certain in designating the person chargeable with the tax at the commencement of the fiscal year as it must be in designating the amount of the charge on the property to which reference is made

for the purpose of ascertaining such amount. An assessment must thus be made in order to create a liability on the part of an individual to pay the tax, and if no such assessment is made no liability is created. *Green v. Craft*, 28 Miss. (6 Cushm.) 70, 75.

Taxes are public burdens, of which every individual may be compelled to bear his part, and that in proportion to the extent of protection he receives or the amount of property held by him, as the will of the Legislature may direct. The power of taxation is said to be an incident of sovereignty, and coextensive with that of which it is incident. In the several states of the Union it extends to all subjects over which their sovereign power extends, and the sovereignty of the state extends to everything which exists by its own authority or is introduced by its permission. *Hanna v. Allen County*, 8 Blackf. 352, 355.

"Taxes," says Judge Cooley, "differ from subsidies, being orderly and regular, and they differ from the forced contributions, loans, and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law and by some rule of proportion." *Boston, C. & M. R. Co. v. State*, 60 N. H. 87, 88.

The clause of the Constitutions of 1860 and 1867 exempting homesteads from all debts, except taxes, etc., are used in the broadest sense, without limitation or restriction, and any execution for taxes in the hands of anybody, due by anybody, so that it be for taxes, money due the state from that source and not paid over, may be collected out of the person so owing that money, though it override that homestead and exemptions of his family taken and set apart out of his property. *Cahn v. Wright*, 66 Ga. 119, 120.

"Taxes," as used in the federal Constitution, must be confined to the idea which they commonly and ordinarily present to the mind as exactions to fill the public coffers for the payments of the debts and promotion of the general welfare of a country. *Worsley v. City of New Orleans* (La.) 9 Rob. 324, 333, 41 Am. Dec. 333.

A "tax" has been defined to be a word of general import, including almost every species of imposition on persons or property, for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs. In a more limited sense it is a sum laid for the same purpose upon polls, lands, houses, property, provisions, and occupations. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 273.

A tax is imposed for a general or public purpose. It is levied for the purpose of carrying on the government. It is a charge on lands and other property which lessens its

value, and in the proportion in which the owner is required to pay is his pecuniary ability diminished. This is the sense in which the term "taxation" is used and understood. *De Clercq v. Barber Asphalt Pav. Co.*, 47 N. E. 367, 167 Ill. 215; *Trustees of Illinois & M. Canal v. City of Chicago*, 12 Ill. (2 Peck) 403, 406.

A tax is the means by which a burden primarily borne by the state is transferred to the citizen. The obligation may have relation to debt already incurred, or it may be in anticipation, dependent on future contingencies. Three things are essential to a tax, as that term is understood by our Constitution: First, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of taxpayers; second, the legal imposition of that sum as an obligation on the collective body of taxpayers; third, an apportionment of such sum among individual taxpayers, so as to ascertain the part or share that each should bear. *Morton v. Comptroller General*, 4 S. C. (4 Rich.) 430, 453; *Southern Ry. Co. v. Kay*, 39 S. E. 785, 787, 62 S. C. 28.

The word "tax," as a verb, when used in respect to fees or costs, is defined to mean to assess, fix, or determine judicially the amount of, as to tax the cost of an action in court. *Anderson's Law Dictionary* defines the word to mean to assess, adjust, fix, or determine, as to tax the items and the amount of costs in a case. Where a county auditor has charged and taxed the fees on the books of his office, as prescribed by law, he may be said to have assessed and determined the amount of fees allowed by law in the particular matter in which he has rendered services. *Seller v. State*, 65 N. E. 922, 927, 160 Ind. 605.

"Tax," as used in Act Ark. July 21, 1868, § 7, providing that the Legislature should from time to time impose upon each railroad company to which bonds shall have been issued a tax equal to the amount of the annual interest upon such bonds, is not used in the sense of a tax that is to be assessed and levied for the support of the state or any of its subdivisions. A tax, in the legal signification of the term, has to be levied on all property by a uniform rule, not as to the rate, but in the mode of its assessment. The word "tax," as used in the act, is not in reference to a tax in its strict legal signification. Among the meanings of the word "tax," are a requisition; a demand; a burden. It is here used in the sense of a charge or burden. *Tompkins v. Little Rock & Ft. S. R. Co. (U. S.)* 15 Fed. 6, 13 (citing *Worcester Dict.*).

"Taxes" are generally classified as specific, ad valorem, and for public benefit. The last two classes are necessarily based upon an assessment of actual values, where-

as in the first class the valuation is either fixed by statute, or the tax is intended to subserve some supposed public interest or policy. *Commonwealth v. Lehigh Val. R. Co.*, 18 Atl. 406, 411, 129 Pa. 429.

Cooley on Taxation says: "Taxes are not demands against which a set-off is admissible. Their assessment does not constitute a technical judgment, nor are they contracts between party and party, either express or implied; but they are positive acts of the government through its various agents, binding on the inhabitants, and to the making and enforcing of which their personal consent individually is not required." A taxpayer, therefore, cannot set off against his taxes an indebtedness of the municipality to him, unless expressly authorized to do so by statute. *Anderson v. City of Mayfield*, 14 Ky. Law Rep. 370, 372, 93 Ky. 230, 19 S. W. 598.

The word "tax," or "taxes," when used in the revenue act, shall be construed to include any tax, special assessment, or cost, interest, or penalty imposed upon property. *Hurd's Rev. St. Ill.* 1901, p. 1494, c. 120, § 292, subd. 14; *Blake v. People*, 109 Ill. 504, 525.

The word "tax," whenever used in the general revenue laws, is defined by section 118 of such laws to mean "any tax, special assessment, or cost, interest, or penalty imposed upon property." *State v. Irey*, 60 N. W. 601, 608, 42 Neb. 186.

The word "taxes," as used in an act relating to municipal liens, means any county, city, borough, township, school, bridge, road, or poor taxes. 4 P. & L. Dig. Laws Pa. 1897, col. 1269, § 55.

The words "tax," "taxes," "taxable" and "taxation," as used in the chapter relating to the assessment of taxes, shall be deemed to include county, district, and municipal corporation levies in all cases not inconsistent with the context. *Code W. Va.* 1899, p. 219, c. 29, § 99.

"Taxation" is a mode of raising revenue for public purposes. *Sharpless v. City of Philadelphia*, 21 Pa. (9 Harris) 147, 169, 59 Am. Dec. 759; *United States v. Wright*, 3 Pittsb. Rep. 192, 194, 28 Fed. Cas. 789; *Reelfoot Lake Levee Dist. v. Dawson*, 36 S. W. 1041, 1044, 1045, 97 Tenn. 151, 34 L. R. A. 725.

"Taxation" is the absolute conversion of private property to public use. *Attorney General v. City of Eau Claire*, 37 Wis. 400, 438.

Taxation is a proportionable and reasonable assessment, which may be imposed from time to time upon persons or property. *In re Meador (U. S.)* 16 Fed. Cas. 1294, 1297.

"Taxation" is a charge levied by the sovereign power upon the property of its subjects. It is not a charge upon its own property, nor upon property over which it has dominion. This excludes from taxation the property of the state, whether lands, revenues, or other property, and the property of the United States. *Van Brocklin v. Anderson*, 6 Sup. Ct. 670, 678, 117 U. S. 151, 29 L. Ed. 845; *People v. McCreery*, 84 Cal. 432, 456.

"Taxation" is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every description, is intrusted to the discretion of those who use it. *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 500, 8 Am. Rep. 141 (citing *McCulloch v. Maryland*, 17 U. S. [4 Wheat.] 316, 429, 4 L. Ed. 579).

"Taxation" is the contribution of each one's proportion to the support of his government, only to serve public ends, and must from its very nature be imposed upon the public. This is fundamental in the idea of a tax. *Baldwin v. Fuller*, 39 N. J. Law (10 Vroom) 576, 584.

By "taxation" is meant a certain mode of raising revenue for a public purpose, in which the community that pays it has an interest. *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277, 280, 52 N. W. 468, 469 (citing *Sharpless v. City of Philadelphia*, 21 Pa. [9 Harris] 147, 59 Am. Dec. 759).

A "power of taxation" is a power to enforce contribution from persons and property for the maintenance of the government. *Shurtleff v. City of Chicago*, 60 N. E. 870, 871, 190 Ill. 473.

By "taxation," as used in Comp. St. c. 12a, relating to cities of the metropolitan class, and providing for a system of taxation, is meant the providing of revenue for the ordinary expenses. *Littlefield v. State*, 60 N. W. 724, 725, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697.

"Taxation" was defined by the court in *Knowlton v. Rock County Sup'rs*, 9 Wis. 410, 418, as the act of laying a tax or imposing impositions, burdens, or charges upon persons or property within the state. It is the process or means by which the taxing power is exercised. The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the very existence of every government. *State v. Thorne*, 87 N. W. 797, 798, 112 Wis. 81, 55 L. R. A. 956.

"Tax," as used in *Little Rock City Charter*, § 29, providing that the inhabitants of Little Rock are exempted from working on any road beyond the limits of the city and

from paying any tax to procure laborers to work on the same, means a tax on the individual, not on property. *Fletcher v. Oliver*, 25 Ark. 289, 295.

"It is not taxation that the government should take from one the profits and gain of another. That is taxation which compels one to pay for the support of the government from his own gain and his own property." *United States v. Baltimore & O. R. Co.*, 84 U. S. (17 Wall.) 322, 326, 21 L. Ed. 597.

"Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not in its nature incompatible with the power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own government; nor is the exercise of that power by the states an exercise of any portion of the power granted to the United States." *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 199, 6 L. Ed. 23.

Must be enforceable.

The word "tax" in its ordinary acceptance means a sum imposed or levied by government or other authority. It is a general term, applied to whatever is required by the government or legal authority thereof to be paid by the people, and presupposes that the burden is imposed by some authority other than that of the individual taxed; else it would not be a tax, but a voluntary contribution. *Morgan v. Cree*, 46 Vt. 773, 783, 14 Am. Rep. 640.

A tax that cannot be exacted by any remedy is no tax at all. *Herriott v. Potter*, 89 N. W. 91, 92, 115 Iowa, 648.

Must be local.

"Taxation," in order to be valid, must be of a public nature or for a public purpose, and must also be local. It is the essence of taxation that it should compel the discharge of a burden by those on whom it rests. An attempt to compel one county or municipality to pay a charge properly resting on the inhabitants of another separate and distinct district or community would be an arbitrary and unauthorized exercise of power. It would be taking private property for private use, and in no proper sense could it be regarded as taxation, but rather in the nature of confiscation. It is true that it is not necessary that the money raised by taxation should always be expended within the district where it is levied and collected, but it may be expended for objects outside

of the district, in which the residents of the district have in a legal sense an interest. District interest is the test whether an object is or is not a proper subject for taxation. A law providing that property in an unorganized county should be subject to taxation in the nearest organized county is an attempt on the part of the Legislature to tax one community for the benefit of another, and is void from the fact that all taxation must be public and local, and for objects in which those who pay the taxes have, in a legal sense, some interest, and from which they may receive some benefit. *Farris v. Vannier*, 42 N. W. 31, 33, 6 Dak. 186, 3 L. R. A. 713.

Must be uniform.

"Taxation" is an act of sovereignty, to be performed, so far as it conveniently can be, with justice and equality to all. *United Railways & Electric Co. v. City of Baltimore*, 49 Atl. 655, 656, 93 Md. 630, 52 L. R. A. 772; *Herrman v. Town of Guttenberg*, 43 Atl. 703, 706, 62 N. J. Law, 605; *People v. Daniels*, 22 Pac. 159-161, 6 Utah, 288, 5 L. R. A. 444; *Turner v. Althaus*, 6 Neb. 54, 77; *Exchange Bank v. Hines*, 3 Ohio St. 1, 10; And exemptions, however meritorious, are acts of grace, and must be strictly construed, and every reasonable intentment must be made that it was not the design to surrender the power of taxation. *Benedict v. City of New Orleans*, 11 South. 41, 42, 44 La. Ann. 793 (citing *Desty, Tax'n*, p. 80).

"Taxes" are contributions imposed by the government for the support of the state. In all just governments it should be a cardinal principal that such imposition should be equal, and that all the property within the state should contribute its equal share of the burden imposed. This is on the principle that, as all the property within the state is equally protected by its laws and institutions, so all property within its boundaries should alike equally contribute to their maintenance and enforcement. *International Life Assur. Soc. of London v. Commissioners of Taxes* (N. Y.) 28 Barb. 318, 319.

Must be for public purposes.

A tax is an imposition for the supply of the public treasury, and not for the supply of individuals or private corporations. *People v. McAdams*, 82 Ill. 356, 361.

The term "taxes" in Const. art. 10, § 3, which provides that taxes may be levied and collected for public purposes only, is used in its generic sense, as expounded by lexicographers, judges, and lawyers long before its use in our organic law. In the sense that taxes can only be levied for a public purpose, that word includes every character and kind of a tax, general or special. The term as there used includes an excise upon the right of a person or corporation to receive

property by devise or inheritance from another. Act April 1, 1895, as amended by Act March 17, 1897, imposing a collateral succession tax to create a fund for maintaining free scholarships in the university, distributed on competitive examinations to applicants without means, is a tax for purely private purposes, in violation of the Constitution. *State ex rel. Garth v. Switzler*, 45 S. W. 245, 248, 143 Mo. 287, 40 L. R. A. 280, 65 Am. St. Rep. 653.

A tax is an imposition for the supply of the public treasury, and not for the supply of individuals or private corporations, however beneficial they may be. Imposing on agents of foreign insurance companies the duty of paying 2 per cent. on the premiums received by them to the Philadelphia Association for the Relief of Disabled Firemen is not a tax. *Philadelphia Ass'n for Relief of Disabled Firemen v. Wood*, 39 Pa. (3 Wright) 73, 82.

The object or purpose to which a tax is applied is to some extent public; that is, its use is not confined exclusively to the benefit of the particular individual taxpayer, but extends to some common object in which more or less individuals have an interest. Yet, it is obvious that a tax may be so levied and so limited in its character and object as not to be a public tax. *Morgan v. Cree*, 46 Vt. 773, 783, 14 Am. Rep. 640.

A tax, says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state." "Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favorite individuals, aid private enterprises, and build up private fortunes, is none the less a robbery, because it is done under the forms of law and is called 'taxation.' This is not legislation. It is a decree under legislative forms." Thus a state cannot pass a law authorizing cities to issue bonds in the aid of private manufacturing enterprises. *Citizens' Saving & Loan Ass'n v. Topeka*, 87 U. S. (20 Wall.) 655, 664, 22 L. Ed. 455.

The word "taxation," as used in Const. art. 8, § 1, declaring that the rule of taxation shall be uniform, does not prohibit the enactment of a statute requiring fire insurance agents to pay a percentage on premiums collected for the benefit of the fire department of the city in which the property insured is located, since the percentage required to be paid is not a tax on the agent or his occupation, but the effect of the act is to go back and reach the company which the agent represents. *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136, 139.

The theory of taxation is that it is levied for public purposes, that it is an attribute essential to the exercise of government, without which it would be powerless to discharge its functions, and for that reason it is held to be inherent. It is the public use for it which marks it as a tax. Where no public end is subserved, the power cannot be called into action. *Elizabethtown Water Co. v. Wade*, 35 Atl. 4, 5, 59 N. J. Law, 78.

Taxes are pecuniary charges imposed by the legislative power of the state on property to raise money for public purposes, and are not confined exclusively to support of the government. The term "tax" includes money raised for public purposes in general, whether governmental or not, and may be properly levied for the purpose of making a donation to a railroad company to insure the resumption of work on and the completion of the railroad, for the purpose of constructing a railroad is public in its nature. *Davidson v. Ramsey County Com'rs*, 18 Minn. 482, 486 (Gil. 432, 434).

Taxation is a mode of raising revenue for public purposes. The taxing power of the state extends no further than to raise money for public use. The Legislature cannot legally and constitutionally exercise the right of taxation in such manner as to coerce the citizen to aid in establishing a purely private enterprise or projects for the payment of municipal bonds issued in aid of such private enterprise, and statutes enacted for such a purpose are unconstitutional and void. *National Bank of Cleveland v. City of Iola*, 9 Kan. 689, 700.

Taxation is a mode of raising revenue for public purposes only, and when it is prostituted to objects in no way connected with the public interests it ceases to be taxation and becomes plunder. *People v. Town Board of Salem*, 20 Mich. 452, 474, 4 Am. Rep. 400.

As due and subject to levy.

"Taxation," as used in Act Jan. 4, 1860, exempting certain property from taxation by the city and county for a certain period, referred to taxes which were due and subject to levy during such time and not merely those which should be assessed during said period. *Southern Hotel Co. v. St. Louis County Court*, 62 Mo. 134, 136.

As judicial act.

See "Judicial Act."

As either legal or illegal.

Under Rev. St. § 3224 [U. S. Comp. St. 1901, p. 2088], declaring that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court, it is held that the word "tax" includes taxes which had been illegally and

wrongfully levied, as well as those which are regular and valid. *Miles v. Johnson* (U. S.) 59 Fed. 38, 40.

Under 14 Stat. 152, § 19, declaring that no suit shall be maintained to restrain the collection of a tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, it is held that the word "tax" means a tax which is in a condition to be collected as a tax and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed; and a contention that the word "tax" meant only a legal tax, and that an illegal tax was not a tax, and so did not fall within the inhibition, was not tenable. *Snyder v. Marks*, 3 Sup. Ct. 157, 159, 109 U. S. 189, 27 L. Ed. 901.

Construed in plural.

The word "tax," as used in R. L. §§ 407, 408, giving a right of action to a collector against the taxpayer to recover a tax, will be considered to mean "taxes," under the rule of construction of statutes contained in R. L. § 2, providing that words importing the singular number may extend and be applied to more than one person or thing. *Wheeler v. Wilson*, 57 Vt. 157, 158.

As a taking.

See "Taking (In Eminent Domain)."

As tax levy.

The word "taxes" is oftentimes used interchangeably for tax levies, and is so used in Code, c. 45, § 46, requiring the sheriff of a county to give a bond as collector of state and county taxes. *State v. Poling*, 28 S. E. 930, 44 W. Va. 312.

Assessment for improvements.

Taxes are impositions for purposes of general revenue, while assessments are special and local impositions upon property in the immediate vicinity of an improvement, for the public welfare, which are necessary to pay for the improvement and made with reference to the special benefit which such property derives from the expenditure. *Palmer v. Stumph*, 29 Ind. 329, 333, 335; *Winoona & St. P. R. Co. v. City of Watertown*, 44 N. W. 1072, 1073, 1 S. D. 46; *Holley v. Orange County*, 39 Pac. 790, 792, 106 Cal. 420; *Howes v. City of Racine*, 21 Wis. 514, 516; *Hale v. City of Kenosha*, 29 Wis. 599, 605; *Lima v. Lima Cemetery Ass'n*, 42 Ohio St. 128, 130, 51 Am. Rep. 509; *Ridenour v. Saffin*, 12 Ohio Dec. 238, 243; *Sharpe v. Speir* (N. Y.) 4 Hill, 76, 82.

The word "tax" or "taxes" does not include local assessments, unless there be

something in the statute in which it is found to indicate such an intention. *Kilgus v. Trustees of Orphanage of Good Shepherd*, 94 Ky. 439, 444, 22 S. W. 750, 757; *Ittner v. Robinson*, 52 N. W. 846, 847, 85 Neb. 133; *First Division of St. Paul & P. R. Co. v. City of St. Paul*, 21 Minn. 526, 529; *In re Ford* (N. Y.) 6 Lans. 92, 95; *Taylor v. Boyd*, 63 Tex. 533, 541; *Pettibone v. Smith*, 30 Wkly. Notes Cas. 325, 329, 24 Atl. 693, 150 Pa. 118, 17 L. R. A. 423; *City of Denver v. Knowles*, 30 Pac. 1041, 1042, 17 Colo. 204, 17 L. R. A. 135 (citing *Farrar v. City of St. Louis*, 80 Mo. 379; *Adams v. Lindell*, 5 Mo. App. 197; *Hammett v. City of Philadelphia*, 65 Pa. [15 P. F. Smith] 146, 3 Am. Rep. 615; *Emery v. San Francisco Gas Co.*, 23 Cal. 345; *Speer v. City of Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; *Hale v. City of Kenosha*, 29 Wis. 599).

The words "taxation" and "assessment," as used in the state Constitution, do not have the same signification. The power of taxation is a power which the Legislature takes, from the law of its creation, to impose taxes upon the property of the citizens for the support of the government. The word "assessment" is employed to represent those local burdens imposed by municipal corporations upon property bordering upon an improved street, for the purpose of paying the cost of the improvement, and laid with reference to the benefit the property is supposed to receive from the expenditure of the money. Property not benefited by the improvement cannot be subject to an assessment for it. The power of assessment cannot be exercised as an independent or principal power, like that of taxation, but must be used as an incident to the power of organizing municipal corporations. *Taylor v. Palmer*, 31 Cal. 240, 250.

A local assessment can only be levied on land. It cannot, as a tax can, be made a personal liability of the taxpayer. It is an assessment on the thing supposed to be benefited. A tax is levied on the whole state, or a known political subdivision, as a county or town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all time, and without it government cannot exist. A local assessment is exceptional, both as to time and locality. It is brought into being for a particular occasion and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. *Town of Macon v. Patty*, 57 Miss. 378, 386, 34 Am. Rep. 451.

While, in a general sense, it may be said that a betterment assessment is a kind

of tax, still there is a well-understood difference in the meaning of the two terms as generally used in the statutes. The word "tax" is used when one is speaking of the annual tax, or any other tax which forms a part of the general burden for public purposes; while the word "assessment" is used to designate the amount to be paid into the public treasury as a part of the benefit specially received by reason of some local improvement, and it cannot be assessed unless there be such benefit, and even then not beyond that. The value of the estate is always diminished by the first, but never by the second. This distinction between the usual legal signification of the words seems to be quite generally recognized. *Boston Asylum and Farm School for Indigent Boys v. Street Com'rs of City of Boston*, 62 N. E. 961, 962, 180 Mass. 485.

The word "assessment" is frequently applied to the special tax imposed upon real estate which is but a small part of some political division for some improvement specially adding to the value and by which the public is also benefited, as when the expense of making streets in front of certain lots is assessed on such lots; but if the same improvement is made at the expense of the entire city or ward in which it is, then the imposition upon the property of the entire city or ward to pay the expense of such improvement is a "tax," in the ordinary sense in which that word is used. *Howes v. City of Racine*, 21 Wis. 514, 516.

"Taxes proper, or general taxes," says Mr. Justice Brewer, "proceed upon the theory that the existence of government is a necessity, that it cannot continue without means to pay its expenses, that for those means it has the right to compel all citizens and property within its limits to contribute, and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. * * * On the other hand, special assessments or special taxes proceed upon the theory that, when a local improvement enhances the value of neighboring property, that property should pay for the improvement." After citing several authorities in support of these propositions, among which is *Cooley, Tax'n*, p. 416, c. 20, he further says: "These distinctions have been recognized and stated by the courts of almost every state in the Union, and a collection of the cases may be found in any of the leading text-books on Taxation. Founded on this distinction is a rule of very general acceptance—that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obliga-

tion to pay special assessments." Appeal of Sewickley M. E. Church, 30 Atl. 1007, 1008, 165 Pa. 475.

Assessments for sewers and curbing are not "taxes," within the meaning of a devise for life requiring the life tenant to pay all taxes on the property. *Chambers v. Chambers*, 39 Atl. 243, 20 R. I. 370.

The word "taxes," as used in a will providing that testator's widow should pay all taxes assessed against the house during her lifetime, did not include assessments for permanent improvements. *Chamberlin v. Gleason*, 57 N. E. 487, 489, 163 N. Y. 214.

Under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing that all taxes legally due and owing by the bankrupt shall be entitled to a preferred payment, a city is entitled to preference in the payment of assessments levied for local improvements. *In re Stalker* (U. S.) 123 Fed. 961, 964.

An assessment is a tax, though ordinarily understood to apply to specific impositions for supposed benefits for a particular work or improvement. *In re Van Antwerp*, 56 N. Y. 261, 265.

The distinction which has sometimes been attempted to be made between assessments for local improvements of this character (street pavements) and taxes does not rest upon any sound foundation, and seems to have led to much confusion. An assessment for the paving of an avenue constitutes a tax. *Lefevre v. City of Detroit*, 2 Mich. 586, 596.

An "assessment for betterment," under the statutes upon the laying out of a highway, is a tax. But it is not an ordinary tax. It is an extraordinary assessment laid on the premises, in view of the permanently increased value of the estate by reason of the public improvement in the vicinity. *Plymton v. Boston Dispensary*, 106 Mass. 544, 547 (citing *Harvard College v. Aldermen of City of Boston*, 104 Mass. 470).

An ordinance requiring lot owners to construct a pavement in front of their lots, and empowering the constable, in case of their failing so to do, to construct the same and collect the cost from the owner of the particular lot, does not levy a tax. *City of Franklin v. Maberry*, 25 Tenn. (8 Humph.) 368, 372, 44 Am. Dec. 315.

The word "taxes," as used in an offer to sell property for a certain sum, net, free of all commissions, taxes, etc., includes special assessments. *Gibbs v. People's Nat. Bank of Claremont*, 64 N. E. 1060, 1062, 198 Ill. 307.

A special assessment for street improvements is a "tax," within Rev. St. § 1114, pro-

viding that the town treasurer shall be credited by the county treasurer with the amount of unpaid taxes returned by him, and that from thenceforth the same shall belong to the county. *Sheboygan Co. v. City of Sheboygan*, 11 N. W. 598, 599, 54 Wis. 415.

The word "taxes," as used in a resolution of a city council, fixing the tax collector's commission at a certain per cent. on all taxes collected by him, embraces not only the tax levied for state or municipal purposes only, but also embraces taxes levied for the payment of local improvements. *City of Hagerstown v. Startzman*, 49 Atl. 838, 839, 93 Md. 606.

Under Const. art. 7, § 13, requiring every law imposing a tax to state the tax and its object, etc., a local assessment for street improvements is not a tax. *In re Ford* (N. Y.) 6 Lans. 92, 96.

"Taxes," as used in Laws 1879, c. 107, §§ 85, 86, providing that all taxes shall be due on a certain date, and fixing a time of the year after which the grantee of real estate is required to pay the taxes, in the absence of an agreement to the contrary, is to be construed as including special assessments. *Tull v. Royston*, 2 Pac. 866, 868, 30 Kan. 617.

Under Act April 21, 1858, providing that the real property of a railroad company, except the superstructure of the road and water station, shall be subject to taxation by ordinance for city purposes, such property is subject to assessments for street improvements. *City of Philadelphia v. Philadelphia & R. R. Co.*, 35 Atl. 610, 611, 177 Pa. 292.

The word "tax," in Amendatory Revenue Law Wash. 1899, p. 302, § 20, declaring that the holder of a general tax certificate, before bringing an action to foreclose the lien, shall pay the "taxes" that have accrued on the property, does not include assessments for street improvements. *McMillan v. City of Tacoma*, 67 Pac. 68, 26 Wash. 358.

As "assessment" is taxation, it is said that the word "taxes," as used in a statute providing that "the executor shall pay the debts of the decedent in the following order: * * * (2) Taxes assessed upon the estate of the deceased prior to his death"—must be held to include "assessment"; but it was held that as assessments, such as street assessments, were not a personal debt of the decedent, and merely a charge on the land, it would not be included. *In re Hun*, 28 N. Y. Supp. 253, 254, 7 Misc. Rep. 409.

Same—Ad valorem assessment.

"Taxation" and "assessments" are not in all respects identical. An assessment implies a tax of a particular kind, predicated upon the principle of equivalents or benefits which are peculiar to the persons or property

charged therewith, and which are said to be assessed or appraised according to the measure or proportion of such equivalents, whereas a simple tax is imposed for the purpose of supporting the government generally, without reference to any special advantage which may be supposed to accrue to the persons taxed. Therefore Const. art. 12, § 2, providing that "laws shall be passed taxing all real and personal property according to its true value in money," does not apply to assessments for street improvements. *Ridenour v. Saffin* (Ohio) 1 Handy, 464, 473.

The terms "taxes" and "taxation" have, respectively, the same meaning wherever found in article 11 of the Constitution, which requires that all taxes shall be assessed in exact proportion to the value of such property. The taxes which must be laid on a basis of value in section 1 constitute the taxation referred to for state purposes in section 4, for county purposes in section 5, and for municipal purposes in section 11, and therefore the only municipal taxation which the Constitution requires to be assessed in exact proportion to the value of the property is that embraced in the terms of section 7, so that assessments for paving streets are not taxes within such section, limiting the rate in cities for each year. *City of Birmingham v. Klein*, 7 South. 386, 387, 89 Ala. 461, 8 L. R. A. 369.

That provision of the Constitution of Missouri which requires all property subject to taxation to be taxed in proportion to its value is applicable only to taxation in its usual, ordinary, and received sense, and taxation for general state, county, city, and town purposes, and not to local assessments. *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 497, 72 Am. Dec. 276.

While the authority of a city council to make improvements within the municipality, and to levy assessments therefor upon the property especially benefited, is derived from the general power of taxation, yet such assessments are not "taxes," under that provision of the organic act which provides that "all property subject to taxation shall be taxed in proportion to its value." Such assessments are no part of those general taxes which are imposed for the purpose of carrying on the ordinary expenses of government, and do not fall within the prohibition of the organic act. *Jones v. Holzapfel*, 68 Pac. 511, 514, 11 Okl. 405.

Same—Collection, interest, and penalties.

"Tax," as used in Rev. St. 1889, c. 120, § 129, which provides that, when land has been forfeited for nonpayment of taxes, the back taxes, together with the penalty of 25 per cent. thereof, shall be added to the tax for the current year, is employed strictly,

and is not synonymous with "assessment," and hence the statute does not authorize the imposition of such penalty on back special assessments. *Hosmer v. Hunt Drainage Dist.*, 25 N. E. 747, 748, 134 Ill. 317.

"Taxes," as used in Acts 1861, c. 94, providing that all taxes which may be levied in the city of Baltimore shall be collected within four years from the levying of the same, and the collection of taxes shall not be enforced by law after the lapse of that time, means general taxes imposed on all persons for state and city purposes within the territorial limits, according to the value of their property, in consideration of the protection which the government affords alike to all, and does not include a local assessment, which is a tax levied occasionally, which may be required upon a limited class of persons interested in a local improvement, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the community in general derive from the expenditure of the money. *Gould v. City of Baltimore*, 59 Md. 378, 379.

The term "taxes" includes special assessments by municipal corporations for public improvements, and therefore such assessments do not bear interest unless so provided by statute. *Sargent v. Tuttle*, 34 Atl. 1028, 1029, 67 Conn. 162, 32 L. R. A. 822.

An assessment for the benefit of a local public improvement is in its nature a tax, and as such carries no interest by way of penalty for nonpayment, unless the law expressly so provides. *Vicksburg, S. & P. R. Co. v. Traylor*, 29 South. 141, 145, 104 La. 284.

Under an act providing that all real estate upon which taxes remain due and unpaid on the 10th day of March annually shall be deemed delinquent, and all such due and unpaid taxes shall bear interest after the 1st day of May, etc., it is held that the word "taxes" was not intended by the Legislature to include special assessments, but related to ordinary taxes levied for state, county, and municipal purposes. *Murphy v. People*, 11 N. E. 202, 205, 120 Ill. 234.

The provisions of article 1, tit. 6, of the Galveston city charter of 1876, and Act Aug. 19, 1876, § 10, to enforce the collection of delinquent taxes on lands assessed since 1870, refers to ordinary taxation, and not to assessments for local improvements, such assessments are not within the meaning of the word "taxation," as employed by the Constitution and statutes. *Allen v. City of Galveston*, 51 Tex. 302, 320.

A statute which imposes damages for wrongfully enjoining the collection of taxes does not apply to an assessment made under an order of court to pay a judgment

against a parish, as such an assessment is not a tax. *Wilson v. Anderson*, 28 La. Ann. 261.

The word "taxes," as used in the General Statutes of Kansas relating to the sale by the county treasurer for delinquent taxes, and providing that all taxes collected by the county treasurers shall be paid over to the city treasurer as fast as collected, etc., is used in its general sense, and includes assessments assessed for local improvements. *Smith v. City of Frankfort*, 42 Pac. 1003, 1005, 2 Kan. App. 411.

Street assessments are taxes, within Ky. St. § 3412, making it the duty of tax collectors of a city of the third class to collect all taxes. *Delker v. City of Owensboro (Ky.)* 61 S. W. 362.

Comp. St. 1893, c. 12a, § 91, declares that the city treasurer, on or before the first Monday of September of each year, shall make out and deliver to the county treasurer a full and complete list of all lots, lands, or real estate, against which at that time any taxes and assessments for the preceding year remained uncollected, together with the amount of such taxes or assessments chargeable against each lot or parcel of real estate set opposite the same, and it shall be the duty of the county treasurer to advertise and sell the lots and real estate in such delinquent list described for the purpose of paying all such taxes or assessments. Held, that the word "taxes," as used in such section, was not to be construed as synonymous with "assessments," since, if it had been intended that the two words were used synonymously, they would not have been separated by the disjunctive conjunction "or," and that the word "assessments," as there used, meant special taxes or local assessments, and that the word "taxes" was used to mean those yearly impositions levied by the corporation for general purposes. *State v. Irely*, 60 N. W. 601, 606, 42 Neb. 186.

Same—Covenants.

The word "taxes," as used in a lease by which defendant agrees to pay all taxes assessed on the lot and the improvements erected on it during the continuance of the lease, includes special assessments for local improvements. *Cassady v. Hammer*, 17 N. W. 583, 62 Iowa, 359; *Blake v. Baker*, 115 Mass. 188; *Pettibone v. Smith*, 24 Atl. 693, 150 Pa. 118, 17 L. R. A. 423.

The word "taxes," as used in a covenant of a tenant whereby he covenants "to pay all the taxes that may be assessed and levied within his term," must be presumed to be used in its common and ordinary acceptance and meaning, and therefore the tenant is not liable for grading and paving

assessments. *Longmore v. Tiernan (Pa.)* 3 Pittsb. R. 62, 64.

A covenant in a lease that the lessee shall pay the taxes of every name and kind that shall be assessed on the premises during the term does not include an assessment for benefit, imposed by authorities of the city in which the lands lie to provide for the expenses of a local improvement. *Beals v. Providence Rubber Co.*, 11 R. I. 381, 382, 23 Am. Rep. 472.

The power to levy special assessments is derived from the taxing power of the government; but the word "taxes," without more, is not generally understood to include assessments, and hence a tenant agreeing to pay taxes on the leased premises is not required to pay special assessments thereon. *Ittner v. Robinson*, 52 N. W. 846, 847, 35 Neb. 133.

The word "assessment," as used in a lease, obligating the lessee to pay all assessments whatsoever levied, did not bind him to the payment of state, city, and county taxes for general purposes; for, though the word "assessment" is often used to signify a proceeding which includes taxes in the above connection, it was used as a proper specific designation of the charges on the property, in which sense it does not include general taxes. The popular understanding and use of the word makes it refer specifically to those charges imposed on real property by the city to defray the expense of local improvements in proportion to the benefits received, and this distinction between "assessments" and "taxes" is observed in the enactments of the Legislature, in all of which the word "assessments" is used as meaning an entirely different proceeding or thing from "taxes." *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. (2 Bradw.) 249, 252.

A special assessment for paving is not a "tax," or public due of any kind, within the meaning of a lease requiring a certain annual rent, besides "all taxes and public dues of any kind"; the court stating that the phrase in question extended only to ordinary and usual taxes and public dues, and could not be regarded as including an expense which, like the one in question, was unknown to the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest. *Bolling v. Stokes (Va.)* 2 Leigh, 178, 181, 21 Am. Dec. 606.

The exception of the taxes for 1893 from the covenant in a deed against incumbrances did not include an assessment for the construction of a sewer. *Smith v. Abington Sav. Bank*, 42 N. E. 1133, 165 Mass. 235.

Special assessments for improving the streets of the city are not taxes, and hence

do not come within the exceptions of a covenant against incumbrances in a warranty deed, except taxes. *Cleveland Park Land & Improvement Co. v. Campbell*, 65 Mo. App. 109, 113.

There is no doubt that the word "taxes," in a deed conveying land clear from taxes, may be used in such a way as to include or exclude an assessment for a sewer. In *Smith v. Abington Sav. Bank*, 165 Mass. 285, 42 N. E. 1133, an exception of "the taxes assessed for the year 1893" from a covenant against incumbrances in a deed was held to refer only to the ordinary annual taxes, and not to embrace such a lien; and where a deed conveyed a good title, free of taxes, it included the special assessment. *Williams v. Monk*, 60 N. E. 394, 179 Mass. 22.

Assessments for street and sidewalk improvements are not within the covenant of a lessee to pay the water tax and half of all other taxes levied on the property. *De Clercq v. Barber Asphalt Paving Co.*, 47 N. E. 367, 167 Ill. 215.

Where a covenant in a deed is to the effect that the premises were free from incumbrances, except taxes, it is possible for the grantee to establish a construction of the term "taxes" which would exclude local assessments. *Sullivan v. Hamilton*, 43 N. Y. Supp. 302, 13 App. Div. 140.

The word "assessments," as used in a deed of lots sold under ordinance of 1790, providing that the lots shall be held forever on payment of the ground rent, but shall be subject to all such assessments and burdens as might be in common with other lot holders in the city, will not be construed in its more modern meaning of a peculiar kind of tax levied upon land specially benefited by improvements which are to be paid for by such assessments. The fact is notorious that a century ago special assessments of this kind on the lands benefited were not usual in this country, and at that time the word "assessment" was used as synonymous with rates or taxes generally. Hence such lands are not exempt from taxation. *Wells v. City of Savannah*, 21 Sup. Ct. 697, 701, 181 U. S. 531, 45 L. Ed. 986; *Id.*, 32 S. E. 669, 670, 107 Ga. 1.

Same—Equality and uniformity.

Constitutional provisions that all "taxes" or "taxation" shall be equal and uniform apply only to general taxation, and have no application to local assessments. *Missouri, K. & T. Trust Co. v. Smart*, 25 South. 443, 446, 51 La. Ann. 416; *Motz v. City of Detroit*, 18 Mich. 495, 514; *Woodbridge v. City of Detroit*, 8 Mich. 274, 280; *Chambers v. Satterlee*, 40 Cal. 497; *Emery v. San Francisco Gas Co.*, 28 Cal. 345, 356; *Taylor v. Boyd*, 63 Tex. 533, 541; *Beaumont v. City of Wilkes-Barre*, 21 Atl. 888, 891, 142 Pa.

198; *Speer v. City of Athens*, 11 S. E. 802, 805, 85 Ga. 49, 9 L. R. A. 402; *Gosnell v. City of Louisville*, 46 S. W. 722, 725, 104 Ky. 201; *Bond v. City of Kenosha*, 17 Wis. 284, 288.

In the ordinary use of the words "tax" and "assessments," there is a recognized difference between their meaning. The one does not in any sense include the other. Thus a constitutional provision that taxation shall be equal and uniform throughout the state does not apply to local assessments on private property to pay for local improvements. So a provision of the Constitution of a state which requires "the rule of taxation to be uniform," in connection with another provision that "it shall be the duty of the Legislature to provide for the organization of cities and to restrain their power of taxation, assessment," etc., "so as to prevent abuses in assessments and taxation," is also construed not to apply to special assessments by municipal corporations made by authority of the Legislature for local improvements. *Lake Shore & M. S. Ry. Co. v. City of Grand Rapids*, 60 N. W. 767, 770, 102 Mich. 374, 29 L. R. A. 195 (quoting *Dill. Mun. Corp. § 778*).

An assessment for improving a street in a city is a tax, and hence must be levied with uniformity. *Whiting v. Quackenbush*, 54 Cal. 306, 310.

"Taxing," as used in the Constitution, providing that laws shall be passed taxing by uniform rule, etc., all property according to its true value, etc., should not be construed as distinguished from the word "assessing," as meaning that the term "tax" is applicable to a general tax, while an assessment relates merely to a levy under a local ordinance, but should be construed to apply to local improvement assessments of a city. *Peay v. City of Little Rock*, 32 Ark. 31, 35.

A tax for lawful improvements, levied on the property within a district created by an act of the Legislature, authorizing the imposition of the tax, is a tax within the meaning of Const. art. 11, § 13, providing that "taxation" shall be equal and uniform through the state, and that all property shall be taxed in proportion to its value, to be ascertained as directed by law. *Smith v. Farrelly*, 52 Cal. 77, 81.

The term "taxation," as used in Const. art. 1, § 32, declaring that no tax or duty shall be imposed without the consent of the people, or their representatives in the legislative assembly, and that all taxation shall be equal and uniform, can be limited alone to the meeting of such expenses as are necessary for the maintenance of the general government of state, county, city, etc., and that the full power resides in the legislative

assembly to provide for other expenses belonging to any other branch of taxation, in their discretion, which discretion is final. The granting by the Legislature to a city of the right to apportion expenses for improving a street on the adjacent lots was, therefore, a rightful exercise of legislative authority. *King v. City of Portland*, 2 Or. 146, 157.

Same—Exemptions.

Property exempt from taxation is still liable for assessments for a public improvement. *Yates v. City of Milwaukee*, 68 N. W. 248, 249, 92 Wis. 352.

A statute exempting from all taxation property granted a railroad company did not exempt it from a "special assessment" for municipal improvements. *Winona & St. P. R. Co. v. City of Watertown*, 44 N. W. 1072, 1073, 1 S. D. 46.

A special tax on a railroad, in lieu of all other taxes, does not confer an exemption from special assessments for local improvements. *Lake Shore & M. S. Ry. Co. v. City of Grand Rapids*, 60 N. W. 767, 770, 102 Mich. 374, 29 L. R. A. 195. The word "tax," as used in Connecticut statutes imposing a tax upon a railroad company and providing that the tax so imposed shall take the place and be in lieu of all other taxes on the railroad, does not include a local assessment imposed for a local improvement. *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 262, 4 Am. Rep. 63.

A railroad company, which by its charter is exempt from all "taxation" of every kind, is nevertheless liable to a special tax levied on its right of way for street paving; special taxation for local improvements not being in the nature of taxation, but being based on the doctrine of compensation for the benefit received from the improvement. *Illinois Cent. R. Co. v. City of Decatur*, 18 N. E. 315, 316, 126 Ill. 92, 1 L. R. A. 613.

The provision of the act "to provide for raising taxes for the use of the state upon certain corporations," etc., exempting from assessment and taxation, save as provided for in the act, the capital stock and personal property of the corporations specified, applies only to state taxation, and does not affect the right of municipal authorities to assess and tax such property for local purposes. *People v. Davenport*, 91 N. Y. 574, 575.

A gross earnings tax on a railroad, "in lieu of all taxes and assessments whatever," relieves it from any charge or special tax imposed on the property for local improvements. *First Division of St. Paul & P. R. Co. v. City of St. Paul*, 21 Minn. 526, 529; *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469, 471.

Under the charter of a railroad authorizing the taxation of its capital stock, and providing that "no other or further tax or imposition" should be levied, it was not liable for an assessment for a portion of the damages and expenses of altering and widening a street used by its tracks. *New Jersey R. & Transp. Co. v. City of Newark*, 27 N. J. Law (3 Dutch.) 185, 193.

The phrase "exempt from taxation," as used in the statutes of Illinois, providing that the property of the Illinois & Michigan Canal shall be exempt from taxation of every description, etc., does not include assessments for improvements. *Trustees of Illinois & M. Canal v. City of Chicago*, 12 Ill. (2 Peck) 403, 406.

An exemption of the lands of a manufacturing corporation from "taxes, charges, and impositions" does not relieve it from assessments for street improvements. *City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law (4 Zab.) 385, 400.

The exemption of the property of a religious or charitable institution from "taxation" does not exempt it from assessments for local improvements. *Boston Asylum & Farm School for Indigent Boys v. Street Com'rs of City of Boston*, 62 N. E. 961, 962, 180 Mass. 485; *Boston Seamen's Friend Soc. v. City of Boston*, 116 Mass. 181, 183, 17 Am. Rep. 153; *First Presbyterian Church v. City of Ft. Wayne*, 36 Ind. 338, 339, 10 Am. Rep. 35; *In re College St.*, 8 R. I. 474, 483; *Lake Shore & M. S. Ry. Co. v. City of Grand Rapids*, 60 N. W. 767, 769, 102 Mich. 374, 29 L. R. A. 195; *In re City of New York* (N. Y.) 11 Johns. 77, 80, 81; *Roosevelt Hospital v. City of New York*, 84 N. Y. 108, 112; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 157, 11 Am. Rep. 412; *City of Chicago v. Baptist Theological Union*, 2 N. E. 254, 256, 115 Ill. 245; *City of Louisville v. McNaughten* (Ky.) 44 S. W. 880. Nor does an exemption from "taxation for governmental purposes." *Kilgus v. Trustees of Orphanage of the Good Shepherd*, 22 S. W. 750, 751, 94 Ky. 439, 15 Ky. Law Rep. 318. Nor an exemption from "all taxation by state or local laws for any purpose whatever." *Zable v. Louisville Baptist Orphans' Home*, 17 S. W. 212, 213, 92 Ky. 89, 13 L. R. A. 668. But an exemption from "all taxes and assessments" relieves it from assessments for local improvements. *Proprietors of Swan Point Cemetery v. Tripp*, 14 R. I. 199, 203; *Hudson County Catholic Protectory v. Board of Township Committee of Kearney Tp.*, 28 Atl. 1043, 1044, 56 N. J. Law (27 Vroom) 385. Contra, see *Protestant Foster Home Soc. v. City of Newark*, 35 N. J. Law (6 Vroom) 157, 162, 10 Am. Rep. 223; *Id.*, 36 N. J. Law (7 Vroom) 478, 13 Am. Rep. 464. Likewise an exemption from "taxation, excepting for state purposes." *Olive Ceme-*

tery Co. v. City of Philadelphia, 93 Pa. 129, 132, 39 Am. Rep. 732.

Within Act May 11, 1874, exempting churches and schoolhouses belonging to any county and certain other public buildings from all and every county, city, borough, bounty, road, school, and poor tax, an assessment for the purpose of building a school is a "tax." That such assessment is a tax is definitely settled in the case of Olive Cemetery Co. v. City of Philadelphia, 93 Pa. 129, 39 Am. Rep. 732, where it is said: "It is conceded, however, that the authority to make and collect such assessments is delegated by the commonwealth. If it does not emanate from the inherent powers of the government to levy and collect taxes, it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former; hence it must be in the latter." City of Erie v. First Universalist Church, 105 Pa. 278, 279.

An exemption of public buildings from "taxation" does not include special assessments. Adams County v. City of Quincy, 22 N. E. 624, 626, 130 Ill. 566, 6 L. R. A. 155.

An assessment for purposes of irrigation against the pueblo lands of a city, which are vacant, unoccupied, and, when irrigated, susceptible of cultivation, by an irrigation district, is not a tax, within the consideration exempting municipal property from taxation. City of San Diego v. Linda Vista Irr. Dist., 41 Pac. 291, 292, 108 Cal. 189.

The exemption of real estate of incorporated agricultural societies from taxation by Gen. St. c. 11, § 5, is only from taxation imposed for the general public purposes of the government, and does not apply to taxation for local improvements. Worcester Agricultural Soc. v. City of Worcester, 118 Mass. 189, 191.

Same—Forced sale.

Within Const. art. 16, § 50, subjecting homesteads to forced sale for taxes due thereon, does not include a special assessment against a homestead for street paving. Lovenberg v. City of Galveston, 42 S. W. 1024, 17 Tex. Civ. App. 162.

A power given to a municipal corporation to sell land for taxes will not authorize a sale for a mere assessment for benefit. Sharp v. Johnson (N. Y.) 4 Hill, 92, 102, 40 Am. Dec. 259.

The statutes have made a plain distinction between taxes which are burdens or charges imposed on persons or property to raise money for public purposes and assessments for city or village improvements, which are not regarded as burdens; and hence a city has no authority to sell lands

for taxes imposed on owners and occupants merely, and not on their lands. Sharpe v. Speir (N. Y.) 4 Hill, 76, 82.

Same—Jurisdiction.

Assessments against the property owner for the cost of the banquettes or paving laid in front of his property under the provisions of a city charter are not "taxes" in the meaning of the article of the Louisiana Constitution defining the jurisdiction of the Supreme Court. Fayssoux v. Denis, 19 South. 760, 761, 48 La. Ann. 850.

The words "tax, toll, and impost," in Const. 1898, art. 85, declaring that the appellate jurisdiction of the Supreme Court shall extend to all cases in which the constitutionality of any tax, toll, or impost whatever shall be in contestation, include any and every exaction, charge, contribution, burden, or tribute levied on the citizen or his property, whenever money or funds are demanded by the law from the citizen or assessed against his property, no matter what the form or method of taxation, whether for general purposes or for local benefits; the language of the Constitution being intentionally made broad enough to cover it. A controversy as to the validity of a city ordinance imposing an assessment on abutting property for the improvement of the street is, therefore, appealable to the Supreme Court, because the cost of the local assessment involved is a tax within the meaning of the constitutional provision. City of Shreveport v. Prescott, 26 South. 664, 667, 51 La. Ann. 1895, 46 L. R. A. 193.

"Taxes," as used in Const. art. 6, § 9, providing that the county court shall have jurisdiction in all matters relating to county taxes, has reference to taxation for general county purposes, and does not include special local assessments, which are raised to be expended for the improvement of the property taxed, and not for the common welfare. McGehee v. Mathis, 21 Ark. 40, 51.

Same—Limitation of amount of taxation.

An assessment for the grading and paving of a street is not a tax, so as to affect the limit fixed on city authorities as to the extent of a tax they may lay in any one year. Borough of Greensburg v. Young, 53 Pa. (3 P. F. Smith) 280, 284.

A local assessment for public works, levied, not on the taxable property generally for mere common public benefit, but only on particular property severally benefited by the works as an equivalent for the direct benefit conferred, are not taxes within the meaning of constitutional restrictions on the power of taxation. Charnock v. Fordoche & Grosse-Tête Special Levee Dist. Co., 38 La. Ann. 323, 325.

Same—Payment in state bonds.

"Taxes," as used in Act March 30, 1871, providing that coupons on state bonds should be receivable for all taxes, debts, dues, and demands due the state, includes the "charges or assessments made by law as a condition precedent to obtaining license for pursuing a business or profession." *Royall v. Virginia*, 6 Sup. Ct. 510, 513, 118 U. S. 572, 29 L. Ed. 735.

Assessment of road labor.

The assessment and performance of labor on a highway is not the payment of a tax within the poor laws. *Overseers of Poor of Town of Amenia v. Overseers of Stanford* (N. Y.) 6 Johns. 92, 93 (cited in *Town of Starksborough v. Town of Hinesburgh*, 13 Vt. 215, 221).

The word "taxes," in the absence of a clear indication to the contrary, must be considered to refer exclusively to the ordinary public taxes, and to be used in the sense of money, and not labor or imposts. The intent is to be deduced from the instrument in which the terms are used. The assessment of road labor or payment of commutation in lieu thereof is not a tax. The ordinance of a town in Florida providing that all able-bodied male residents thereof should be subject to work upon the streets and highways of said town for six days in each year does not impose a tax. *Galloway v. Town of Tavares*, 19 South. 170, 171, 37 Fla. 58.

Assessment to pay judgment against parish.

A statute which imposes damages for wrongfully enjoining the collection of taxes does not apply to an assessment made under an order of court to pay a judgment against a parish, as such an assessment is not a tax. *Wilson v. Anderson*, 28 La. Ann. 261.

Bonus distinguished.

See "Bonus."

Commutation tax.

The provisions of Const. art. 7, § 14, requiring three-fifths to form a quorum on the passage of bills to impose taxes, has no reference to the passage of a military law, by which a commutation tax is imposed on the un-uniformed militia in lieu of militia service. *People v. Supervisors of Chenango*, 8 N. Y. (4 Seld.) 317, 325.

Costs, interest, and penalties.

The word "taxes," as used in Revenue Act 1872, § 253, by which taxes are made a lien on the land, is declared by the act to embrace taxes, costs, interest, or penalties. Therefore the act of 1881, amending section 253, in terms making the taxes, penalties, interest, and costs a lien upon the property

assessed, creates no new lien. *Biggins v. People*, 106 Ill. 270, 276.

Debt distinguished.

See "Debt."

Eminent domain distinguished.

"Taxation" exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore made in the latter case, because the government is the debtor for the property so taken, but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates on a community, or a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates on an individual, without reference to the amount or value exacted from any other individual or class of individuals. Keeping these distinctions in mind, it will never be difficult to determine which of the two powers is exerted in any given case. *People v. City of Brooklyn*, 4 N. Y. (4 Comst.) 419, 424, 55 Am. Dec. 268.

Fees of officers.

The word "tax" in its broadest significance includes fees, costs, and all of the pecuniary burdens imposed upon the people under authority of law. But it does not follow that, because taxes might in certain cases include fees, it was necessarily intended that it should have such meaning in Const. § 20, forbidding the passage of local laws for the assessment and collection of taxes; and hence a local law regulating the fees of county officers was not unconstitutional. *State v. Fogus*, 9 Pac. 123, 124, 19 Nev. 247.

A statute requiring, in all counties of more than 50,000 inhabitants, the sheriff and certain other officers to exact in all civil actions, suits, or proceedings certain fees and charges for the benefit of the counties, is not in conflict with the provisions of the Constitution that "the legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say, * * * regulating the practice in courts of justice, * * * and for the assessment and collection of taxes for state, county, township, or road purposes." The terms "assessment" and "taxation" are often used in the sense coextensive with the sovereign power under which the right is exercised, as, for instance, when applied to the raising of a special fund to defray the expenses of a public local improvement. But the long and well-established meaning of the terms, as ordinarily used in the Constitution and statutes, and as gen-

erally understood, imports a burden imposed for general revenue, for the ordinary expenses of the state, county, or township government. The term "taxation," both in common parlance and in the laws of the several states, has been ordinarily used, not to express the idea of sovereign power which is exercised, but the exercise of that power for a particular purpose, viz., to raise a revenue for the general and ordinary expenses of the government, whether it be the state, county, town, or city government. It is in this sense the word is used in the section of the Constitution under consideration. A law providing a salary for the sheriffs and other court officers in certain counties, and fees to be paid to the county by litigants for the services of such officers and the court, are in no sense an exercise of the taxing power, and do not constitute the levy of a tax. *State v. Frazier*, 59 Pac. 5, 7, 8, 36 Or. 178.

The "tax" provided for in Rev. Code, c. 28, § 4, providing that on every indictment or civil suit the parties convicted or cast shall pay a tax of one dollar, and in every suit in equity a tax of two dollars, is not repealed by the general revenue act of 1858-59, repealing all taxes not therein imposed, because the tax is not the kind of taxes embraced in that revenue act. Indeed, it is not a tax at all, in the sense public taxes are understood. It is a part of the bill of costs taxed by the clerk, to be paid by the unsuccessful party in every suit, to pay the expenses of the court, the aid of which he has wrongfully invoked at the public expense. The fact that it is called a "tax" makes no difference. "Tax" is a familiar and appropriate term in judicial proceedings. The fees of clerks, sheriffs, witnesses, referees, and lawyers are all taxes upon the losing party, and are taxed by the clerk as costs. One of the definitions of tax in Webster is "to assess, fix, or determine judicially as to the amount of costs on actions in court, as 'the court taxes bills of cost.'" *Hewlett v. Nutt*, 79 N. C. 263, 264.

Whether the sum required by Rev. St. § 148a, as amended February 12, 1889, requiring a payment to the Secretary of State for filing articles of incorporation and also of consolidation, be termed a "fee" or "tax" or "assessment," is immaterial; for it is clearly not a tax on property. The filing and record of such articles is simply an authority or license to the persons filing them to form a corporation, and the sum paid therefor is the consideration demanded and paid the state for the grant of the right to be a corporation. *Ashley v. Ryan*, 31 N. E. 721, 724, 49 Ohio St. 504.

The word "taxed," as used in Sess. Laws 1895, c. 189, § 6, requiring the stenographer's fee to be taxed as costs in each case in the district court, is here used in the sense of assessing, fixing, or determining the amount

to be paid by the unsuccessful party in an action in court, and such fee is not a tax within section 1, art. 11, of the Constitution. *Beebe v. Wells*, 15 Pac. 565, 567, 37 Kan. 472.

Fee on trackage of railroad.

A fee of \$1 per mile for each mile of track operated within a state by a railroad, to be paid to the commissioner of railroads and telegraphs, is a tax; its nature not being affected by the name assigned to it. *Pittsburgh, C. & St. L. Ry. Co. v. State*, 16 L. R. A. 380, 383, 49 Ohio St. 189, 30 N. E. 435.

Fines and forfeitures.

"Taxes," as used in Act March 18, 1879, limiting the appropriation of taxes by the county court to "90 per cent. of the taxes for that year," means all the taxes levied upon the assessments of property and to be extended upon the tax books. The term does not comprehend or embrace the revenue accruing to the county from fines, forfeitures, and licenses, and does not prevent the court from appropriating that also, in addition to the appropriation of 90 per cent. of the taxes levied on the assessments of property, since the revenues to arise from fines, forfeitures, penalties, or licenses are wholly independent, and have no connection with nor relation to the amounts levied on property. *Allis v. Jefferson County*, 34 Ark. 307, 311.

Import duties.

Under Rev. St. § 3369 [U. S. Comp. St. 1901, p. 2204], providing that, when forfeited cigars offered for sale will not bring a price equal to the tax due and payable thereon, such goods shall not be sold for consumption in the United States, it is held that the term "tax" is not intended to include import duties, but refers merely to the internal revenue tax. *United States v. Fifty-Nine Demijohns Aguadiente and Four Barrels of Cigarettes* (D. C.) 39 Fed. 401.

As incumbrance.

See "Incumbrance (On Title)."

Judgment distinguished.

Judgments are the judicial sentences of courts, rendered in cases within their jurisdiction and coming legally before them, and are conclusive in all cases where no appeal or writ of error lies, and cannot be inquired into or controverted. Taxes, on the other hand, are those proportional and reasonable assessments or duties which may, by reason of the Constitution, be imposed from time to time by the general court upon the inhabitants of the commonwealth, for the necessary defense and support of the government, and for the protection and the preservation of the rights and to promote the interests of the people. They do not partake of the nature of judgments. Neither are they contracts be-

tween party and party, either express or implied. They are acts of the government, binding upon the inhabitants, to the making or enforcing of which their personal consent individually is not required. Therefore taxes are not the subject of set-off, under *Rev. St. Mass. c. 96, § 2*, providing that no demand shall be a set-off unless it is founded upon a judgment or upon a contract. *Peirce v. City of Boston, 44 Mass. (3 Metc.) 520, 521*. See, also, *Bonaparte v. State, 63 Md. 465, 470*.

As Liability.

See "Liability."

License or license fee.

A license is not a "tax" in the constitutional sense of that word. *City of East St. Louis v. Wehrung, 46 Ill. 392, 393* (citing *People v. Thurber, 13 Ill. [3 Peck] 554*); *United States Distilling Co. v. City of Chicago, 112 Ill. 19, 21*; *Braun v. City of Chicago, 110 Ill. 183, 186*; *City of Santa Barbara v. Stearns, 51 Cal. 499, 501*; *People v. Naglee, 1 Cal. 232, 252, 52 Am. Dec. 312*.

The term "taxation," as used in the doctrine that the Legislature cannot authorize the power of taxation under the pretense of sanitary regulations, or other exercise of the police power of the state, in the interests of the public health and safety, means the providing of revenue for the ordinary expenses of state or municipal government. But it does not follow, therefore, that any ordinance will be held void simply because it provides for a fund to be derived from license fees, and such a measure will not be held to come within the doctrine above mentioned, and will be upheld by the courts whenever it appears to have been designed to promote the welfare of the public, and the revenue derived therefrom is not disproportionate to the cost of its enforcement and the regulation of the business to which it applies. *Littlefield v. State, 60 N. W. 724, 725, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697*.

The word "taxation," in its ordinary sense, means a charge for the support of the state, or some of its subordinate municipal agencies, and does not refer to a charge merely incidental to the exercise of the police power. *City of Oil City v. Oil City Trust Co., 25 Atl. 124, 125, 151 Pa. 454*.

Any pecuniary charge imposed by the government for the privilege of residence or holding property, or of exercising a calling or engaging in a profession or business, is a tax; and hence, where a state contracted that the coupons attached to its bonds shall be receivable for all taxes, the contract embraces license taxes. *Harvey v. Virginia (U. S.) 20 Fed. 411, 413*.

"Taxation," as used in *Const. art. 9, § 8*, authorizing municipalities to assess and col-

lect taxes for corporate purposes, includes the power of a municipality to impose by way of license fees a tax on business and avocations, though strictly speaking the imposition of a license for a trade or calling by a municipality is referable to the police power possessed by such bodies. *State v. City of Columbia, 6 S. C. (6 Rich.) 1, 4*.

"License" and "tax" are frequently and properly employed as convertible terms, though not precisely synonymous; for a license fee or exaction, whatever name or designation is given it, when plainly imposed for the sole or main purpose of revenue, is in effect a tax. *Parish of East Felicinia v. Levy, 4 South. 309, 40 La. Ann. 332*.

The charter of a corporation provided that it should be exempt from any state, county, or municipal tax or license for transacting business. Held, that the words "tax or license" were not used synonymously, and the company was exempt from payment of all taxes, and not merely from paying a license for carrying on its business. *City of Bowling Green v. Kentucky Masonic Mut. Life Ins. Co., 5 Ky. Law Rep. 697*.

The "power to tax" means the power to take from the citizen a sum for the support of the government, whether that be national, state, or municipal. A power to license is not a power to tax. *Hoeftling v. City of San Antonio, 20 S. W. 85, 87, 85 Tex. 228, 16 L. R. A. 608*.

The tax imposed by Act March 24, 1881, imposing on every firm, person, or association of persons owning or running any palaces, sleeping, or dining room cars not owned by the railroad company, an annual tax, is not a tax upon persons, which under the Constitution of Texas must be uniform; nor is it a tax upon property, which under the Constitution of Texas must be taxed in proportion to its value. *Pullman Palace Car Co. v. State, 64 Tex. 274, 275, 53 Am. Rep. 758*.

As used in a contract by the owner with the pledgee of a stallion to refund to him the taxes paid by him upon the stallion upon its return to the owner, "taxes" does not include a license paid to keep the horse; the word "taxes" referring to taxes on the horse itself, and not upon the use of the horse. *Anderson v. Doll, 27 Cal. 607, 611*. See, also, *Allis v. Jefferson County, 34 Ark. 307*.

The word "tax," in *Const. 1849, art. 6, § 6*, providing that the district courts shall have original jurisdiction in all cases at law involving the illegality of any tax, and in *Code Civ. Proc. 1872, § 838*, providing that parties to an action in a justice's court cannot give evidence upon any question which involves the legality of any tax, is used in its large sense, as being a charge or

burden imposed upon persons, property, or business to raise money for public purposes, and therefore includes a license fee or charge for the transaction of any business. *City of Santa Barbara v. Stearns*, 51 Cal. 499, 501.

The word "taxes," as used in Const. art. 11, § 12, providing that the Legislature shall have no power to impose taxes on counties, cities, towns, etc., for county, city, town, or municipal purposes, includes license fees imposed mainly, if not solely, for the purpose of revenue. It is clear that the section is not limited to taxes upon property; for by its language the Legislature is prohibited from imposing taxes upon the inhabitants of municipal corporations, as well as upon other property, for municipal purposes, and a license tax imposed and required to be paid into the county treasury for the use of the county general fund is outside of the power of the Legislature to impose. *People v. Martin*, 60 Cal. 153, 155.

"Tax," within the meaning of the statute requiring that all taxes imposed by the city of New Orleans shall bear 10 per cent. interest, etc., is generic, and includes a license tax levied for revenue. *City of New Orleans v. Rhenish Westphalian Lloyds*, 81 La. Ann. 781, 785.

A tax carries with it the idea of imposition and compulsion. A statute imposing a duty on goods sold at public outcry by licensed auctioneers, and which duty is to be paid by the vendor of the goods, is not a tax, because it is purely optional with the vendor whether he will or will not avail himself of the advantages offered by the state upon the terms it proposes. If he do avail himself thereof, he thereby agrees to pay the charges imposed. *Wintz v. Girardey*, 31 La. Ann. 381, 383.

The charter of a corporation exempting its stock from taxation did not exempt it from the payment of a license "tax." *City of New Orleans v. New Orleans Canal & Banking Co.*, 32 La. Ann. 104, 105.

A license imposed by a city ordinance on all persons keeping a meat shop or stand outside the city market is not a "tax," but compensation which the city demands from such dealers for the additional labor of officers and expense thereby imposed. *Ash v. People*, 11 Mich. 347, 352, 83 Am. Dec. 740.

The word "tax," in Const. art. 10, § 3, providing that taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax, includes a license fee imposed on the keepers of meat shops. *City of St. Louis v. Spiegel*, 75 Mo. 145, 146.

The imposition of a license fee, by an ordinance exacting a charge for a license

to give theatrical exhibitions for a specified time, together with a fee of one dollar for the officer issuing the license, is not a tax, within the meaning of Const. art. 12, § 5, requiring the taxing of all property by a uniform rule. *Baker v. City of Cincinnati*, 11 Ohio St. 534, 540.

Same—Corporation fee.

The annual license fee imposed in New Jersey on corporations is not a tax, and therefore is not provable as such under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. In *re Danville Rolling Mill Co.* (U. S.) 121 Fed. 432.

Rev. St. c. 24, §§ 22, 23, requiring an agent of a foreign insurance company to take out a license, is not a tax on property, but is a burden imposed on the agent for the right of exercising a franchise or privilege, and which the Legislature would have the right to withhold or inhibit altogether; and the amount of premiums charged is merely used as a mode of computing the amount to be paid for the exercise of the privilege. *People v. Thurber*, 13 Ill. (3 Peck) 554, 557.

Same—Dog tax.

The tax laid on dogs is not ascertained by value, but specifically, and therefore is to be regarded as a license, rather than a tax, and hence does not come within the provision of a statute exempting personal property of a railway company from taxation. *Hendrie v. Kalthoff*, 12 N. W. 191, 48 Mich. 306.

The word "tax," means a burden, charge, or imposition placed or set on persons or property for public use; and hence, since dogs cannot be said to be property, a statute imposing a tax of \$1 per annum on dogs does not use the term in its common acceptation, but rather in the sense of license, and is therefore not within Const. 1876, art. 8, § 1, providing that all property shall be taxed in proportion to its value—the word "tax," as used in the Constitution, being used according to its usual acceptation as defined. *Ex parte Cooper*, 3 Tex. App. 489, 493, 30 Am. Rep. 152; *Cole v. Hall*, 103 Ill. 30, 31.

In *Van Horn v. People*, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159, the question was considered as to whether a per capita tax on dogs is a tax. *Graves, J.*, in delivering the opinion says: "The fundamental proposition is that the exaction attempted by the statute is a tax, and, not being laid according to any mode of uniformity, nor assessed according to the cash value of the property, the imposition is unconstitutional. It is also suggested that dogs are included in the actual mass of property taxed under the general law, and that it is not competent

to select one species of property and subject it to double taxation. It is unnecessary to point out the inaccuracies of this reasoning. The foundation on which it rests is fallacious. The supposition that the statute is an emanation from the taxing power is a mistake. The act is an execution of the police power, and no reason is perceived for denying its validity." The same general doctrine has been declared in *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Tenney v. Lenz*, 16 Wis. 566; *Mitchell v. Williams*, 27 Ind. 62; *Holst v. Roe*, 39 Ohio St. 340, 342, 345, 48 Am. Rep. 459.

Same—Liquor license.

The word "tax" in its proper sense does not include a license issued for retailing liquor. *Burch v. City of Savannah*, 42 Ga. 596, 598 (cited in *State v. Hardy*, 7 Neb. 377, 380).

While the burden imposed by the Dow law (Act March 3, 1888) upon the traffic in intoxicating liquors is in some of the sections of the law termed an "assessment," the word is used as synonymous with "tax." *State v. Rouch*, 25 N. E. 59, 63, 47 Ohio St. 478.

A payment of \$100, or any other amount of money, for a license to sell spirituous liquors, is not a "tax," within Const. art. 10, § 5, providing that no tax shall be levied, except in pursuance of law, etc. *Henry v. State*, 28 Ark. 523, 525.

The imposition of a state tax upon such privileges, pursuits, and occupations as are of no real use to society, such as the occupation of a wholesale dealer in spirituous liquors, is not a tax upon property, within the meaning of the Constitution of Arkansas, providing for the taxation of property according to its true value in money. *Straub v. Gordon*, 27 Ark. 625, 628.

"Taxation" is a legislative power, specially mentioned in the Constitution, but always in connection with the subject of revenue for the support of the government generally, or some particular department or branch of it; and it is in such connection that we find the requirement of uniformity. This being so, we are led to conclude that this constitutional injunction has reference solely to taxation pure and simple, according to the commonly accepted meaning of the term, for the purpose of revenue only, and not those impositions made incidentally under the police power of the state, exerted either directly or by delegation as a means of constraining and regulating what may be regarded as a pernicious or offensive act or business; so that the exaction of license fees under the act regulating the taxation of intoxicating liquors is not "taxation" in either the ordinary or constitutional signif-

ication of such word. *Pleuler v. State*, 10 N. W. 481, 486, 11 Neb. 547.

The power to tax or restrain the sale of liquor, when given to a municipal corporation, includes the power to license the sale thereof. *Town of Mt. Carmel v. Wabash County*, 50 Ill. 69, 73.

Licenses to keep saloons are issued under the police power, while licenses to conduct other classes of business do not need police regulation. Such licensing is used simply as a means of obtaining revenue; and, whether granted under the police power or the taxing power, the sums paid for them are a source of revenue, and in equity constitute a tax on the particular business. *Fritsch v. Salt Lake County*, 47 Pac. 1023, 1029, 15 Utah, 83.

"Taxes," as used in a statute providing that all land and other taxable property situated within the limits of a corporation shall be exempt from the payment of parish taxes, etc., does not include parish licenses, such as saloon keepers' licenses, etc. The word "taxes," as used in the statute, means property taxes. *Parish of Morehouse v. Brigham*, 6 South. 257, 258, 41 La. Ann. 665.

Tax on gross receipts of railroad.

An ordinance adopted as a part of the state Constitution by the people of Missouri July 4, 1865, imposing a tax on the gross receipts of a certain railroad company, imposes a tax, notwithstanding the fact that the ordinance provides that the same shall be appropriated by the General Assembly in payment of the principal and interest due and to become due upon the bonds issued by the state to the company. *Pacific R. Co. v. Maguire*, 87 U. S. (20 Wall.) 86, 44, 22 L. Ed. 232.

Tolls.

A "tax" is a demand of sovereignty, while a "toll" is a demand of proprietorship. *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. 485, 487, 148 U. S. 92, 37 L. Ed. 380.

Tolls for the actual use of passage over land or water highways cannot be treated as taxes. They are not levied on the property or on persons as their share of any public burden laid on the people, but they are a fixed compensation in lieu of a quantum valebat for the use of that which has value and which is actually used to advantage. Thus taxes levied on those who used a stream, which had been improved for logging purposes by the state, is not a tax. It is collected for the same purpose as turnpike tolls, or railway and wharfage charges, which no one ever has supposed were public taxes, or a tax at all. *Manistee River Imp. Co. v. Sands*, 19 N. W. 199, 200, 53 Mich. 593.

By the terms "tax," "impost," and "duty," as used in the ordinance of 1787, is meant a charge for the use of the government, not compensation for improvements. The fact that, if any surplus remained from the tolls over what is used to keep locks in the river in repair and for their collection, it is to be paid into the state treasury as a part of the revenue of the state, does not change the character of the charge or impost. *Huse v. Glover*, 7 Sup. Ct. 313, 316, 119 U. S. 543, 30 L. Ed. 487; *Ouachita & M. R. Packet Co. v. Aikin*, 7 Sup. Ct. 907, 909, 121 U. S. 444, 30 L. Ed. 976.

Town taxes.

The word "taxes," as used in 2 Rev. St. p. 50, imposing a tax of 25 cents on each share of stock owned by individuals of a bank, and declaring that the said bank should not be liable to any further tax, prohibits the imposition of all taxes, town as well as county or state. *Bank of Cape Fear v. Deming*, 29 N. C. 55, 59.

Water rents.

Water rents are not taxes, entitling one to notice as of the levy of a tax. *Silkman v. Board of Water Com'rs*, 24 N. Y. Supp. 806, 807, 71 Hun, 37.

Within the meaning of *Starr & C. Ann. St. 1890*, c. 24, conferring on cities and villages power to provide for water supply for use and protection from fire, and paragraph 445, authorizing the city council to tax, assess, and collect from the inhabitants such tax, rates, and rents for the use and benefits of water used or supplied to the inhabitants by such waterworks, the words, "tax, rents, and rates" refer to the mere operation of the plant and the collection of its revenues, and not to any mode of taxation, strictly speaking. The revenues and rates that are spoken of are the earnings of the plant from the use of the water by those persons who take the same, and hence the city is not authorized to levy a tax, not for the use of the water, but in addition thereto. *Village of Lemont v. Jenks*, 64 N. E. 362, 364, 197 Ill. 363, 90 Am. St. Rep. 172.

A tax is a demand of sovereignty. In the case of *Wagner v. City of Rock Island*, 34 N. E. 545, 140 Ill. 139, 21 L. R. A. 519, it is said: "Taxes are the enforced proportional contribution from persons and property, levied by the state, by virtue of its sovereignty, for the support of the government and for all public needs, and they are therefore justly and properly subjected to the rule of uniformity. Rates charged by the city for water supplied by it are not taxes, within Const. art. 10, § 3, requiring all taxes to be uniform. *St. Louis Brewing Ass'n v. City of St. Louis*, 37 S. W. 525, 528, 140 Mo. 419.

The term "taxes" does not include water rates paid by the consumers under the statute incorporating the water commission of Detroit. The lien, therefore, though enforced in the same way as a lien for taxes, is really a lien for indebtedness, like that in force on mechanics' contracts or against ships and vessels. *Jones v. Water Com'rs of Detroit*, 34 Mich. 273, 276.

TAX BOOK.

The term "tax book" or "tax list," in the statutes relating to the duty of the county auditor to correct the assessment, refers to the current list or book, and to none other. *Jewett v. Foot*, 93 N. W. 364, 366, 119 Iowa, 359.

TAX CERTIFICATE.

Any tax certificate, see "Any."

A "tax certificate" is a certificate of the sale of land on account of the nonpayment of taxes, in the consideration of the payment of such taxes by the purchaser, and entitles the holder, under certain conditions, to a legal conveyance of the land. It is in no sense a negotiable instrument, a chose in action, or a chattel interest. It is evidence of an equitable title to the land itself, and enables the purchaser, on certain conditions and in a certain time, to call in the legal title. It savors so strongly of realty that such title descends to the heir and is not assets in the hands of the executor. *Eaton v. Manitowoc County*, 44 Wis. 489, 492.

The term "tax certificate," as used in *Laws 1877*, c. 37, § 6, requiring notice of the expiration of the time of redemption to be served is only applicable to the certificate of a tax sale prescribed in *Gen. St. 1878*, c. 11, § 84, and the certificate of assignment provided for in section 89. *Nelson v. Central Land Co.*, 29 N. W. 121, 122, 35 Minn. 408.

TAX CLAIM.

The term "tax claim," as used in an act relating to municipal liens, means the claim filed to recover taxes. 4 P. & L. Dig. Laws Pa. 1897, col. 1269, § 55.

TAX COLLECTOR.

A "tax collector" is a tax gatherer. He turns the money which he collects over to the treasurer, if he be not treasurer. *Mutual Life Ins. Co. of New York v. Martien*, 71 Pac. 470, 471, 27 Mont. 437.

The "tax collector" is the official representative of the public in the matter of the collection of taxes. He is empowered to enforce collection by resort to summary rem-

edies, and upon sale he executes the papers evidencing the same. For the exercise of those remedies the tax list and warrant are his sufficient authority. Upon him alone devolves the duty of providing the taxpayer with the proper evidence of his payment of taxes and its application. *Lobban v. State*, 64 Pac. 82, 88, 9 Wyo. 377.

A collector of town taxes, though not named in any list of officers authorized by the charter of the town, is a public officer, within a statute punishing public officers for embezzlement. *State v. Walton*, 62 Me. 106, 111.

A collector of taxes is a public officer whose duty it is to collect the taxes and pay the same into the treasury of the state or to the parties entitled. *State v. Nicholson*, 8 Atl. 817, 818, 67 Md. 1.

A collector is an officer who collects or receives taxes, duties, or other public revenues. It is sufficient if he is authorized by law to receive the money for and on behalf of the public, and he need not possess the power to enforce payment by a legal process. *State v. Moores*, 73 N. W. 299, 303, 52 Neb. 770.

"Collector," as used in Pub. St. art. 16, c. 8, § 117, requiring county treasurers to pay over the state tax in like manner as heretofore required of the sheriff or collector, is synonymous with "sheriff." *Bingham v. Winona County*, 8 Minn. 441, 447 (Gil. 390, 395).

Gen. St. c. 92, art. 1, § 6, providing that the delinquent tax list shall be placed in the hands of the sheriff or collector for collection, means one who has been appointed in place of the sheriff to collect the taxes. *Baldwin v. Hewitt*, 11 S. W. 803, 88 Ky. 673.

A collector is the agent of the town or city in collecting a tax, and the town is really the only party interested. So an action to recover city taxes illegally assessed should be against the city, and not the collector. *Fish v. Higbee*, 47 Atl. 212, 22 R. I. 223.

The word "collector," or "collectors," when used in the revenue act, shall be construed to include county, town, district, and deputy collectors. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 4.

The term "collector," as used in the chapter relating to the collection of taxes, shall mean a person receiving a tax list and a warrant to collect the same. *Rev. Laws Mass.* 1902, p. 229, c. 13, § 1.

The word "collector" includes any person intrusted with the collection of public revenue. *Shannon's Code Tenn.* 1896, § 67.

Wherever the word "collector" is used in the chapter relating to the collection of

taxes, it shall be construed to mean a collector appointed by the auditor of public accounts. *Code Va.* 1887, § 633 [1 *Code Va.* 1904, p. 310].

TAX DEED.

As color of title, see "Color of Title."

As lien, see "Lien."

A tax deed is a creature of statute, and must have that meaning and intentment only which the statute directs. *Kepley v. Fouke*, 58 N. E. 303, 187 Ill. 162.

TAX DUPLICATE.

As written instrument, see "Written Instrument."

TAX FOR CORPORATE PURPOSE.

See "Corporate Purpose."

TAX FOR COUNTY PURPOSE.

See "County Purpose."

TAX LEGISLATION.

"Tax legislation" means the making of laws that are to furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. Imposing on agents of foreign insurance companies the duty of paying 2 per cent. on the premiums received by them to the Philadelphia Association for the Relief of Disabled Firemen is not, either in form or substance, tax legislation, but is a mere requisition that one class of men shall pay their money to another class, and is not legislation at all. *Philadelphia Ass'n v. Wood*, 39 Pa. (3 Wright) 73, 82.

TAX LIST.

The terms "list" and "grand list," as they are used in our statutes relative to taxation, mean a schedule of the polls and ratable estate of the inhabitants, upon which taxes are to be assessed. A list that only represents real estate answers the requirement of the statute as fully as would a list that represented the real and personal property. Such is the meaning of the term in *Gen. St. p.* 1036, providing that every male citizen of the age of 21 years, whose list shall have been taken in any town or city at the annual assessment next preceding any town or city meeting, shall be legal voters in town meetings, as it is obvious that the intention of the law was to allow such persons as are subject to taxation in towns and are residents therein to vote in the annual meetings of such towns. *Wilson v. Wheeler*, 55 Vt. 446, 452.

The personal list required to be lodged in the town clerk's office as a basis for taxation is an assessment judicially fixed by the listers, of which all taxpayers may and must take notice. The written notice required by the statute to be given to persons assessed for money, etc., is a mere notice, not an assessment. The personal list is the judicial determination of the listers of the amount of the taxpayers' personal estate that should enter into the annual grand list to be completed in May, and the giving of such notice is not equivalent to or a compliance with the statute requiring the making and filing of such list. *Bartlett v. Wilson*, 8 Atl. 321, 329, 59 Vt. 23.

"Tax list," as used in St. July 4, 1829, providing for the collection of taxes on the unimproved lands of nonresidents, and requiring every collector of taxes, within a certain time after the assessment of such taxes, to deliver to the deputy secretary a copy of his list of all such taxes, made out and signed by the selectmen, ordinarily signifies a roll or catalogue; but a roll does not always contain a number of names or several particulars. Though the warrant of the treasurer contains a tax against one place only, his warrant is a list of taxes. *Homer v. Cilley*, 14 N. H. 85, 100.

The term "tax list" includes the treasurer's warrant for the collection of a single sum assessed against an unincorporated place, which is returned and filed in the office of the Secretary of State. "The tax is comprised in a single item, and thus in one sense it may be said that there is no list; but there is, and in the nature of things can be, no better list." *Wells v. Burbank*, 17 N. H. 393, 407.

The term "list of taxable property" in the statute which allows the assessor fifteen cents for every person's list of taxable property includes a list returned by the assessor whether it embraces property or not, and, therefore, he is entitled to fifteen cents for such list. *Harrison v. Commonwealth*, 83 Ky. 162, 168.

The term "tax book," or "tax list," in the statutes relating to the duty of the county auditor to correct the assessment, refer to the current list or book, and to none other. *Jewett v. Foot*, 93 N. W. 364, 366, 119 Iowa, 359.

TAX ON TONNAGE

A "tax on tonnage" bears directly on the owners of the goods who are having them transported, and is an attempt to regulate commerce, and is not the same as a tax on gross receipts, which is a tax on the money of a carrier after it has reached the treasurer of the corporation. *Philadelphia & S.*

Mail S. S. Co. v. Commonwealth, 104 Pa. 109, 115.

TAX RECORD.

Act 1869, authorizing the sale of land for taxes, provides that the petition filed by the Auditor General shall be in a record book, which shall contain a description of the land and the taxes thereon in appropriate columns; that such record shall be ruled with columns for the description, the amount of taxes, the interest, charges, etc.; and that it shall also contain blank columns for other specified entries, to be made at the time of the decree and on the sale. Held, that it was not contemplated by the act that either the petition or decree should contain any description of the land, or statement of the amount decreed to be due, but that both the decree and the petition should refer to the record book, which constitutes the "tax record." *Millard v. Truax*, 58 N. W. 70, 71, 99 Mich. 157.

TAX ROLL.

A "tax roll" means the roll in proper form to warrant the treasurer in enforcing the tax. *Babcock v. Beaver Creek Tp.*, 31 N. W. 423, 424, 64 Mich. 601.

The "tax rolls" are the original extensions of the levies made by the proper authorities, and include state, county, township, and school taxes. *Smith v. Scully*, 71 Pac. 249, 250, 66 Kan. 139.

Comp. Laws, § 3196, relating to assessments for municipal improvements, provides that in no case shall the whole amount to be levied by special assessments upon any lot for any one improvement exceed 25 per cent. of the value of such lot as valued and assessed for state and county taxes in the last preceding ward tax roll, and any cost exceeding such per cent. shall be paid from the general fund of the city. Held, that the "last preceding ward tax roll," referred to, was the last completed roll on which state, county, and school taxes had been spread. *Nowlen v. City of Benton Harbor (Mich.)* 96 N. W. 450, 452.

TAX SALE.

A "tax sale" is a sale made of property proceeded against by the state as belonging to some one other than itself, in enforcement of taxes due by that property and its owners. *Gulf States Land & Improvement Co. v. Wade*, 25 South. 105, 108, 51 La. Ann. 251.

A "tax sale," or, what is the same thing, a sale for nonpayment of taxes, means a sale made in a proceeding in rem; and hence that part of a statute relating to ex-

emptions which provides that no property shall be exempt from sale for nonpayment of taxes has application only to proceedings in rem against the property, and not for judgments in personam, except where based on a liability for the purchase money or improvements. *Douthett v. Winter*, 108 Ill. 330, 334.

TAX TITLE.

As an interest in land, see "Interest (In Property)."

"Tax title" is the title by which one holds lands purchased at a tax sale. A "tax title" is not a derivative title. If valid, it is a breaking of all other title, and is antagonistic to all other claims to the land. *Willcuts v. Rollins*, 52 N. W. 199, 201, 85 Iowa, 247.

A "tax title" is different from an ordinary title. It is prima facie valid, and protects the purchaser at tax sale from imputation of bad faith. *Cooper v. Falk*, 33 South. 567, 569, 109 La. 474.

A tax title is purely technical, as distinguished from a meritorious title, and depends for its validity on a strict compliance with the statute. *Kern v. Clarke*, 59 Minn. 70, 73, 60 N. W. 809 (quoting *Black*, Tax Titles, § 409).

Under Code, § 1753, declaring that "any person holding or claiming under a tax title land heretofore or hereafter sold for taxes, when the period for redemption has expired without redemption of the same, may proceed by bill" to have such title confirmed and quieted, and Act 1858, providing "that any person claiming to hold lands under and by virtue of any tax deed or certificate of sale for taxes, either for state, county, district, or other purposes, heretofore or hereafter to be made," etc., a tax title is such, whether the same is acquired on sale for taxes of state, county, district, or other purposes. *Beirne v. Burdett*, 52 Miss. 795, 797.

TAXABLE COSTS.

"Taxable costs," as used in a stipulation by which plaintiff agreed that, if an action of tort were changed into a suit in equity, he would pay the defendant's taxable costs, includes separate costs to each defendant, and not one bill of costs merely for all. *George v. Reed*, 104 Mass. 366, 367.

A direction in an order to pay "the taxable costs of the witnesses" is sufficiently certain. It means such costs or fees as the witnesses are entitled to by law. *Nichols v. Besselaer County Mut. Ins. Co.* (N. Y.) 22 Wend. 125, 128.

"Taxable costs" are in contemplation of law full indemnity for the expenses of a

party who is successful in a suit between party and party, whether at law or in equity. *Rowland v. Maddock*, 67 N. E. 347, 349, 183 Mass. 360 (citing *Newton Rubber Works v. De Las Casas*, 182 Mass. 436, 65 N. E. 816).

Where an award provided that one of the parties should pay the taxable costs of a suit which had been pending in court, the phrase "taxable costs" meant such as the party was entitled to have taxed by law. *Wright v. Smith*, 19 Vt. 110, 111.

The word "taxable," as applied to costs and disbursements, is sufficiently synonymous with the word "necessary," so that the use of one in place of the other in an order does not change the meaning; either word relating, not to the allowance of disbursements, but wholly to the quality or character of the items. *Wilson v. Lange*, 84 N. Y. Supp. 519, 520.

TAXABLE INHABITANT.

A "taxable inhabitant" is one who is or may lawfully be taxed; one who possesses all the qualifications necessary to authorize the proper taxing authorities to assess him with a tax. In re *Annexation of Chester Tp.*, 34 Atl. 457, 174 Pa. 177.

The words "taxable inhabitants," in a statute forbidding the abolition or alteration of school districts without the consent of a majority of the taxable inhabitants, cannot have their full, unrestrained meaning, so as to include every resident liable to be taxed, or they must be held to include, not only females, but infants of the most tender age, but are limited to legal voters who are taxable and live within the district. *Elkin v. Deshler*, 25 N. J. Law (1 Dutch.) 177, 179.

TAXABLE PROPERTY.

In answering the question, "what is taxable property?" it is obvious that we should consider all laws of a general character upon the subject of assessments and collection of taxes; for the rule of construction is that all statutes in pari materia must be so construed as that proper effect may be given to the provisions of each enactment. In relation to the assessment of property and collection of taxes, the amount of taxable property is that which a person owns in excess of his indebtedness; for it is "the duty of the assessor to deduct the amount of indebtedness within this state of any person assessed from the amount of his or her taxable property." *Misc. Laws*, c. 57, § 16. *Stephens v. Multnomah County*, 6 Or. 353, 355.

The term "taxable property" is sometimes used in a sense to indicate that which a person owns exclusive of his indebtedness. *Stephens v. Multnomah County*, 6 Or. 353. But it is not so used in *Hill's Ann. Laws*, §

2383, providing that when the assessor by mistake returns as taxable property a greater amount than should be assessed to any person, etc., but it means the property liable to taxation. *Steel v. Fell*, 45 Pac. 794, 795, 29 Or. 272.

The power granted to the city authorities by the charter of Buffalo (Laws 1843, c. 132) to assess all "taxable property" includes, not only such as is then taxable by the general law of the state, but whatever should be made subject to taxation by any general statute after it is passed. *City of Buffalo v. Le Couteulx*, 15 N. Y. 451, 453.

"Taxable property," as used in Act Feb. 26, 1883, § 2, erecting certain portions of old counties into a new county, providing that a certain portion of certain indebtedness should be divided between the counties in proportion to the taxable property of one of the counties, a portion of which had been taken, signifies liable to taxation, something of value, subject to assessment and to be levied on and sold for taxes. The mere assessment of property does not make it taxable. In order to render property taxable, there must be the fundamental right to assess. *Custer County v. Yellowstone County*, 9 Pac. 586, 587, 6 Mont. 89.

The words "taxable property," as used in the charter of Charleston, granted in 1783, authorizing the city council to make such assessments on the inhabitants of the city or those who hold taxable property within the same as shall appear to them expedient, embrace all property not exempt by the law of the state from taxation. Hence the lands belonging to St. Philip's Church in the city are exempt from city taxation, since property of churches is exempted from taxation by various acts of the Legislature. *Vestry of St. Philip's Church v. City of Charleston (S. C.)* McMull. Eq. 139, 144, 150.

The words "taxable property," when used in the title relating to taxation, shall include taxable estates, both real and personal, including choses in action. V. S. 1894, 356.

TAXABLE VALUE.

"Taxable value" is the sum at which property is appraised for taxation. *Amoskeag Mfg. Co. v. City of Manchester*, 46 Atl. 470, 472, 70 N. H. 200.

The "taxable value" of a corporation is its bonded indebtedness, together with its stock. *Simpson v. Hopkins*, 33 Atl. 714, 715, 82 Md. 478.

TAXED.

Under the Iowa statute declaring that, before a deed can be executed by a county commissioner for lands sold by him for de-

linquent taxes, a notice that a deed will be applied for must be served by the party entitled thereto on the person in whose name the land is "taxed," a notice must be served on the person in whose name the land is listed for assessment. *Heaton v. Knight*, 16 N. W. 532, 63 Iowa, 686.

After lands are listed and assessed to a person named, and the assessment is returned to the auditor, they are to be regarded as taxed, within the meaning of Code 1873, § 894, providing that notice of the expiration of the time for redemption from a tax sale shall be given to the person in whose name the land is taxed, etc. *Adams v. Snow*, 21 N. W. 765, 766, 65 Iowa, 435.

TAXING BY UNIFORM RULE.

See "Uniform Rule of Taxation."

TAXING MASTER.

The officer of the court whose duty it is to tax the costs of actions is known as a "taxing master." *Hersey v. Hutchins*, 52 Atl. 862, 71 N. H. 458.

TAXING POWER.

The "taxing power" is one of the attributes or incidents of sovereignty. It is and must be inherent in every form of government, and it could be exercised even with us, although the Constitution was entirely silent on the subject. The necessity for the exercise of the power rests wholly in the discretion of the Legislature, and that discretion extends to the selection of the subjects of taxation or the things to be taxed, whether it be persons or property, business, or vocation. *Scott v. Pitt*, 62 N. E. 662, 664, 169 N. Y. 521, 58 L. R. A. 372.

TAXPAYER.

See "Delinquent Taxpayer"; "Property Taxpayer."

Under the vote of a town to divide that portion of the surplus revenue which belongs to the town among the resident taxpayers in such town at the time of passing the vote, a resident in the town, liable to taxation, but who has never been taxed therein, is not entitled to a share of such surplus. *Thompson v. Town of Newtown*, 21 N. H. (1 Forst.) 595, 599.

Act Feb. 27, 1857, § 2, gave the council of the city of Hannibal power to borrow money on the credit of the city, but provided that the interest should not exceed a certain amount, unless two-thirds of the qualified voters of the said city should vote for the payment of a greater rate. Section 3 provided that the council should have power to

subscribe for railroad stock, but that before such subscription would be valid it should be ratified by a majority of the taxpayers at a poll to be opened for that purpose. Section 10, prescribing the qualification of voters in said city, required, among other things, that the voters should have paid a tax or city license. In considering the validity of the bonds issued pursuant to such sections, the court said: "It is argued that the Legislature used the word 'taxpayers' in the third section of Act 1857 in a sense designedly differing from that of 'qualified voters' in the second section, who are to decide upon the question of the rate of interest on money borrowed in excess of 10 per cent. per annum. We see no evidence, however, of any such intention. On the contrary, that supposition would necessitate the conclusion that the word 'taxpayers' was meant to include persons not otherwise qualified to vote, for example, any free white male citizen, minors, women, married and unmarried, and nonresidents. The reasonable interpretation is that the question of ratifying the subscription should be submitted to a vote of the taxpayers of the city having the qualification otherwise of lawful voters. *Hannibal v. Fauntleroy*, 105 U. S. 408, 412, 26 L. Ed. 1103.

The term "taxpayers," in Pub. Laws 1884, c. 447, permitting the abolition of school districts in favor of towns, and requiring the school property taken to be appraised, and the taxpayers of each district to have returned to them their proportionate share of the appraised value of the property in the district, should be construed to mean the individual taxpayers, and therefore such rebate should be to them, and not to the school treasurer. In re Town Council of Cranston, 28 Atl. 608, 610, 18 R. I. 417.

A "taxpayer" is a person owning property in the state subject to taxation and on which he regularly pays taxes. *State ex rel. Sutton v. Fasse* (Mo.) 71 S. W. 745.

"Taxpayer" as used in Rev. St. art. 3942, providing that all persons who are legally qualified voters of the state and of the county of their residence, and who are resident taxpayers in said district, as shown in the last assessment rolls of the county, shall be entitled to vote in any such school district, does not mean only those whose names appear on the last assessment rolls of the county, but means one owning property within the territory subject to taxation. To constitute a taxpayer in the meaning of the statute, it is not necessary that the taxes due on his property should have been assessed. *Hillsman v. Faison*, 57 S. W. 920, 922, 23 Tex. Civ. App. 398.

Act N. Y. May 18, 1869 (Laws 1869, c. 907), as amended by Act May 12, 1871 (Laws

1871, c. 925), provides for a petition of taxpayers for the issuance of bonds by a municipal corporation, and provides that the word "taxpayers" means the owners of non-resident lands taxed as such. Held that, where a petition under the statute uses the word "taxpayers," it would be deemed to include owners of nonresident lands taxed as such. *Whiting v. Town of Potter* (U. S.) 2 Fed. 517, 520.

Laws 1871, c. 925, § 1, provides that "the word 'taxpayer' shall mean any corporation or person assessed or taxed for property, either individually or as agent, trustee, guardian, executor, or administrator, or who shall have been intended to have been thus taxed, and shall have paid or is liable to pay the tax as hereinbefore provided, or the owner of any nonresident lands taxed as such, not including those taxed for dogs or highway tax only." *Strang v. Cook* (N. Y.) 47 Hun, 46, 48.

Where a statute authorizing the issuing of certain bonds upon the verified petition of a majority of the taxpayers defines "taxpayers" to be "taxpayers, exclusive of those taxed for dogs and highways only," the definition is confined to the use of the word "taxpayers" in the act; and a petition which fails to aver that the petitioners are a majority of the taxpayers, "exclusive of those taxed for dogs or highways only," is fatally defective, and bonds issued upon such petition are invalid. *Town of Mentz v. Cook*, 15 N. E. 541, 543, 108 N. Y. 504.

Where a statute provided for the issuance of bonds and stated that certain persons should be deemed "taxpayers," not including those taxed for dogs or highways only, a petition alleging that the signers were a majority of the taxpayers was not invalidated by an omission to state the words "not including those taxed for dogs or highways only," as the word "taxpayers" did not include those not taxed for dogs. *Rich v. Town of Mentz* (U. S.) 18 Fed. 52, 53.

The word "taxpayer," as used in the title relating to intoxicating liquors, shall not include any person who does not pay a tax for real or personal property assessed on the grand list of the town in which he resides. *Gen. St. Conn. 1902, § 2637.*

"Taxpayers," as used in Ky. St. § 4464, requiring that the petition to take the sense of voters upon a proposition to vote a tax for a graded school must be signed by at least 10 legal voters who are taxpayers, means persons who pay taxes in their own name on property in their own name, and does not include persons whose wives pay taxes. *Tate v. Earlander School Dist No. 32* (Ky.) 49 S. W. 337.

TEACHER.

See "Religious Teacher"; "School Teacher."

"Teachers," as used in Act April 1, 1872, giving the board of education of the city and county of San Francisco authority to employ teachers and fix, allow, and order paid their salaries, cannot be construed to include inspecting teachers, to perform duties imposed by the act on the board itself and on the superintendent, consisting of visiting the schools, ascertaining their conditions by oral examinations, observing the methods of the teachers, and giving them advice and instruction in the methods of teaching. *Barry v. Goad*, 26 Pac. 785, 786, 89 Cal. 215.

The term "teacher," as used in the act relating to schools in city districts of the first class, shall include all teachers regularly employed by boards of education in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers. *Bates' Ann. St. Ohio*, 1904, § 3897d.

TEACHER'S CERTIFICATE.

A certificate granted to a teacher is a license to him to pursue a certain avocation and to seek a certain public employment, which, without it, he cannot pursue or seek. A right during the period for which the certificate is granted to him is a valuable property in his hands, just as a right to practice as an attorney of a court is property in the hands of him who has been admitted to it. The annulment of the teacher's certificate is the destruction of his property. *Scheibner v. Baer*, 84 Atl. 193, 194, 174 Pa. 482.

TEAM.

See "Working Team."

One horse, harness, and cart are within the meaning of the word "team," as used in and exempted from execution by Laws 1842, c. 157. *Harthouse v. Rikers*, 8 N. Y. Super. Ct. (1 Duer) 606, 607, 11 N. Y. Leg. Obs. 223, 224.

"Team," as used in exemption laws exempting the team of the debtor, etc., consists of one or two horses, with their harness and the vehicle to which they are customarily attached for use. *Brown v. Davis* (N. Y.) 9 Hun, 43, 44.

The "team" which the exemption laws exempt from sale on execution, to the value of a certain sum, may be composed of one or more animals, and whatever number may compose it, if within the limit as to value fixed by statute, it will be exempt. *Wilcox v. Hauley*, 31 N. Y. 648, 655.

As one for carrying loads.

"Team," as used in Gen. St. art. 14, § 3, providing for the mode of passing when any wagon, carriage, etc., should meet or overtake a team on the highway, means vehicle, with the animals drawing it, used for carrying loads, as distinguished from one used for the carrying of persons. *Hotchkiss v. Hoy*, 41 Conn. 568, 577.

In an action to recover for injuries caused by a collision between teams, it was alleged that the plaintiff was driving in a wagon, and that defendant was driving in another wagon, on the same side of the same highway, so that the team of said defendant was approaching that of the plaintiff from the opposite direction, and that the teams of defendant and plaintiff would have to meet, and treble damages were sought to be recovered under a statute which provides that the drivers of vehicles for the conveyance of persons, meeting each other on the highway, who shall fail to turn to the right and slacken speed, shall pay to the party injured treble damages for driving against the other vehicle. It was held that the word "wagon" and "team" might as properly be used to designate a vehicle for the carriage of goods as one for the conveyance of persons. Neither of them nor both of them constitute a sufficiently specific description of the vehicle named in the statute to entitle the recovery of treble damages. *Rowell v. Crothers*, 52 Atl. 818, 75 Conn. 124.

Driver.

"Team," as used in Rev. St. c. 80, § 3, prohibiting a person from recovery of damages for injuries sustained because of the breaking down of a toll bridge, if the weight of the load which he was transporting exceeded a certain amount exclusive of the "team and carriage," should be construed as not including the weight of the driver, seated upon the load. *Dexter v. Canton Toll Bridge Co.*, 12 Atl. 547, 548, 79 Me. 563.

As live stock.

The word "team" means two or more horses, oxen, or other beasts harnessed together to the same vehicle for drawing. It may be admitted that the term "stock" does not embrace the idea of a team; but it cannot be denied that the term "team" embraces the idea of live stock. A team, therefore, is composed of live stock, and cannot exist without it, and is embraced within the meaning of the term "live stock" as used in Code, § 1289, making a railroad corporation liable for injuries to live stock running at large by reason of the railroad's failure to fence at all points where the right to fence exists. *Inman v. Chicago, M. & St. P. R. Co.*, 15 N. W. 286, 287, 60 Iowa, 459.

Load.

As used in Gen. St. c. 60, § 1, making towns liable for damages happening to any person or his team or carriage by reason of defects in the highways, the words "team or carriage" are meant to include whatever animal or animals drew or carried the load and their harness, and also the load itself. *Woodman v. Town of Nottingham*, 49 N. H. 387, 393, 6 Am. Rep. 526.

One horse.

A single horse is a "team," and exempt from execution as such under the New York exemption laws, when it is kept and used with another horse, which the debtor hires to work with it. *Lockwood v. Younglove* (N. Y.) 27 Barb. 505, 507.

A single horse, kept and used for drawing loads, etc., is within the exemption from execution of a "team," under the provisions of Laws 1842, c. 157; it not being necessary, to constitute a team within the purview of the act, that there should be two or more horses. *Hutchinson v. Chamberlin*, 11 N. Y. Leg. Obs. 248, 250; *Hoyt v. Van Alstyne* (N. Y.) 15 Barb. 568, 571.

"Team," as used in the statute providing for the recovery of damages against a town for injuries done to the plaintiff's person, team, or carriage by the insufficiency of a highway, means the animal or animals drawing or carrying a load, whether one or many, or that are driven over the highway, whether in harness or otherwise. *Conway v. Town of Jefferson*, 46 N. H. 521, 526.

The word "team," when applied to horses, imports the use of horses together. *Corp v. Griswold*, 27 Iowa, 379, 380.

The term "team," in a statute exempting from execution a team, etc., includes one horse, if necessary to the support of the debtor's family. *Knapp v. O'Neill* (N. Y.) 43 Hun, 317, 318.

"The word 'team,' as used in our language and in this country, has a broader and more extensive meaning than that given in our dictionaries, or in any of the cases that I find which have dwelt upon its interpretation. A horse or other animal, trained and used for labor and service, when it constitutes the motive power to accomplish such labor and service, is, in my opinion, a 'team,' according to the popular and statutory meaning of the word." *Finnin v. Malloy*, 33 N. Y. Super. Ct. (1 Jones & S.) 882, 891.

As one or more pairs of draught horses.

"Team," as used in a guaranty that a certain harvest machine may be operated by one good team, may mean either one or more pairs of any kind of draught animals; and hence parol evidence is admissible to show declarations of the seller as to the

amount of power required to operate the machine. *Ganson v. Madigan*, 15 Wis. 144, 153, 82 Am. Dec. 659.

Unbroken colt.

Though a statute exempts in terms a "team of horses," the courts will not construe the term so literally as to deny the exemption of an unbroken colt, of which the debtor became possessed in his efforts to obtain a horse. *Nelson v. Fightmaster*, 44 Pac. 218, 214, 4 Okl. 38.

An unbroken colt, that had never been used, and which there was no evidence the execution debtor intended to use, he having two other horses for the purpose of his business, is not a team, or part of a team, exempt from execution. *Hogan v. Neumeister*, 76 N. W. 65, 117 Mich. 498.

The term "team," in a statute providing that in case of any special damage to any person or his team or carriage, by reason of obstruction, insufficiency, or want of repair of any highway or bridge of any town, the person injured shall recover his damage in an action against the town, includes a two year old colt, driven with two other colts, loose in the highway, as the statute is to be read in connection with another statute, that no damages shall be allowed for injury to droves of cattle by reason of deficiency of a bridge, or if, when the accident happened, the number of cattle on the bridge exceeded 25. *Elliott v. Town of Lisbon*, 57 N. H. 27, 29.

Wagon.

A wagon, customarily used in connection with a horse or horses and harness, constitutes a part of a team, within the meaning of the exemption laws, providing that one team of a debtor shall be exempt from execution. *Dains v. Prosser* (N. Y.) 32 Barb. 290, 291.

A wagon is not included within the word "team," within the statutes providing for the exemption of a team from execution. *Morse v. Keyes* (N. Y.) 6 How. Prac. 18, 21.

As used in Laws 1842, exempting a team from execution, "team" includes a one-horse wagon belonging to a practicing physician. *Eastman v. Caswell* (N. Y.) 8 How. Prac. 75, 76.

A one-horse wagon belonging to a practicing physician is exempt from execution under an act exempting "working tools and team." *Eastman v. Caswell* (N. Y.) 8 How. Prac. 75, 76.

TEAM WORK.

"Team work," as used in a statute exempting from execution two horses kept and

used for team work, means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, or transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation. None of these uses of a horse are suggested by the expression "kept and used for team work." *Hickok v. Thayer*, 49 Vt. 372, 374.

"Team work," as used in the statute exempting to a debtor two horses, kept and used for team work, does not include a horse kept and used as a racer, and not otherwise, although he had been casually used on a few occasions for work, and also in carrying members of the bankrupt's family to and from work or school. *In re Libby* (U. S.) 103 Fed. 776, 777.

TEAMSTER.

"Teamster," as used in Prac. Act, § 219, subd. 6, exempting from execution or attachment the team by the use of which a huckster, peddler, teamster, or other laborer habitually earns his living, means a person who is engaged with his own team or teams in the business of teaming; that is, in the business of hauling freight for others for a consideration, by which he habitually supports himself and family, if he has one. The fact that a carpenter or other mechanic, who occupies his time in labor at his trade, purchases a team and also carries on the business of teaming by the employment of others, does not constitute him a teamster in the sense of the statute, although it is not necessary that a teamster should drive his team in person to be entitled to the exemption. In order to entitle a party to the exemption as a teamster, he must show that he habitually earns his living by the use of such horses, etc. A clerk in a store at a stated salary, who had purchased a team mainly to furnish employment for his son, 17 years old, and by whom exclusively the team was used habitually in hauling freights for the store and for other parties, and in delivering goods from the store to customers, was not a teamster within the meaning of the statute. *Brusie v. Griffith*, 34 Cal. 302, 306, 91 Am. Dec. 695.

"Teamster," as used in Comp. Laws, § 1282, exempting from execution the team by the use of which a teamster or other laborer habitually earns his living, means one who is engaged with his own team or teams in the business of teaming; that is to say, in

the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business, habitually and for the purpose of making a living by that business. *Elder v. Williams*, 16 Nev. 416, 420.

As laborer or workman.

A "teamster," using his own team and engaged in hauling slate for a slate company for a compensation based on the amount hauled, is not, strictly speaking, either a laborer or workman, and thus is not protected by a statute making the stockholders of the slate company personally liable for the wages of its workmen and laborers. *Moyer v. Pennsylvania Slate Co.*, 7 Pa. (21 P. F. Smith) 293, 298.

As livery stable keeper.

"Teamster," as used in the exemption statute, cannot be construed to include a livery stable keeper, simply because he drives his own team in carrying persons around town. In common speech a teamster is one who drives a team; but in the sense of the statute every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster when he does not drive a team continually. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually and for the purpose of making a living by that business. *Edgecomb v. His Creditors*, 7 Pac. 533, 534, 19 Nev. 149.

TEASER.

"Teaser" is the name given to a machine used for cleaning cotton. *Whitney v. Carter* (U. S.) 29 Fed. Cas. 1070, 1071.

TECHNICAL

The "technical import" of words is that which is suggested by their use in reference to a science or profession, that which particular use has affixed to them; and when the natural and technical import unite upon a word, both their rules combine to control its construction, and no other signification than that which they suggest can be affixed to it, unless upon the most positive declaration that a different one was designed. *People v. Hallett*, 1 Colo. 352, 359; *People v. May*, 3 Mich. 598, 605.

TECHNICAL ERROR.

"Technical errors," as used in Rev. St. 1881, § 1891, providing that, in consideration of questions presented on an appeal, the Supreme Court shall not regard technical errors, etc., means "merely abstract and practically harmless errors." *Epps v. State*, 1 N. E. 491, 502, 102 Ind. 539.

TECHNICALLY PURE.

"Technically pure," as used in reference to substances employed in chemical process, means pure in the ordinary acceptation of the terms of the art. *Matheson v. Campbell* (U. S.) 69 Fed. 597, 608.

TELEGRAPH.

The word "telegraph" is derived from the Greek, and signifies to write afar off or at a distance. It is a word which has been applied to various contrivances or devices to communicate intelligence by means of signals or semaphores which speak to the eye for a moment. But, in its primary and literal signification of writing, printing, or recording at a distance, it never was invented, perfected, or put into practical operation till it was done by Morse. He preceded Steinhell, Cook, Wheatstone, and Davy in the successful application of this mysterious power or element of electro-magnetism to this property, and his invention has naturally superseded every contrivance. It is not only a "new and useful art," if that term means anything, but a most wonderful and astonishing invention, requiring tenfold more ingenuity and patient experiment to perfect it than the art of printing with types and presses as originally invented. *O'Reilly v. Morse*, 56 U. S. (15 How.) 62, 134, 14 L. Ed. 601.

"Telegraph," as now usually accepted and in common parlance, is generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of, first, a battery or other source of electric power; secondly, of a line, wire, or conductor for conveying the electric current from one station to another; thirdly, of the apparatus for transmitting, interrupting, and, if necessary, reversing the electric current at pleasure; and, fourthly, of the indicator or signalling instrument. *Hockett v. State*, 105 Ind. 250, 261, 5 N. E. 178, 185, 55 Am. Rep. 201 (citing *Imperial Dict.*).

In Louisiana the court of appeal will take judicial notice that the "telegraph" of a railroad usually consists of wires strung on posts set upright in the ground alongside of the road. *P. & H. H. Youree v. Vicksburg, S. & P. R. Co.*, 34 South. 779, 781, 110 La. 791.

As common carrier.

See "Common Carrier."

As an instrument of commerce.

The electric telegraph is an instrument of commerce, and thus subject to regulation by Congress under the commerce clause of the Constitution. "The electric telegraph marks an epoch in the progress of time. In little more than one-fourth of a century it has changed the habits of business and become one of the necessities of commerce. It is indispensable as a means of intercommunication, and especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than 80 per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders, contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships are directed. The telegraphic announcements of the market abroad regulate prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure important information." A state cannot exclude a telegraph company, which has accepted the restrictions and conditions imposed by Act Cong. April 14, 1866, from entering the state. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9, 24 L. Ed. 708.

As public use.

See "Public Use."

Telephone included.

The term "telegraph" means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word "telephone." *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312, 315, 316, 59 Pac. 698, 699.

"Telegraph," as used in *Bates' Ann. St.* § 3454, authorizing a magnetic telegraph company to construct telegraph lines from point to point along and upon a public road by the erection of the necessary fixtures, is a mode of transmitting messages or other communications sufficiently comprehensive to embrace the telephone. *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Telegraph Ass'n*, 27 N. E. 890, 894, 48 Ohio St. 390, 12 L. R. A. 534, 29 Am. St. Rep. 559.

"Telegraph," as used in *Acts 1868, c. 471, § 133*, declaring that any person, etc., owning a telegraph line doing business within the state shall receive dispatches from other telegraph lines, etc., should be construed to embrace "telephone." *Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co.*, 7 Atl. 809, 810, 66 Md. 399, 59 Am. Rep. 167.

"Telegraph," as used in an act incorporating a telegraph company, may be taken to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, and as sufficiently comprehensive to embrace the telephone; and a company organized as a telegraph company under the general corporation law is authorized to do a general telephone business. *State v. Central New Jersey Telephone Co.*, 21 Atl. 460, 462, 53 N. J. Law 341, 11 L. R. A. 664.

Rev. St. §§ 5263, 5268 [U. S. Comp. St. 1901, pp. 3579, 3581], authorizing telegraph companies to construct and operate their lines over and along post roads of the United States, includes telephone companies. The telephone and telegraph both communicate messages by means of electricity over wires. The telegraph communicates these messages by sound of instruments; the telephone by the human voice, usually. Both depend upon electricity for their action. Each is but a form of use, and the product and result of the same principle. The names are only used to distinguish the method of the communication. *City of Richmond v. Southern Bell Telephone & Telegraph Co.* (U. S.) 85 Fed. 19, 24, 28 C. C. A. 659.

The telephone is simply an improved telegraph, and was formerly called the speaking telegraph. The instruments used at the terminals are different; but the poles, the wires, the insulators, and the generation of the electric current are all the same. The slight technical difference was exceedingly well stated by one of the witnesses at the hearing in the following language: "In sending telegraph messages, the sender writes out into words what he wishes to transmit, and another party takes it and translates it into sounds that represent letters, which are sent over the wire by breaking the electric current, which reproduces the sounds at the other end, which are retranslated by the operator at the end into words and delivered to the customer; and in sending the message by telephone the person who desires to send a message speaks into the instrument, and, instead of breaking and interrupting the current, it is partially broken and varied by the air waves produced by speaking, and the spoken words of air waves pass over the wire by their effect on the electric current—that is, they are reproduced into sound waves, and give out the same sound at the other end as was spoken into the instrument at the transmitting end—and so comes within the provision of Rev. St. U. S. §§ 5263, 5268 [U. S. Comp. St. 1901, pp. 3579, 3581], authorizing telegraph companies to maintain telegraph lines over the public domain of the United States. *Northwestern Telephone Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N. W. 315, 317, 78 Minn. 334.

It is held that the term "telegraph," in Rev. St. arts. 698, 699, providing that corporations created for the purpose of constructing and maintaining magnetic telegraph lines may set their poles upon public roads, etc., includes telephones. *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, 55 S. W. 117, 93 Tex. 313, 49 L. R. A. 459, 77 Am. St. Rep. 884.

The term "telegraph companies," in Code 1873, § 2882, providing that actions may be brought against telegraph companies in any county through which the line passes or is operating, is to be construed as including telephone companies. "In *Iowa Union Telephone Co. v. Board of Equalization*, 67 Iowa, 250, 25 N. W. 155, it was held that a telephone company was to be regarded, for the purposes of taxation, as coming within the denomination of 'telegraph company,' within the meaning of the statute." *Franklin v. Northwestern Telephone Co.*, 28 N. W. 461, 462, 69 Iowa, 97.

The term "telegraph companies," in a statute authorizing a city to license telegraph companies, includes telephones. "Of course, there is a distinction between the two classes of business; but in almost every respect they are very similar, if not identical. One may require more lines of wire than the other; but we are not aware of any other distinction, outside of their office or places of operation, distinguishable to the naked eye. *Wisconsin Telephone Co. v. City of Oshkosh*, 21 N. W. 828, 830, 62 Wis. 32.

A "telephone company" is a "telegraph company," in the meaning of the latter term as used in a statute providing for assessing telegraph lines and property. "Both the telephone and telegraph are used for distant communication by means of wires stretched over different jurisdictions. The fundamental principle by which communication is secured is the same. It was held in *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828, that a statute authorizing the formation of corporations for building, owning, and operating telegraph lines was sufficient to authorize the formation of corporations for building, owning, and operating telephone lines; the decision being based upon the identity of the principle by which communication in each case is secured." *Iowa Union Telephone Co. v. Board of Equalization*, 25 N. W. 155, 67 Iowa, 250.

A "telegraph company," within the meaning of Revenue Act June 7, 1879, authorizing the taxation of telegraph companies, includes a telephone company. In so holding the court cites the English case of *Attorney General v. Edison Telephone Co. of London*, L. R. 6 Q. B. Div. 244, in which it was held that a telephone line operated under telephone patents was a telegraph line, and communications sent over it were

telegrams, within the meaning of the act of 1869, conferring exclusive telegraph privileges upon the Postmaster General. In the opinion by Stephen, J., "It is said that in Mr. Edison's specification the words 'telegraph' and 'telegraphic' are frequently used in reference to his invention." And it is further stated in the same opinion that in Webster's Dictionary, published in 1856 (Am. Ed. 1854), an electro-magnetic telegraph is defined under the word "telegraph" as an instrument or apparatus for communicating words or language to a distance by the use of electricity, and under the head of "electro-magnetic telegraph" as an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any distance with the velocity of lightning. The last definition is that of Morse himself, and, as will be seen by the date, both were given many years before telephone transmitters or receivers were ever dreamed of. The same edition of Webster defines "telegraph" to be a machine for communicating intelligence from a distance by various signals or movements previously agreed upon, which signals represent letters, words, or ideas, which can be transmitted from one station to another as far as the signals can be seen. This definition shows that the word "telegraph" did not originally include the idea of transmission over a wire, by means of electricity or otherwise, but merely signals addressed to the eye, and, compared with the later definitions, illustrates the changes of meaning which words necessarily undergo in consequence of a never ceasing progress of discovery and invention. *Commonwealth v. Pennsylvania Telephone Co.* (Pa.) 42 Leg. Int. 180.

"Telegraphy" is the transaction of business over or through wires. The title of Act May 1, 1876, entitled "An act supplementary to 'An act to provide for the incorporation and regulation of certain corporations' relative to the incorporation and powers of telegraph companies for the use of individuals," etc., sufficiently expresses its purpose to authorize the incorporation of telephone companies, since a telephone company is virtually a telegraph company. *The York Telephone Co. v. Keesey*, 5 Pa. Dist. R. 366, 369.

TELEGRAPH COMPANY.

"Telegraph companies," like common carriers, are public servants, and held to a high degree of diligence and a strict discharge of duty; and, having violated their duty and been negligent in its discharge, such companies are liable in damages. *Western Union Telegraph Co. v. Frith*, 58 S. W. 118, 119, 105 Tenn. 167 (citing *Marr v. Western Union Telegraph Co.*, 85 Tenn. [1 Pickle] 529, 3 S. W. 496; *Wadsworth v. Same*, 86 Tenn. [2 Pickle] 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Western Union Telegraph Co. v. Mellon*, 96

Tenn. 66, 33 S. W. 725; *Jones v. Western Union Telegraph Co.*, 101 Tenn. 442, 47 S. W. 699).

Any person or persons, joint-stock company, association, or corporation engaged in transmitting to, from, through, or in the state telegraph messages, shall be deemed and held to be a telegraph company. Ind. T. Ann. St. 1899, § 4954.

The term "telegraph company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, when engaged in the business of transmitting to, from, through, or in the state telegraphic messages. *Bates' Ann. St. Ohio* 1904, §§ 2777, 2780-17.

Telegraph companies are quasi public servants. *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 497, 10 Atl. 495, 1 Am. St. Rep. 353.

Railroad company.

A railroad company, operating a telegraph line for its trains, and not for profit, is not a "telegraph company operating miles of wire," within Acts 1888, c. 3, and is not, therefore, subject to taxation as such. *Adams v. Louisville, N. O. & T. Ry. Co.* (Miss.) 18 South. 932.

Telephone company.

Telephone company as, see "Telegraph."

TELEGRAPH OPERATOR.

As a clerk, see "Clerk."

As laborer, see "Laborer."

TELEGRAPH STATIONS.

"Telegraph stations," as used in a contract between a railroad and telegraph company granting the telegraph company the privilege of putting up and maintaining a telegraph wire for general telegraphic correspondence on the line of telegraph posts along the line of the railroad, and liberty to establish and maintain telegraph stations at such points along the line of the road, means ordinary offices for the business of telegraphy at cities or villages along the line of the road. *Railroad Co. v. Telegraph Co.*, 38 Ohio St. 24, 29.

TELEPHONE.

The prohibition against charging or receiving more than \$50 per annum for the use of a telephone on a separate wire, which is made by District of Columbia Corporation Act June 30, 1898, does not require a telephone company to furnish at that rate such additional equipment as wall cabinet and

desk, auxiliary bells, etc., if the separate charges had theretofore been made, since by the words "use of a telephone" the court cannot extend the statute beyond its terms, and hold it to include things which were not theretofore furnished by the company as a part of the telephone. *Chesapeake & P. Telephone Co. v. Manning*, 22 Sup. Ct. 881, 886, 186 U. S. 238, 46 L. Ed. 1144.

As instrument alone.

"Telephone," according to the course of business, refers only to the instrument itself, apart from wires, batteries, call bells, switchboards, and other appliances with which it is connected in its practical and commercial use. *Western Union Telegraph Co. v. American Bell Telephone Co.* (U. S.) 105 Fed. 684, 696.

As a public use.

See "Public Use."

As whole system.

The word "telephone," as used in Act April 13, 1858, regulating the rental allowed for the use of telephones, designates and refers to an entire system or apparatus, composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument. *Hockett v. State*, 5 N. E. 178, 185, 105 Ind. 250, 55 Am. Rep. 201; *Central Union Telephone Co. v. Bradbury*, 5 N. E. 721, 725, 106 Ind. 1.

As public use.

See "Public Use."

Telegraph distinguished.

"Telephone" differs from "telegraph" very materially, in this: that the transmission of news, the sending and receiving of messages, by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. Webster defines "telephone" as an instrument for conveying sounds to a great distance. *Central Union Telegraph Co. v. State*, 118 Ind. 194, 206, 19 N. E. 604, 610, 10 Am. St. Rep. 114.

TELEPHONE COMPANY.

As telegraph company, see "Telegraph."

Telephone companies, like telegraph companies, are common carriers of information, and their lines are daily employed in the transaction of interstate commerce. Therefore neither a state nor an Indian nation has power to grant to one company the exclusive right to maintain telephone lines within its territory. Such a grant, being void ab initio, cannot be invoked to prevent the construction and maintenance of

lines by other companies or persons, although they are not interstate, but merely local. *Muskogee Nat. Telephone Co. v. Hall*, 118 Fed. Rep. 382, 384, 55 C. C. A. 208.

A telephone company is a common carrier in the same sense as a telegraph company, and it has certain well-defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently in legal contemplation devoted to a public use. *Hockett v. State*, 5 N. E. 178, 185, 105 Ind. 250, 55 Am. Rep. 201.

A "telephone company" is a common carrier, in the sense that it is bound to furnish service to any one offering to comply with its reasonable requirements, not only in respect to its public stations system, but also in respect to the so-called private system of instruments installed in offices, residences, and places of business. *State ex rel. Payne v. Kinloch Telephone Co.*, 67 S. W. 684, 635, 93 Mo. App. 349.

A telephone company is a common carrier, as was said by Justice Brewer in *Missouri v. Bell Telephone Co.* (U. S.) 23 Fed. 539. A telephone system is simply a system for the transmission of intelligence. It is, perhaps, in a limited sense and yet in a strict sense, a common carrier. The moment it establishes a telephonic system, it is bound to deal equally with all citizens in every department of business, and, the moment it opened its telephonic system to one telephone company, that moment it put itself in a position where it was bound to open this system to any other telephone company tendering equal pay for equal services. Being a common carrier, it has not the right to discriminate in granting licenses for the use of the telephone instruments. *Delaware v. Delaware & A. Telegraph & Telephone Co.* (U. S.) 47 Fed. 633, 638.

Telephone companies are the common carriers of news, and all persons are entitled to the enjoyment of the benefits to be derived from the use of the telephone, and the company is a public servant in the commerce of the country and is subject to the process of the court in compelling it to discharge its public duties by supplying telephones to all alike who demand them, without discrimination. *State v. Nebraska Telephone Co.*, 22 N. W. 237, 239, 17 Neb. 126, 52 Am. Rep. 404.

The term "telephone company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, engaged in the business of transmitting to, from, through, or in the state telephonic messages. *Bates' Ann. St. Ohio* 1904, §§ 2777, 2780-17.

Any joint-stock association, company, copartnership, or corporation, whether incorporated under the laws of this state, or of any other state, or of any foreign nation, engaged in transmitting to, from, through, in, or across the state of South Carolina telegraphic messages, shall be deemed and held to be a telegraph company. Civ. Code S. C. 1902, § 288.

TELEPHONE EXCHANGE.

A "telephone exchange" is an arrangement for putting up and maintaining wires, poles, and switchboards within a given area, with a central office and the necessary operators to enable hirers of telephones within that area to converse with each other. *Western Union Telegraph Co. v. American Bell Telephone Co.* (U. S.) 105 Fed. 684, 696.

TELEPHONE LINE.

In its proper sense, "line" means wire connecting one telegraph or telephone station with another, or the whole of a system of telegraph or telephone wires under one management or name. *Webst. Dict.* A telegraph wire between stations, forming with them the circuit. *Cent. Dict.* As used in the telephone business, it means the line of poles and wires supported thereon, without regard to the number of those wires. *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 21 So. 570, 571, 39 Fla. 25.

TELEPHONIC SYSTEM.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. *Commercial Union Telephone Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 250, 17 Atl. 1071, 1074, 5 L. R. A. 161, 15 Am. St. Rep. 893 (citing *Missouri v. Bell Telephone Co.* [U. S.] 23 Fed. 539).

TELLER.

See "Bank Teller."

TELLTALE.

A "telltale," or tickler, is a contrivance to warn railroad brakemen of the proximity of a bridge. It is constructed of an upright on each side of the road and a pole running across the road and resting upon the uprights, from which pole a number of strands of wire are suspended. *Wallace v. Central Vt. R. Co.*, 18 N. Y. Supp. 280, 281, 63 Hun, 632.

TEMPER.

See "Violent Temper."

"Temper," in Pen. Code 1895, art. 7, defining adequate cause, as that term is used in article 698, defining manslaughter as voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law, as that it would commonly produce a degree of anger in a person of "ordinary temper" sufficient to render the mind incapable of cool reflection, is not of the same meaning as the word "courage." "Temper" means disposition of mind, as inclination to give way to anger, resentment, or the like. "Courage" means that quality of mind which enables one to encounter dangers and difficulties with firmness, or without fear or depression of spirits; valor; boldness; bravery, etc. A man may be a person of mild and agreeable temper or disposition, capable of patience and forbearance, with coolness under great insults or provocation, and yet he may be a man of great courage; and vice versa. It is erroneous, in an instruction on adequate cause in a homicide case, to use the phrase "ordinary temper and courage," instead of the words "ordinary courage." *Gardner v. State*, 48 S. W. 170, 171, 40 Tex. Cr. R. 19.

TEMPERANCE.

"Temperance," as used in an information in the nature of a quo warranto for the forfeiture of the charter of a corporation alleged to have been formed to promote the cause of temperance, has no fixed, legal meaning, as contradistinguished from its usual import. Webster defines it as "habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation, as temperance in eating and drinking, temperance in the indulgence of joy or mirth." The term "temperance" is too vague and uncertain to enable it to be said therefrom that a fund in possession of such corporation is a public charity, which can be administered by a court of equity; and it follows that the perversion of the fund is not an injury to the public, and forfeiture therefor cannot be maintained. *People v. Dashaway Ass'n*, 24 Pac. 277, 279, 84 Cal. 114, 12 L. R. A. 117.

A gift for the promotion of temperance will be construed as a gift to a charity. *Harrington v. Pier*, 82 N. W. 845, 857, 105 Wis. 485, 50 L. R. A. 307, 76 Am. St. Rep. 924.

TEMPERANCE SALOON.

A "temperance saloon" is a place where nonintoxicating drinks and other refresh-

ments are kept for sale. *City of Clinton v. Grusendorf*, 45 N. W. 407, 408, 80 Iowa, 117.

TEMPERATE.

Webster defines "temperate" as moderate, or not excessive. The use of the words "sober and temperate in the use of spirituous liquors," in insurance policies, does not imply that, in order for a man to be sober and temperate, he should abstain from the use of intoxicating liquors; and the fact that a man may have been drunk on some occasions does not of itself make him an intemperate man. *Wolf v. Mutual Ben. Life Ins. Co.* (U. S.) 30 Fed. Cas. 407, 409.

"Temperate," within the meaning of a question, in an application for life policy, whether the applicant has always been temperate, is to be construed as meaning abstinence from the excessive or injurious use of liquors, and not total abstinence. The word "temperate" suggests moderation and restraint from excessive or injurious use, and not total abstinence. *Chambers v. Northwestern Mut. Life Ins. Co.*, 67 N. W. 367, 369, 64 Minn. 495, 53 Am. St. Rep. 549.

The words "sober and temperate," as used in an application for insurance, are to be taken in their ordinary sense. They do not imply total abstinence. The moderate, temperate use of intoxicating liquors is consistent with sobriety; but, if one use liquors to such an extent as to produce frequent intoxication, he is not "sober and temperate," within the meaning of the contract. *Brockway v. Mutual Ben. Life Ins. Co.* (U. S.) 9 Fed. 240, 253.

A warranty in an insurance policy that the insured was "temperate," etc., meant that his habit was to refrain from excessive indulgence in the use of intoxicants, and not that he abstained from all use. *Meacham v. New York State Mut. Ben. Ass'n*, 24 N. E. 283, 120 N. Y. 237.

TEMPERATE HABITS.

A statement by an applicant for life insurance that he was of "temperate habits" does not imply total abstinence, and is not falsified by proof of a single or incidental use. *Supreme Lodge K. P. v. Foster*, 59 N. E. 877, 881, 26 Ind. App. 333.

An occasional excess in the use of intoxicating liquors does not constitute a habit, or make a man intemperate, within the meaning of a policy insuring one as a person of "temperate habits"; but if the habit has been formed and is indulged in of drinking to excess and becoming intoxicated, whether daily and continuously, or periodically, with sober intervals of greater or

less length, the person addicted to such habit cannot be said to be of temperate habits, within the meaning of the policy. *Union Mut. Life Ins. Co. v. Relf*, 38 Ohio St. 596, 599, 38 Am. Rep. 613.

"Temperate habits," as used in an application for a life insurance policy, in which the insured stated that he was a man of temperate habits, means customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. An occasional use of intoxicating liquors does not render the insured a man of intemperate habits, nor would an exceptional case of excess justify the application of such character to him. If the habits of the insured, in the usual, ordinary, and everyday routine of his life, were temperate, the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional overindulgence. "Intemperate habits cannot be imputed to one because his appearance and actions might indicate a night of excessive indulgence." *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350, 351, 28 L. Ed. 1055.

A life policy representing the insured to be a person of "temperate habits" should be construed to mean that the occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of delirium tremens may sometimes follow a single excessive indulgence. When we speak of the habits of a person, we refer to his customary conduct. It would be incorrect to say that a man has a habit of anything from a single act. The court did not, therefore, in instructing the jury that if the habits of the insured, in the usual, ordinary, and everyday routine of his life, were temperate, the representations made are not untrue, within the meaning of the policy, although he may have an attack of delirium tremens from an exceptional overindulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. *Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 7 Sup. Ct. 1221, 1228, 122 U. S. 501, 30 L. Ed. 1100.

"Habit," as generally understood and as defined by lexicographers, is a disposition or condition of the mind or body; the tendency or aptitude for the performance of certain actions acquired by custom, or a frequent repetition of the same acts. Habit is that which is held or retained; the effect of custom or frequent repetition. Hence we

speak of good habits and bad habits. Frequent drinking of spirits leads to habits of intemperance, etc. If an applicant for insurance had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to a repetition of it, and led him into what have been called "sprees," and thesesprees were frequent, and rendered him incapable of controlling his appetite while they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounted to a habit. *Davey v. Etna Life Ins. Co.* (U. S.) 20 Fed. 482, 492.

TEMPEST.

A "tempest" is a violent wind, storm, tumult, or commotion. In Webster's Dictionary it is defined as an extensive current of wind, rushing with great velocity and violence, and a storm of extreme violence, and as synonymous with "storm"; thus indicating that a freshet is not a storm, within such term, when used in an insurance policy. *Stover v. Insurance Co. (Pa.)* 3 Phila. 38, 39.

TEMPLATE.

"A template is a piece of sheet iron, the contour of which corresponds to the opening between the rolls." *Johnson Steel Street Rail Co. v. North Branch Steel Co.* (U. S.) 48 Fed. 191, 193.

TEMPORALITIES.

The "temporalities" of the Catholic Church are the revenues of the church derived from pew rents, Sunday and other collections, graveyard charges, school fees, and donations. *Barabasz v. Kabat*, 87 Atl. 720, 86 Md. 23.

TEMPORARILY.

The expressions "for the time" and "for the time being" are equivalent to the word "temporarily," and each constitutes a good definition of that word. *State v. Cunningham*, 55 Atl. 654, 75 Vt. 332.

"Temporarily," as used in Acts 1867, c. 367, authorizing and empowering the board of police commissioners, whenever in their judgment the public peace and tranquillity might require, to order the closing temporarily of all barrooms, bars, drinking houses, and liquor shops, and all other places where liquor is usually sold in the city of Baltimore, construed in its ordinary and accepted meaning and import, means that such orders should operate, not only for a short, but

for a definite, interval or portion of time. *State v. Strauss*, 49 Md. 288, 296.

The word "temporarily," as used in the enacting clause of Act Feb. 20, 1875, entitled "An act to remove the seat of government temporarily to Wheeling," is used in its most familiar signification and import, or natural and ordinary meaning, and in contradistinction to permanent, or any definite period of time, and not in a technical sense. Therefore the removal of the seat of government temporarily to Wheeling means simply that the Legislature and others understood and contemplated that the removal of the seat of government to Wheeling should be for a time, perhaps of not long duration, and at any rate not permanently, but rather until otherwise provided by law. *Slack v. Jacob*, 8 W. Va. 612, 650.

The word "temporarily," as used in the Constitution, providing that the judges of circuit courts may temporarily exchange circuits or hold court for each other, under such regulations as may be made by law, means a local, and not a permanent or lasting, interchange of judges. Act Dec. 25, 1840, providing for the interchange of circuits, provides for a permanent, and not for a temporary, exchange, and is therefore unconstitutional. *Knox v. Beirne*, 4 Ark. (4 Pike) 460, 464.

TEMPORARY.

"Temporary" means lasting for a time only; existing or continuing for a limited time; not of long duration; not permanent; transitory; changing; but a short time. *Moore v. Smead*, 62 N. W. 426, 429, 89 Wis. 558.

2 Bouv. Law Dict. p. 573, defines "temporary" thus: "That which is to last for a limited time, as a temporary statute, or one which is limited in its operation for a particular period of time after its enactment; the opposite of perpetual." *People v. Wright*, 70 Ill. 388, 399.

TEMPORARY ALIMONY.

"Temporary alimony" is intended for the support of the wife pending an action for divorce; and hence the husband cannot set off against the support allowed the value of household goods and other property appropriated or used by the wife. *Dayton v. Drake*, 64 Iowa, 714, 716, 21 N. W. 158.

TEMPORARY INJUNCTION.

A temporary injunction merely prevents action until a hearing can be had. *Calvert v. State*, 34 Neb. 616, 631, 52 N. W. 687, 692.

A preliminary injunction is commonly spoken of as a "temporary injunction," and is

granted pending a hearing on the merits, and only upon complainant's entering into bond, with surety, conditioned and payable as required by law. The writ is obtained upon an *ex parte* hearing, and the bond is required as a protection against the abuse of this extraordinary process and to prevent oppressions by its use. It is different from a permanent injunction, in that it is preliminary to a hearing on the merits, and by no means dependent on such hearing. *Jesse French Piano & Organ Co. v. Porter*, 32 South. 678, 679, 134 Ala. 302, 92 Am. St. Rep. 31.

In *Palmer v. Foley* (N. Y.) 45 How. Prac. 110-118, in discussing the office of a temporary injunction, the court uses this language: "The object of a process of injunction is both preventative and protective. It seeks to prevent a meditated wrong, and not to redress an injury, which can usually be done only at law, and then to protect the party against any unlawful invasion of his rights." *Armitage v. Fisher*, 24 N. Y. Supp. 650, 658, 4 Misc. Rep. 315.

A temporary order of injunction does not contemplate that an order on the application is to be had before the application is finally acted upon. It is to all intents and purposes a complete and final action on the application for a temporary order of injunction, subject only to the right of the opposite party to a modification or dissolution. *State v. Baker*, 88 N. W. 124, 126, 62 Neb. 840.

TEMPORARY INSANITY.

"Temporary insanity," as used in Pen. Code, art. 48, providing that neither intoxication nor temporary insanity produced by the voluntary recent use of ardent spirits shall constitute any excuse for the commission of crime, is that condition of the mind directly produced by the use of ardent spirits; and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and criminal, he is in that condition known as "temporary insanity." So far as the mental status is concerned, there is no difference between temporary insanity and "settled insanity," which is the term applied to delirium tremens caused by the breaking down of the person's system by long-continued or habitual drunkenness, and brought on by abstinence from drink. But they differ widely in their causes and results. The latter is from drink as a remote result; the former, from drinking as a direct result. Settled insanity is an involuntary result, from which all shrink alike. Temporary insanity is voluntarily sought after. In the first there is no criminal responsibility, but in the second responsibility never ceases. *Evers v. State*, 20 S. W. 744, 748, 31 Tex. Cr. R. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811.

TEMPORARY LOAN.

A "temporary loan," within the general municipal law, seems to be one which is to be paid with and by the taxes of a current fiscal year. *People v. Carpenter*, 52 N. Y. Supp. 781, 785, 31 App. Div. 603.

A loan is not temporary which is made for 11 months and then paid to answer a temporary purpose of the creditor, and as soon as that purpose is effected is renewed or made again for the same period. *Una v. Dodd*, 39 N. J. Eq. (12 Stew.) 173, 187.

TEMPORARY RECEIVER.

A "temporary receiver," whether he be the marshal or another, is not a trustee for the creditors of the bankrupt, but is a caretaker and custodian of the visible property pending adjudication, and until a selection of a trustee. If in any sense a trustee, he is a trustee for the bankrupt, in whom is the title to the property until it passes by operation of law, as of the day of the adjudication, to the trustee selected by the creditors. *Boonville Nat. Bank v. Blakey* (U. S.) 107 Fed. 891, 895, 47 C. C. A. 43.

TEMPORARY REMOVAL.

"Temporary removal," as applied to leaving a homestead, means a removal for a fixed and temporary purpose, or for a temporary reason. *Moore v. Smead*, 62 N. W. 426, 429, 89 Wis. 558.

"Temporary removal" means a removal for a fixed and temporary purpose, or for a temporary reason; and, in order to prevent the abandonment of the homestead by such removal, it must be made with a certain and abiding intention of returning to the homestead and abiding thereon as a homestead. *Blackburn v. Lake Shore Traffic Co.*, 63 N. W. 289, 290, 90 Wis. 362.

TEMPORARY RESTRAINING ORDER.

A "temporary restraining order" contemplates a further hearing on the application for a temporary injunction upon notice, and a hearing by the adverse party on such application. *State v. Baker*, 88 N. W. 124, 126, 62 Neb. 840.

TEMPORARY STATUTE.

A temporary statute is a statute limited as to duration. *People v. Wright*, 70 Ill. 383, 399.

TEMPTATION.

"Temptation" is that which tempts to evil; an evil enticement or allurement. *Suther v. State*, 24 South. 43, 45, 48, 118 Ala. 88.

"Temptation," as the term is used in the statement that seduction must be accomplished by means of temptation, deception, etc., is that which tempts to evil; an evil enticement or allurements. The temptation may be by conduct or act, or by suggestions of confidence and secrecy. If they are believed by an unmarried woman, and she is induced thereby to surrender her chastity, it will constitute seduction. *Hall v. State*, 32 South. 750, 758, 134 Ala. 90.

"Temptation" is not always invitation. As the common law is understood by the most competent authorities, it does not excuse trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen. *Paolino v. McKendall*, 53 Atl. 268, 272, 24 R. I. 432, 60 L. R. A. 133, 96 Am. St. Rep. 736 (citing *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364); *Delaware, L. & W. R. Co. v. Reich*, 40 Atl. 682, 684, 61 N. J. Law, 635, 41 L. R. A. 831, 68 Am. St. Rep. 727.

TEN CENT PIECE.

The words "ten cent piece," in an indictment charging the taking by defendant of one ten cent piece in coin, means ten cent piece of the United States. *Kirk v. State*, 32 S. W. 1045, 35 Tex. Cr. R. 224.

TEN DAYS' ADVERTISING.

A decree for a sale of personalty of a decedent's estate after "ten days' advertising" in a newspaper at the place of sale, at which several dailies were published, meant that the notice should be published at least ten times and on ten distinct days. An advertisement on one day ten days prior to the sale would certainly not be ten days' advertising, nor would a publication three times within that time be ten days' advertising. An advertisement on one day, published ten days prior to the sale, might well be an advertising ten days before the sale, but it would not be ten days' advertisement, as prescribed by the decree. *Maxwell v. Burns* (Tenn.) 59 S. W. 1067, 1071.

TEN DAYS' NOTICE.

A subcontractor's notice of lien, given on the fifteenth of February, is given ten days before the filing of the lien, where the same was filed on the 25th of the same month, within Rev. Code 1885, p. 1027, § 22, requiring "ten days' notice" to be given before the filing of any lien; the first day being excluded and the last included in computing the time. *Hahn v. Dierkes*, 37 Mo. 574, 575.

As used in St. 55 Geo. III, c. 68, requiring "ten days' notice" on an appeal to the session

against an order for stopping up a footway, meant ten days' notice, one inclusive and the other exclusive. *Rex v. Justices of West Riding of Yorkshire*, 4 Barn. & Adol. 685.

TEN DOLLAR BILL.

"Ten dollar bill" means a bank bill of the denomination of \$10, or a treasury note of the same denomination. *State v. Freeman*, 89 N. C. 469, 472.

TEN DOLLARS IN MONEY.

An indictment charging the taking of "ten dollars in money" means that money of the value of \$10 was taken. *State v. Brown*, 18 S. E. 51, 52, 113 N. C. 645.

TEN O'CLOCK.

An entry in a justice's docket that a case was adjourned to a certain day at "ten o'clock" will be understood to mean that it was adjourned to 10 o'clock a. m., and not 10 o'clock p. m. *Taylor v. Wilkinson*, 22 Wis. 40, 42.

TENANCY.

See "General Tenancy"; "Joint Tenancy."

"A tenancy exists where one has let real estate to another to hold of him as landlord. When duly created and the tenant put in possession, he is the owner of an estate for the time being, and has all the usual rights and remedies of an owner to defend his possession. But a tenancy does not necessarily imply a right to complete and exclusive possession. It might, on the other hand, be created with implied or express reservation of a right to possession on the part of the landlord, for all purposes not inconsistent with the privileges granted to the tenant." *Morrill v. Mackman*, 24 Mich. 279, 284, 9 Am. Rep. 124.

To constitute "tenancy," the occupant of premises must have some right to a tenancy thereof by contract, express or implied; in other words, he must have a landlord. There must be some privity between him and the landlord, or some agent of the owner, who is authorized to rent or lease the premises. *Bates v. State*, 76 S. W. 462, 463.

No particular form of words is necessary to create a tenancy. Any words that show an indication of the lessor to divest himself of the possession and confer it on another, subject to his own title, is sufficient. *Lightbody v. Truelsen*, 39 Minn. 310, 313, 40 N. W. 67, 68.

TENANCY OF THE PRESENT OCCUPANTS.

The phrase "tenancy of the present occupants," stated in a title insurance policy as

a defect in or objection to the title against which the insurer does not insure, must be construed as the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used, and does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession. The word "tenant" is generally used in a popular sense, and as mentioned in this sense, according to Webster, is "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord." *Place v. St. Paul Title Ins. & Trust Co.*, 69 N. W. 706, 707, 67 Minn. 126, 64 Am. St. Rep. 404.

TENANT.

See "Joint Tenants"; "Subtenant"; "Terre-Tenant."

Tenants and others, see "Others."

The party to whom a lease is made is called the "tenant." *Becker v. Becker*, 43 N. Y. Supp. 17, 22, 18 App. Div. 342.

The term "tenant" is used to designate a person leasing property from the owner thereof. *Jackson v. Harsen* (N. Y.) 7 Cow. 323, 326, 17 Am. Dec. 517.

A tenant is a purchaser of an estate in the land or building hired. *Bowe v. Hunking*, 135 Mass. 380, 383, 46 Am. Rep. 471.

A tenant is one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. *Cliff v. White*, 12 N. Y. (2 Kern.) 519, 527; *Walker v. McCusker*, 12 Pac. 723, 725, 71 Cal. 594.

One who holds land by any kind of title, whether for years, for life, or in fee, is a tenant. *Hosford v. Ballard*, 39 N. Y. 147, 151.

A tenant may be defined to be one who has possession of the premises of another, subject to the other's title and with his consent. *Lightbody v. Truelson*, 39 Minn. 310, 313, 40 N. W. 67, 68.

The common acceptance of the word "tenant" is "one who holds or possesses lands by any kind of right; one who has an occupation or temporary possession of lands or tenements whose title is in another; one who has possession of any place; a dweller; an occupant." And this is substantially the legal definition. *Woolsey v. State*, 30 Tex. App. 346, 347, 17 S. W. 546, 547 (citing *Webst. Dict.*; *Bouv. Law Dict.*).

A tenant is one who occupies lands or premises of another in subordination to that other's title and with his assent, express or implied; but, in order to create the relation, the two elements must concur. *Dixon*

v. Ahern, 14 Pac. 598, 600, 19 Nev. 422; *Adams v. Gilchrist*, 63 Mo. App. 639, 645. Any person who sustains such a relation to property and its owner is a tenant, within the meaning of *Sayles' Civ. St. art. 3122*, prohibiting a tenant from subleasing the premises without his landlord's consent, and his property is subject to a lien to secure the rent, whether such person is a lessee or an assignee, or only a subtenant. *Forrest v. Durnell*, 26 S. W. 481, 482, 86 Tex. 647.

The fact that one is in possession of the lands of another does not of itself establish a tenancy, because, if he is in possession under claim of title in himself, or under title of another, or even in recognition of the owner's title, but without his assent, he is a mere trespasser, and cannot be compelled to yield rent for his occupancy; nor is he estopped from attacking the owner's title. *Dixon v. Ahern*, 19 Nev. 422, 426, 19 Pac. 598.

To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real property simply as a servant or licensee of his master, and in such case he cannot be considered a tenant of the master, so as to make the master guilty of a breach of covenant against reletting by placing him in possession of the property of which the master was a lessee. *Presby v. Benjamin*, 62 N. E. 430, 431, 169 N. Y. 377, 57 L. R. A. 317.

The word "tenant," as used in 2 Rev. St. p. 502, § 15, relating to distraint, does not extend beyond the original lessee and persons coming in under him as assignees, either in fact or in law. It is true that the word, when taken in its largest sense, includes every person who holds land, whatever be the nature or extent of his interest; but the word as used in the statute is in reference to the particular relation between landlord and tenant, lessor and lessee. *Coles v. Marquand* (N. Y.) 2 Hill, 447, 449.

Where an ordinance provided that snow should be removed from the sidewalk in front of a building by the tenant or occupant, and, in case there should be no tenant, by the owner, a building, part of which is leased to one tenant and the rest to another, cannot be regarded as having no tenant within the meaning of the ordinance. *Commonwealth v. Watson*, 97 Mass. 562, 564.

There is no doubt as to the general proposition that ordinarily, where a party in possession conveys to another and thereafter remains in possession, he does so in a general sense as a tenant of his grantee. Under such conditions the law declares the grantor the tenant at law of the grantee, and he may be ejected at any time. The official relation of landlord and tenant, how-

ever, does not exist between them. They become such merely by operation of law, and the meaning is that the grantor thereafter holds in subserviency to his grantee. *Brooks v. Hyde*, 37 Cal. 366, 374.

Cropper distinguished.

The difference between a tenant and a cropper is clear. The tenant has an estate in the land for the term, and consequently he has a right of property in the crop. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession in the whole is his. The landlord has no lien on the crop for rent, whether such lien be stipulated for or not. A cropper has no estate in the land, but that remains in the landlord. Consequently, though he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share; in short, he is a laborer receiving a share of the crop. *Harrison v. Ricks*, 71 N. C. 7, 10, 11.

In *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, it is said the true test to be applied to cases in which the rent is to be paid in shares is as follows: "On the other hand, if A. should demise, lease, and let the farm to B., to have and to hold for the term of one or five years, to be cultivated in a husbandlike manner, B. rendering and paying to A. an annual rent for the use of the farm, to wit, one-half of the crop raised, I see no reason why the parties should not be deemed to intend an actual and technical lease." Thus an agreement whereby the party of the first part does hereby lease a farm, etc., one-third of the grain, roots, and hay to be delivered, and the tenant has all the buildings on the premises and is to keep them in repair, and the term is one year, from December to December, a longer time than a cropping season merely, and there is no possession reserved to the landlord during the term, or any control over the premises, and it is under seal and made to bind heirs, executors, and assigns, is a lease, and not a cropping contract. *Strain v. Gardner*, 21 N. W. 35, 39, 61 Wis. 174.

The term "cropper," and not "tenant," characterizes one who raises a crop upon the land of another under contract to raise the crop for a particular party, and therefore such person has a lien upon the crop for whatever is due him from the landlord. *Burgie v. Davis*, 34 Ark. 179.

Insufficient as description of interest.

"Tenant," as used in a petition in forcible entry and detainer, reciting that the applicant is the tenant of the premises pursuant to an agreement with the landlord,

simply means one who holds or possesses lands or tenements by any kind of title, and does not indicate whether he is a tenant for years, or from year to year, or from month to month, or at will, or at sufferance, and is not, therefore, a description of the interest of the petitioner, as is required by Code Civ. Proc. § 2235. *Fuchs v. Cohen*, 19 N. Y. S. 236, 29 Abb. N. C. 56, 22 Civ. Proc. R. 269.

Lodger distinguished.

The opinions of eminent judges in cases under English statutes giving the elective franchise to the sole occupiers of houses of a certain value assume it as unquestionable that a mere lodger in the house of another is not a tenant. In *Fludier v. Lombe*, Hardw. Cas. 307, Lord Hardwicke held that a man who let room to lodgers was still the sole occupier of the house, and said: "A lodger was never considered by any one as an occupier of a house. It is not the common understanding of the word. Neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger." See, also, opinion of Chief Justice Erie in *Cook v. Humber*, 11 C. B. (N. S.) 33, 46. In like manner under the English valuation and tax acts it has been held that a mere admission of a common lodger or inmate, the landlord retaining the legal possession of the whole house, did not constitute a tenancy. *White v. Maynard*, 111 Mass. 250, 253, 15 Am. Rep. 28 (citing *Stamper v. Overseers of Sunderland*, L. R. 3 C. P. 388; *Reg. v. St. George's Union*, L. R. 7 Q. B. 90).

The distinction between "lodgers" and "tenants" may in some cases be fairly drawn, and may depend on character of the hiring, with reference sometimes to the business of the lessor and the present intention of the parties, as gathered from all the other surrounding circumstances of the particular case. The tenant is put into the exclusive possession of his room, while the boarder or lodger has merely the use of them, without the actual or exclusive possession, which is in the lessor, subject to such use. *Linwood Park Co. v. Van Dusen*, 58 N. E. 576, 581, 63 Ohio St. 183 (citing 1 McAdam, Landl. & T. 621).

As occupant of land.

See "Occupant—Occupier."

TENANT AT SUFFERANCE.

A "tenant at sufferance" is one who comes into the possession of land by lawful title, but who holds over by wrong after the termination of his term. *Fielder v. Childs*, 73 Ala. 567, 577; *Godfrey v. Walker*, 42 Ga. 562, 574; *Hanson v. Johnson*, 62 Md. 25, 29, 50 Am. Rep. 199; *Kellogg v. Kellogg*

(N. Y.) 6 Barb. 116, 130; *Rowan v. Lytle* (N. Y.) 11 Wend. 616, 618; *Jackson v. Cairns* (N. Y.) 20 Johns. 301, 305; *Emerson v. Emerson* (Tex.) 35 S. W. 425, 426. Provided, however, that he does not come in by act of law; for, if he comes in by act of law, and then holds over, he is regarded as an intruder or trespasser. *Johnson v. Donaldson*, 20 Atl. 242, 243, 17 R. I. 107.

Examples of this kind of tenure usually given are a lessee for a term of years or for the life of another person, who holds the possession of the lands or tenements after his term or estate has expired. It is in effect nothing more than the continuance of a possession lawfully taken after the title under which it was taken is ended. *Pleasants v. Claghorn* (Pa.) 2 Miles, 302, 304.

"When a tenant has come rightfully into possession of lands by permission of the owner, and continues to occupy the same after the time for which, by such permission, he has a right to hold the same, he is said to be a tenant by sufferance." In the language of the elementary writers, "he is one who comes in by right, and holds over without right." He holds without right, and yet is not a trespasser. *Bright v. McOuat*, 40 Ind. 521, 525 (quoting Washb. Real Prop.).

A tenant at sufferance is one who entered by a lawful demise or title, and, after that has ceased, wrongfully continues in possession without the assent or dissent of the person next entitled. *Willis v. Harrell*, 45 S. E. 794, 795, 118 Ga. 900.

"Tenancy by sufferance" is a tenancy of such a nature that there is by necessary implication an absence of any contractual relation between the owner and the tenant, and so if, during such a tenancy, there be any express permission or assent given by the owner, the tenancy becomes one at will. *Willis v. Moore*, 59 Tex. 628, 637, 46 Am. Rep. 284.

An estate at sufferance is an estate created, not by the consent, but by the laches, of the owner. *Rowan v. Lytle* (N. Y.) 11 Wend. 616, 618.

"Tenancy at sufferance" is created by holding over after the termination of a lease without the permission of a landlord, and the tenant is not entitled to notice to quit unless the landlord has permitted the tenancy to continue for such a length of time as to imply an assent on his part. *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, 270.

The term "tenant at sufferance" cannot be used, in the statute (Comp. Laws, § 2807) providing that "all estates at will and at sufferance may be determined by either party by three months' notice given to the other

party," in a sense which would entitle any one holding over wrongfully to the statutory notice, since that would put it in the power of any occupant to prolong a wrongful possession indefinitely. *Allen v. Carpenter*, 15 Mich. 25, 34.

Anyone who continues in possession without agreement after a particular estate ended is a tenant at sufferance, and the purchaser of the estate of two tenants for life, remaining in possession after the death of the survivor, becomes a tenant at sufferance to the owner of the fee or person entitled to possession. *Livingston v. Tanner* (N. Y.) 12 Barb. 481, 484.

If the lessee of a tenant for life is in possession at the time of the life tenant's death, and continues to hold over, he becomes a tenant by sufferance; but if the lessee is not in possession, or does not hold over, a mere recognition of a lease previously made does not constitute such tenancy. *Wright v. Graves*, 80 Ala. 416, 418.

A husband holding over on his wife's land after her death is not a tenant at sufferance, but a mere trespasser, in whose favor the statute runs against his wife's heirs, under How. St. § 8700, providing that the right of an heir or one who died seised to recover land accrues at the time of the ancestor's death, if there be no estate intervening. *Pattison v. Dryer*, 57 N. W. 814, 816, 98 Mich. 504.

TENANT AT WILL.

A tenant at will is one who enters into possession of the land, etc., of another lawfully, but for no definite term or purpose, and whose possession is subject to the determination of the landlord at any time he sees fit to put an end to it. *Emerson v. Emerson* (Tex.) 35 S. W. 425, 426; *Robb v. San Antonio St. Ry. Co.*, 18 S. W. 707, 708, 82 Tex. 392.

Where lands or tenements are let by one to another, to have and to hold to him, at the will of the lessor, by force of which lease the lessee is in possession, he is called "tenant at will," because he hath no certain or sure estate, for the lessor may put him out when he pleases. *Post v. Post* (N. Y.) 14 Barb. 253, 258 (quoting Co. Litt. § 68; 1 Cruise, 269; 4 Kent, Comm. 110); *Barry v. Smith*, 23 N. Y. Supp. 129, 131, 1 Misc. Rep. 240 (citing *Reynolds v. Reynolds* [N. Y.] 48 Hun, 142, 144).

A tenant at will is "one who holds lands or tenements let to him by another at the will of the lessor." 2 Bl. Comm. 145; 4 Kent, Comm. 110. This definition gives a very imperfect idea of the rights and obligations of a landlord and tenant between whom a tenancy at will subsists. A tenancy at will

arose in every case where one man leased lands or tenements to another, and no fixed period of time was agreed upon at which the occupancy thereof should cease. The language of the books now is that tenancy at will cannot now arise without express grant or contract, and all general tenancies are constructively tenancies from year to year. *Spalding v. Hall* (U. S.) 6 D. C. 123, 125.

"Tenancy at will" is one that may be terminated at the will of either party. *Davis v. Murphy*, 128 Mass. 143, 145; *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205, 209; *Hilsendegen v. Scheich*, 21 N. W. 894, 898, 55 Mich. 468; *Brown v. Fowler*, 63 N. E. 76, 78, 65 Ohio St. 507.

If one with the consent of the owner is let into or remains in possession under circumstances not showing an intention to create a freehold interest or a tenancy from year to year, he is a tenant at will. A vendee let in under an oral agreement of purchase is a tenant at will, and a parol gift of land creates a mere tenancy at will, which may be revoked or disaffirmed by the donor. *Collins v. Johnson*, 57 Ala. 304, 307.

"Tenancy at will" is an estate which simply confers a right to the possession of the leased premises for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication, as well as by express words. The payment and acceptance of rent are facts from which the existence of such tenancy may be inferred. As a tenancy at will is determinable at any time, the tenant has no certain and indefeasible estate which he can assign or grant to any other person. *Cunningham v. Holton*, 55 Me. 33, 36.

A tenant at will includes one who is placed on land without any terms prescribed or land reserved, and has a mere occupancy. *Stoltz v. Kretschmar*, 24 Wis. 283, 285 (citing 4 Kent. Comm. 114).

A tenant holding over is not a tenant at will, unless he holds over at the express or implied consent of the landlord. *Benfey v. Congdon*, 40 Mich. 283, 285.

A tenant at will holds by the landlord's permission, express or implied, and differs in this respect from a tenant at sufferance, who holds over by wrong. *Willis v. Harrell*, 45 S. E. 794, 795, 118 Ga. 906.

A tenant under a lease, who holds over after the term is ended against the consent of the lessor, and refuses to surrender possession, is not a tenant at will. *Perine v. Teague*, 6 Pac. 84, 85, 66 Cal. 446.

A person who enters and holds land under a contract to buy it is to be regarded at law as at least a tenant at will. *Jones v. Jones* (S. C.) 2 Rich. Law, 542.

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A verbal agreement between the wife, after her husband's death, and her son, that they should live together on the farm during her life, and that he should carry it on, and that they should pay the debts of the estate, and an entry and possession by the son under the agreement, creates a tenancy at will from year to year. *Leavitt v. Leavitt*, 47 N. H. 329, 340.

TENANT BY THE CURTESY.

See "Curtesy."

TENANT BY ENTIRETY.

See "Entirety (Estate By)."

TENANT FOR LIFE.

As owner, see "Owner."

A "tenant for life" of estates is one to whom lands or tenements are granted or devised, or to which he derives title by operation of law, for the term of his own life or the life of another. In re *Hyde* (N. Y.) 41 Hun, 72, 75; *Hyde v. Gage* (N. Y.) 11 Civ. Proc. R. 155, 159.

TENANT FOR YEARS.

See "Estate for Years."

TENANT FROM WEEK TO WEEK.

A "tenant from week to week" is not included in the description of tenants for life, lives, or years, in St. 4 Geo. II, c. 28, giving an action for double the value of rent for premises held over after a notice to quit. *Lloyd v. Rosbee*, 2 Camp. 453, 454.

TENANT FROM YEAR TO YEAR.

A "tenant from year to year" is one who holds lands or tenements under the demise of another, where no certain term has been mentioned, but an annual rent has been reserved. 1 Steph. Comm. 271; 4 Kent, Comm. 111, 114.

"A tenancy from year to year continues," says Lord Kenyon, O. J., "so long as both parties please, as between the original parties, so long as both of them live; and the tenant cannot be dispossessed without six months' notice ending at the expiration of the year." *Shore v. Porter*, 3 Term R. 13, 16 (cited in *Brown v. Kayser*, 18 N. W. 523, 524, 60 Wis. 1).

A demise for no definite period at a fixed rate per month creates a tenancy from year to year, under Rev. St. 1876, p. 338, providing that tenancies in which the premises are occupied by the consent of the landlord shall

be deemed tenancies from year to year. *Rothschild v. Williamson*, 83 Ind. 387, 388.

"Tenancies from year to year" still exist in Minnesota as at common law, except so far as the length of notice required to terminate them has been changed by Gen. St. 1878, c. 75, § 40, relating to notices to quit. *Hunter v. Frost*, 49 N. W. 327, 329, 47 Minn. 1.

The decided weight of authority is that, when a lease is made not complying with the statute of frauds and possession is taken, there arises by operation of law a "tenancy from year to year." This implied tenancy will arise where occupation is had under a parol demise for years, void because exceeding the period allowed by the statute of frauds. *Tayl. Landl. & Ten.* 56. An entry under a lease for a term at an annual rent void for any cause, and a payment for rent, creates a tenancy from year to year on the terms of the lease, except as to duration. *Arbenz v. Exley, Watkins & Co.*, 44 S. E. 149, 150, 52 W. Va. 476, 61 L. R. A. 957 (citing *Wood*, St. Frauds, § 22).

The term "year," as used in speaking of the estates from year to year, is merely descriptive, and therefore the estate includes tenancies from month to month, etc. *Rosenblatt v. Perkins*, 22 Pac. 598, 600, 18 Or. 156, 6 L. R. A. 257.

TENANT IN COMMON.

"Tenants in common" are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously. 2 Bl. Comm. 191; *Gould v. Subdistrict No. 3*, 8 Minn. 427, 431 (Gil. 382, 384); *Coster v. Lorillard* (N. Y.) 14 Wend. 336; *Manhattan Real Estate & Building Ass'n v. Cudlipp*, 80 N. Y. Supp. 993, 996, 80 App. Div. 532; *Taylor v. Millard*, 23 N. Y. St. Rep. 694, 695; *Taylor v. Millard*, 23 N. E. 376, 377, 118 N. Y. 244, 6 L. R. A. 667; *Griswold v. Johnson*, 5 Conn. 363, 365; *Silloway v. Brown*, 94 Mass. (12 Allen) 30, 36; *Gittings v. Worthington*, 9 Atl. 228, 233, 67 Md. 139; *O'Bryan v. Brown* (Tenn.) 48 S. W. 315, 316. There is no necessity for unity of interest. Tenants in common are such as have a unity of possession, but distinct and several titles to their shares. *Tilton v. Vall* (N. Y.) 42 Hun, 638, 640. The quantities of their estate may be different, the shares may be unequal, the modes of acquisition of title may be unlike, and the only unity between them be that of possession. A remainderman may have a constructive possession sufficient to constitute the unity of the right of possession required to exist in a tenancy in common, and enable him to maintain an action for partition during the life of the life tenant. *Sullivan v. Sullivan* (N. Y.) 4 Hun, 198, 300.

Tenants in common are tenants who "are seized per my and per tout, each being entitled before severance to an interest in every inch of the soil." *Martin v. Bowie*, 15 S. E. 736, 742, 37 S. C. 102.

The relation of tenant in common arises where two or more persons are entitled to lands in such a manner that they have an undivided possession, but several freeholds; i. e., no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others or to receive his share of the rents and profits. *Carver v. Fennimore*, 19 N. E. 103, 104, 116 Ind. 236 (citing *Rap. & L. Law Dict.*).

"Tenants in common are such as hold lands and tenements by any kind of title, either in fee, for life, for years, or at will." *Bouv. Law Dict.* 580. "There can be no tenancy in common in a mere actual possession by one. There must be some right or title to the possession, and not a mere actual possession, to create a co-tenancy. There may be a partnership or tenancy in common in a right or title to land; but I cannot see how there could be a partnership or tenancy in common in an actual possession, unless all the partners or tenants in common were actually occupying the land." *Lillianskyoldt v. Goss*, 2 Utah, 292, 297.

"Tenants in common" are persons who hold by unity of possession. The possession of one is the possession of the other, and the taking of the whole profits by one does not amount to an ouster of his companions. Tenancy in common is a joint estate, in which there is unity of possession, but separate and distinct titles. The tenants have separate and independent freeholds or leaseholds in their respective shares, which they manage and dispose of as freely as if the estate was one in severalty. There is no restriction upon their power of alienation; and the tenant may dispose of it by will, while the heirs of an intestate tenant will inherit the estate. *Gage v. Gage*, 29 Atl. 543, 546, 66 N. H. 282, 28 L. R. A. 829.

A tenancy in common is not created by several purchases of distinct and specific portions of common property, for it is said "tenants in common are generally defined to be such as hold the same land together by several and distinct title and by unity of possession, because none knows his own severalty, and therefore all occupy promiscuously." *Hunter v. State*, 30 S. W. 42, 44, 60 Ark. 312 (citing *Black, Law Dict.*).

Where one rents land for the purpose of having a single crop raised on it, of which the lessor is to have a part for the use of the land and the cultivator a part for his labor, and there is no evidence that it was the intention that the relation of landlord and tenant should exist between them, the

parties are to be considered as tenants in common in the crop. *Ponder v. Rhea*, 32 Ark. 435, 437.

There can be neither a tenancy in common, nor a common interest, nor a joint tenancy and survivorship, in a mere expectancy; but, in order to create the object of a tenancy in common, there must be an actual estate in possession. *Betts v. Betts* (N. Y.) 4 Abb. N. C. 317, 353.

Wherever two or more persons from any cause are entitled to the possession simultaneously of any property in the state, a tenancy in common is created. Tenants in common may have unequal shares. They will be held to be equal, unless the contrary appears. The fact of inequality does not give the person holding the greater interest any privileges, as to possession, superior to the person owning a lesser interest, so long as the tenancy continues. *Civ. Code Ga.* 1895, § 3143.

Joint tenants distinguished.

The essential difference between joint tenants and tenants in common is that joint tenants have the land by one joint title and in one right, and tenants in common have several titles or by one title and several rights, which is the reason joint tenants have one joint freehold, and tenants in common have several freeholds. *Coster v. Lorillard* (N. Y.) 14 Wend. 265, 336.

The only practical difference between the estates of joint tenancy and tenancy in common is the right of survivorship, and, as the statute has abolished this and provided that the estate holden should be considered in the same manner as if they had been tenants in common, all distinction has been destroyed. *Redemptorist Fathers v. Lawler*, 54 Atl. 487, 488, 205 Pa. 24.

As owner.

See "Owner."

TENANT IN DOWER.

"Tenancy in dower" arises where the husband is seised of an estate of inheritance and dies. In this case the wife shall have a third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life. *Combs v. Young's Heirs*, 12 Tenn. (4 Yerg.) 218, 225, 26 Am. Dec. 225 (citing 2 Bl. Comm. 12a; Co. Litt. 31a).

TENANT IN FEE SIMPLE.

See "Fee Simple."

TENANT IN POSSESSION.

Practice Act, § 236, provided that "the purchaser at sheriff's sale from the time of

the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof." Held, that the phrase "tenant in possession" was intended to designate the class of persons from whom the purchaser was to receive the rents, and embraced the judgment debtor, as well as his lessee. *Harris v. Reynolds*, 13 Cal. 514, 516, 73 Am. Dec. 600 (quoted in *Whithed v. St. Anthony & D. Elevator Co.*, 83 N. W. 238, 239, 9 N. D. 224, 50 L. R. A. 254, 81 Am. St. Rep. 562). The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not pay; but the phraseology designed evidently to fix a general right, applying to all cases of tenancy, for none are excluded. *Walker v. McCusker*, 12 Pac. 723, 724, 71 Cal. 594.

TENANT OF THE FREEHOLD.

The phrase "tenant of the freehold," in a statute relating to the acquisition of land for public purposes, and providing for certain notice to be served on the tenant of the freehold, means tenant in possession appearing as a visible owner. *Oulpeper County v. Gorrell* (Va.) 20 Grat. 484, 511.

TENANTABLE REPAIR.

See "Good Tenantable Repair."

TENANT'S FIXTURES.

The term "tenant's fixtures," in a strict legal definition, is to be understood to signify things which are fixed to the freehold of the demised premises, but which nevertheless the tenant is allowed to disannex and take away, provided he seasonably exert his right to do so. A cistern and sinks, put into a building leased as a hotel, though fastened by nails or set into the floor by cutting away the boards, and water pipes fastened to the walls by hooks and passing through holes cut for the purpose in the floors and partitions, were held to be tenant's fixtures. *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 270, 64 Am. Dec. 64.

TEND TO EXPOSE.

An instruction in a libel suit stating that matter is libelous which "tends to expose a man to public hatred" is a substantial compliance with Pen. Code, § 242, defining libel to be a malicious publication, etc., which exposes any person to contempt, ridicule, etc. *Turton v. New York Recorder Co.*, 22 N. Y. Supp. 766, 769, 3 Misc. Rep. 314.

TENDED LINE.

"Tended line," as used in V. S. § 4583, imposing a penalty upon certain fishing, except fishing through ice with not more than 15 tended lines, means a line with a single hook fastened to any object upon the bank or upon the ice. *State v. Stevens*, 88 Atl. 80, 81, 69 Vt. 411.

TENDER.

"Tender" is defined to be the offer of money in satisfaction of a debt, by producing and showing the amount to the creditor or party claiming, and expressing verbally a willingness to pay it. *Tompkins v. Batie*, 7 N. W. 747, 748, 11 Neb. 147, 38 Am. Rep. 361 (citing *Worcester Dict.*).

"Tender" is an offer to perform an act which the party offering is bound to perform. *McClain v. Batton*, 50 W. Va. 121, 130, 40 S. E. 509.

Actual or manual production.

To constitute a valid legal tender there must be an actual offer of the sum due, unless the actual production of the money be dispensed with by a refusal to accept or something equivalent thereto; and this offer must be an absolute one, not coupled with any condition. See 2 *Starkie*, Ev. 778, 779, and cases there cited. *Hunter v. Warner*, 1 Wis. 141, 147.

To prove a plea of tender it must appear that there was a production and manual offer of the money, unless the same be dispensed with by some positive act or declaration on the part of the creditor; and it is not enough that the party has the money in his pocket, and says to the creditor that he has it ready for him, and asks him to take it, without showing the money. *Bakeman v. Pooler* (N. Y.) 15 Wend. 637, 638.

A plea of tender, offered at any time, at rules, or in court, ought not to be received unless the money tendered accompanies it. *Downman v. Downman's Ex'rs* (Va.) 1 Wash. 26, 31.

A tender must be made in money current at the time; otherwise, it is not money at all, and there is no tender. *Downman v. Downman's Ex'rs* (Va.) 1 Wash. 26, 31.

"Tender" has a definite legal significance. It imports, not merely the readiness and an ability to pay the money or to deliver over the deed or the property at the time and place mentioned in the contract, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the tender is to be made. A money tender means an offer to pay in specie, and in the description of coin made current by the act of Congress.

Under a plea of tender, however, the party is not required to prove a literal and actual compliance with all the requisites of a legal tender, as it is defined in the books, in order to maintain the issue. He may prove his affirmance by showing an offer to pay in bank notes, which was not rejected on account of the character of the medium, or he may show that, when about to produce the money or thing to be tendered, his adversary told him it was unnecessary, and that he would not accept it, or any other act or declaration by which some of the formal requisites of a stated legal tender were dispensed with. *Holmes v. Holmes* (N. Y.) 12 Barb. 137, 144.

Equivalent to payment.

For the purpose of avoiding a penalty and forfeiture, or the loss of any rights or privileges, tender is the exact equivalent of payment, and it does not have to be repeated. *Beatty v. Mutual Reserve Fund Life Ass'n* (U. S.) 75 Fed. 65, 72, 21 C. C. A. 227.

Tender, if of sufficient amount, when accepted, is payment. When rejected, it operates as payment so long as it is kept good. *Brown v. Lawton*, 32 Atl. 733, 735, 87 Me. 83.

A legal tender is equivalent to payment as to all things that are incidental or consequential to the debt. The creditor, while not losing his rights to the prior debt by refusal of the tender itself, loses all collateral benefit and securities; and, where the tender is followed by payment into the court, interest and costs cannot be recovered. *Wright v. John A. Robinson & Co.*, 32 N. Y. Supp. 463, 466, 84 Hun, 172.

Liability admitted.

Tender admits a liability or indebtedness to the amount of the sum tendered. *Taylor v. Chicago, St. P. & K. C. Ry. Co.*, 40 N. W. 84, 86, 76 Iowa, 753 (citing *Buford v. Funk* [Iowa] 4 G. Greene, 493, 495).

Tender of any kind is only an admission to its extent, and no further. When made, it admits the fact of the tender, with all the conditions, limitations, and terms at the time imposed. Nothing further can be inferred from it. *Brix v. Ott*, 101 Ill. 70, 76.

Mutual promises.

The word "tender," as used in connection with mutual and concurrent promises, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, and the transaction is completed and ended, but it only means a readiness and willingness, accompanied with the ability, on the part of one of the parties to do the acts which the

agreement requires him to perform, provided that the other will concurrently do the acts which he is required to do by it, and a notice of the former to the latter of such readiness. *Smith v. Lewis*, 26 Conn. 110, 119; *Raudabaugh v. Hart*, 55 N. E. 214, 218, 61 Ohio St. 73, 76 Am. St. Rep. 361; *Aborn v. Mason* (U. S.) 1 Fed. Cas. 37, 39 (citing *Smith v. Lewis*, 26 Conn. 110; *Adams v. Clark*, 63 Mass. [9 Cush.] 215, 57 Am. Dec. 41); *Cook v. Doggett*, 84 Mass. (2 Allen) 439, 441; *Gullford v. Mason*, 48 Atl. 386, 388, 22 R. I. 422. See, also, *Manistee Lumber Co. v. Union Nat. Bank*, 32 N. E. 449, 452, 143 Ill. 490; *Shouse v. Doane*, 21 South. 807, 811, 39 Fla. 95.

In the case of mutual and concurrent promises, the word "tender" does not mean the same kind of an offer as when used in reference to the payment of a debt due in money; but it only means a readiness and willingness, accompanied with an ability on the part of the party, and such a tender does not require the bringing of money into court to keep it. *Clark v. Wels*, 87 Ill. 438, 441, 29 Am. Rep. 60.

Payment into court distinguished.

"Tender" is defined to be an offer by a debtor to the creditor of the amount of the debt. The offer must be in lawful money, which must be actually produced to the creditor, unless by words or acts he waives production, and the offer must be definite and unconditional. The payment of money into court under order is more than a simple tender. A tender is an offer to pay the debtor before suit, and cannot be made after suit is brought. It is purely *ex parte*. If it is not accepted, the debtor must retain his money; and, if established on plea, the only effect is to stop interest thenceforward on the amount tendered. But a payment into court is different. It is not *ex parte*, but done by order of court. The money paid in is for the plaintiff, and the possession of it cannot be resumed by the debtor. *Salinas v. Ellis*, 2 S. E. 121, 122, 26 S. C. 337.

Unconditional offer necessary.

A tender, in order to be effective, must be unconditional. *United States v. World's Columbian Exposition* (U. S.) 56 Fed. 630, 638.

A tender of money for the payment of a debt, to be available as a defense or as the foundation of an action in favor of the party making the tender, must be without qualification. *Noyes v. Wyckoff*, 21 N. E. 158, 114 N. Y. 204.

Tender must be unconditional. Thus, although a party who tenders money has a right to exclude any presumption against himself that the sum tendered is in part payment of the debt, yet, if he add a con-

dition that the party who receives the money shall acknowledge that no more is due, it will invalidate the tender. The reason of this rule is manifest; for if the tender be of a sum as all that is due, that being disputed, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more; whereas, if the same sum were tendered unconditionally, no such effect would follow. *Thompkins v. Batie*, 7 N. W. 747, 748, 11 Neb. 147, 38 Am. Rep. 361.

When a strict tender of money is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it. *Irvin v. Gregory*, 79 Mass. (13 Gray) 215, 218.

Where an offer is made to pay money by way of compromise, and with the understanding between the parties that, if the money is accepted, it shall be a complete and final settlement of all matters of dispute between the parties, such offer is not a tender in law, since a tender must be without condition, absolutely. *Latham v. Hartford*, 27 Kan. 249, 251.

An offer of money, coupled with the statement that it is a tender, in payment in full of all claims of the person to whom the money is thus offered, does not constitute a tender. *Shiland v. Loeb*, 69 N. Y. Supp. 11, 12, 58 App. Div. 565.

TENDER YEARS.

The phrase "minor of tender years," used in various connections in pleadings, may embrace as well minors of 20 years as of 20 months. It cannot be said absolutely what is or is not a tender age, and, applying to the rule that a pleading is to be taken most strongly against the pleader, little more effect can apparently be given to the phrase "minor of tender years" than that it indicates a minor not endowed with the discretion of maturity. *Meyer v. King*, 16 South. 245, 246, 72 Miss. 1, 35 L. R. A. 474.

TENDING TO SHOW.

The statement that there has been evidence "tending to show" a particular fact is equivalent to a statement that evidence has been offered relating to such fact; the force and effect of the evidence being in no sense suggested by the term. *White v. State*, 54 N. E. 763, 765, 153 Ind. 689.

TENEMENT.

See "Single Tenement."

"Tenement" signifies anything that may be holden, provided it be of a permanent na-

ture, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. *Mitchell v. Warner*, 5 Conn. 497, 517 (citing 2 Bl. Comm. 18, 17; 1 Inst. 6); *Lenfers v. Henke*, 73 Ill. 405, 408, 24 Am. Rep. 263; *Keller v. Pagan*, 32 S. E. 353, 355, 54 S. C. 255.

The word "tenement" embraces, not only what may be inherited, but whatever may be holden. *Pond v. Bergh* (N. Y.) 10 Paige, 140, 156.

The word "tenement," in its most extensive signification, comprehends everything which may be holden, provided it be of a permanent nature. In a more restricted sense, it is a house or building. *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. 18, 19, 84 Iowa, 407, 15 L. R. A. 296.

The word "tenement," in its legal sense, means an estate in land, or some estate or interest connected with, pertaining to, or growing out of the reality, of which the owner might be dispossessed. A tenement comprises everything which may be holden so as to create a tenancy in the feudal sense of the word. *Field v. Higgins*, 35 Me. 339, 341, 342 (citing 3 Kent, Comm. 401).

"Tenement," in its ordinary acceptance, is applied to houses and other buildings, yet in its proper legal sense it signifies everything that may be holden. It not only includes land, but rents and other interests. *Oskaloosa Water Co. v. Board of Equalization*, 51 N. W. 18, 19, 84 Iowa, 407, 15 L. R. A. 296.

The word "tenement," in legal acceptance, means property held by a tenant. *Marmet Co. v. Archibald*, 17 S. E. 299, 300, 37 W. Va. 778.

"Tenement" is frequently used in a restricted sense, as signifying a house or building; but it is also used in a much more enlarged sense, as signifying land or any corporeal inheritance, and it will be understood in its enlarged sense in remedial statutes, like St. 1825, c. 89, providing further remedies for landlord and tenants. *Sacket v. Wheaton*, 34 Mass. (17 Pick.) 103, 105.

"Tenement" is a large word which will pass, not only lands and other inheritances, which are holden, but also offices, rents, commons, and profits arising from lands. 1 Co. Litt. 219; *Shep. Touch.* 91. "With us the word 'tenement' is applied exclusively to land, or what is usually denominated 'real property.'" *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200 (quoting *Stearns, Real Actions*, 150).

"Tenements," as used in the common law, entitling a wife to dower in all lands and tenements of which the husband died seised, is, according to Blackstone, a word of greater extent than "lands," which in-

cludes any ground, soil, or earth whatever, and has in its legal signification an indefinite extent upward as well as downward. *Lenfers v. Henke*, 73 Ill. 405, 408, 24 Am. Rep. 263.

"Tenements" is a word of greater meaning and extent sometimes than "land," and includes, not only land, but rents, commons, and several other rights and interests issuing out of or concerning land. *Canfield v. Ford* (N. Y.) 28 Barb. 336, 338.

Pier or wharf.

A wharf or pier, reclaimed from tide water by embankment or by raising the bottom with stone, earth, or other material, is a "tenement," within the meaning of 2 Rev. St. p. 512, which authorizes summary proceedings in favor of a landlord to recover the possession of houses, lands, or tenements. The word "tenement" signifies everything which may be holden, if it be of a permanent nature. *People v. Kelsey* (N. Y.) 14 Abb. Prac. 372, 376.

Railroad franchise.

The word "tenements," while embracing simple franchises, nevertheless, as used in a statute relative to forcible entry and detainer, must be restricted to tenements upon which an entry can be made and of which there can be tangible possession, and hence does not include a railroad franchise. *Gibbs v. Drew*, 16 Fla. 147, 150, 28 Am. Rep. 700.

Term for years.

In an action for damages sustained by a breach of an implied covenant for quiet enjoyment in a lease of a wharf, with the right to collect wharfage for one year, the court said: "A term for years in lands is not in law a 'tenement' or a 'hereditament.'" *Coke* says that "'tenementum,'" or "tenement," is a large word, which will pass, not only lands and other inheritances, which are holden, but also offices, rents, commons, profits & prebends out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised ut de libero tenemento.' 1 Co. Litt. (by Thomas) 219. 'But "hereditaments,"' he says, 'is the largest word of all that kind; for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real, personal or mixed.' Id. The first of these definitions requires that the estate or interest, to amount to a tenement, should be a freehold at least, and to be termed a hereditament, according to the second, it must be descendible by inheritance." The "terms for years" fall within the definition of things personal. They go to the executors, like other chattels, and, although they are denominated "chattels real," to distinguish them from mere movables, they are not, when speaking with legal ac-

curacy, considered real estate. In *People v. Westervelt* (N. Y.) 17 Wend. 674, the meaning of the terms "real estate" and "tenements" at common law was shown to exclude "terms for years" and other chattel interests. *City of New York v. Mable*, 13 N. Y. (3 Kern.) 151, 159, 64 Am. Dec. 538.

The word "tenements" imports, not only land on which one has an estate of inheritance or other freehold, but also a tenancy for years. *Merry v. Hallet* (N. Y.) 2 Cow. 497.

TENEMENT HOUSE.

A "tenement house" is a building, the different rooms or parts of which are let for residence purposes by the possessor to others as distinct tenements, so that each tenant, as to the room or rooms occupied by him would sustain to the common landlord the same relation that the tenant occupying a whole house would do to his landlord. *Lindwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 200, 58 N. E. 576.

"Tenement house" is defined in *Laws* 1867, c. 908, § 2273, as any house which is erected, leased, or hired to be kept or occupied as a home or residence for more than three families, living independent of one another and doing their cooking on the premises. *White v. Collins Bldg. & Const. Co.*, 81 N. Y. Supp. 434, 437, 82 App. Div. 1.

The term "tenement house," as used in an act relating to tenement houses in cities of the first class, shall be taken to mean every building which, or a portion of which, is occupied, or is to be occupied, as a residence of three or more families, living independently of each other and doing their cooking upon the premises. 3 P. & L. Dig. *Laws Pa.* 1897, col. 60, § 15.

A four-story building, occupied by 3 families living in separate apartments on the second floor, and by 2 families living in separate apartments on the third floor, numbering in all 16 persons, all tenants of one owner, is a "tenement house," within the meaning of *Rev. St. § 2573*, making it the duty of any owner of any tenement house of more than two stories high to provide a convenient exit therefrom in case of fire, etc. *Rose v. King*, 30 N. E. 267, 270, 49 Ohio St. 213, 15 L. R. A. 160, 165.

A building occupied as a dwelling, whether attached to the land or not, is a tenement, within the meaning of a statute prohibiting the keeping and maintaining of a tenement for the illegal keeping and sale of intoxicating liquors. *Commonwealth v. Mullen*, 44 N. E. 343, 166 Mass. 377.

Apartment house distinguished.

The word "tenement house," in a covenant of a deed forbidding the erection of any

tenement house on the premises, is to be construed in its plain, ordinary, and popular sense, not according to the definition of Acts 1867, c. 908, § 17, which declares that a tenement house, within the meaning of the act, shall be taken to mean and include every house, building, or portion thereof which is rented and hired out, and is occupied as the home or residence of more than three families, living independently of one another and doing their cooking on the premises, and of more than two families on a floor so living and cooking, but having a common right in the halls, stairways, yards, etc. "The question here, however," said Mr. Justice O'Brien in a similar case (*Boyd v. Kerwin*, 15 N. Y. Supp. 721), "is not what is defined as a tenement within the provisions of the act, but what was a tenement house within the meaning of the covenant." A tenement house then (1873), as well as now, has a well-defined popular meaning. When one says today that a person lives in a tenement house, he does not mean that such person lives in a house like the Navarro Flats; and yet those flats are occupied by more than three families living independently of one another and doing their cooking upon the premises. Webster's Dictionary of 1871 says that a tenement house is often, in modern usage, an inferior dwelling house rented to poor persons. Worcester, citing American Cyclopædia, says that a tenement house is a building having tenements occupied by poor families. "Tenement houses," says the International Cyclopædia (volume 14, p. 1851), "commonly speaking, are the poorest class of apartment houses. They are generally poorly built, without sufficient accommodations for light and ventilation, and are overcrowded. The middle rooms often receive no daylight, and it is no uncommon thing for several families to be crowded into one of these dark and unwholesome rooms. Bad air, want of sunlight, and filthy surroundings work the physical ruin of the wretched tenants, while their mental and moral condition is equally lowered. Attempts to reform the evils of tenement life have been going on for some time in a great many of the great cities of the world." Certainly the evils of tenement life, as above referred to, are not to be found in a tenement containing a parlor, library, dining room, butler's pantry, kitchen, five bedrooms, servant's room, private bathroom, and servant's bathroom, in a building lighted by electricity and having modern open plumbing, gas ranges, and telephone. The erection of such an apartment house is not the erection of a tenement house within the meaning of the covenant. *Kitchings v. Brown*, 75 N. Y. Supp. 763, 769, 37 Misc. Rep. 439.

The compound words "tenement house" signify and mean a house with distinct tenements or homes, which separate and different families and persons occupy as tenants,

not merely a boarding house or hotel; for in these the occupancy is not one of tenancy, but that of guests or boarders. The conversion and change of houses into French flats or apartment houses is a violation of a covenant not to erect a tenement house, as a building which is to be occupied by tenants in name and in fact is clearly within the true meaning and definition of a tenement house. *Musgrave v. Sherwood* (N. Y.) 53 How. Prac. 811, 815, 54 How. Prac. 338, 358.

The words "tenement house," as used in a deed, executed in 1873, conveying property and containing a covenant, in favor of adjoining property, that no tenement house should be erected on the property, mean houses containing suites of rooms renting from \$6 to \$15 per month by persons of very limited means, and do not mean apartment houses, which at that time were unknown, and which came into use about 1880. Therefore the restriction did not prevent the construction of a modern apartment house of a commodious and handsome appearance, fitted with various suites of rooms to be occupied by tenants, each suite complete in itself and equipped with modern appliances and conveniences, renting from \$600 to \$1,100 per year. *White v. Collins Bldg. & Const. Co.*, 81 N. Y. Supp. 434, 437, 82 App. Div. 1.

As building.

See "Building"; "Building (In Criminal Law)."

Different use of rooms.

"Tenement," in its modern use, often signifies such part of a house as is separately occupied by a single person or family, in contradistinction to the whole house. It may consist of a single room, or contiguous rooms, or rooms upon different stories, if controlled by a single person and used in connection with each other. The fact that one room is occupied and used as a shop, and another for a living room or kitchen, by the same person, does not make these rooms distinct tenements. *Commonwealth v. Clynes*, 22 N. E. 436, 150 Mass. 71.

House synonymous.

See "House."

Leased room.

A leased room is a "tenement," within Gen. St. 1875, § 17, providing that "the tenant of any tenement, which may without his fault or neglect" become unfit for occupancy, may quit possession of such tenement. *Miller v. Benton*, 13 Atl. 678, 680, 55 Conn. 529.

Part of a building.

An indictment, under Gen. St. c. 87, § 6, charging that the defendant kept and main-

tained a certain "tenement" for illegal sale of liquor, was supported by proof that the defendant used the cellar in his dwelling house for such a purpose. *Commonwealth v. Welch*, 84 Mass. (2 Allen) 510.

An indictment, under St. 1855, c. 405, for keeping a certain tenement for the illegal sale of intoxicating liquors, was sustained by proof of keeping a grocery shop, where there were jugs and decanters on the shelf in a room behind the shop and opening into it, where defendant sold liquor. *Commonwealth v. McArty*, 77 Mass. (11 Gray) 456.

A tenement is not necessarily an entire building. It may be a part of it, and proof that a defendant occupied a part of the building and used it for illegal purposes, while other persons occupied other parts of the same building, will not support a charge of keeping and maintaining a building, or a building and tenement. *Commonwealth v. Lee*, 18 N. E. 586, 587, 148 Mass. 8.

A shop, which was a room fronting on a wharf and extending back to a street, fitted up and equipped for the liquor traffic, was a "tenement," within the meaning of an act forbidding the maintaining of a tenement as a liquor nuisance. *Commonwealth v. Cogan*, 107 Mass. 212, 213.

In a statute declaring buildings or tenements in which liquor is sold to be common nuisances, "tenement" includes either a building or a part of a building. *Commonwealth v. Quinlan*, 27 N. E. 8, 9, 153 Mass. 483.

A tenement is not necessarily an entire building, but often is only a part. An indictment, under St. 1855, c. 405, for keeping a certain tenement for the illegal sale of intoxicating liquors, is sustained by proof of keeping a whole building, using part illegally, or of keeping a building consisting of one room only, and which might properly be called a "shop." *Commonwealth v. Godley*, 77 Mass. (11 Gray) 454, 455.

The word "tenement," in New Jersey, means "parts of a building leased without the land on which the buildings stand." *Taylor v. Hart*, 18 So. 546, 548, 73 Miss. 22, 80 L. R. A. 716 (citing *Miller v. Benton*, 13 Atl. 678, 680, 55 Conn. 529).

Part occupied by one family.

"Tenement," as used in an ordinance establishing the rates of charges for the use of water, and providing that the rate for each tenement having water fixtures should be \$3 annually, means such part of the house as was separately occupied by a single family, in contradistinction from the whole house. *Young v. City of Boston*, 104 Mass. 95, 104.

"A tenement house, as defined in the Century Dictionary, is a house or block of buildings, divided into dwellings and occupied by separate families. The Pennsylvania statute defines tenement houses as every building in which rooms or floors are used or let to lodgers or families. In the light of these citations we see no reason to question the sufficiency of the definition of the words 'tenement house' contended for by the counsel for defendant in error, to wit, a building, the different rooms or parts of which are let for residence purposes by the possessor to others as distinct tenements, so that each tenant, as to the room or rooms occupied by him, would sustain to the common landlord the same relation that the tenant occupying the whole house would to his landlord." *Rose v. King*, 30 N. E. 267, 270, 49 Ohio St. 213, 15 L. R. A. 160.

Part of room.

In modern use "tenement" signifies rooms let in houses, or such part of a house as is separately occupied by a single family or person, in contradistinction from the whole house. Where a part of a room is occupied by one, and a distinct portion by another, as where one occupies one side of a room and another the opposite side, or one the front and the other the rear, the portion appropriated to either is properly called his "tenement," and himself the "tenant," even if no partition separates their respective buildings and a passageway between them is used in common. *Commonwealth v. Hersey*, 11 N. E. 116, 117, 144 Mass. 297.

TENEMENTUM.

The word "tenementum," in the statute de donis, has been held to extend to everything which savors of the realty. *Blackwell v. Wilkinson* (Va.) Jeff. 73, 79.

TENET.

The word "tenet," in a writ of partition, implies a tenant of freehold, and does not include tenants for years only. *McKee v. Straub* (Pa.) 2 Bin. 1, 8.

TENNESSEE MONEY.

"Tennessee money," as used in a note payable in Tennessee money, means gold and silver coin, since nothing but gold and silver constitutes Tennessee money. *Searcy v. Vance*, 8 Tenn. (Mart. & Y.) 225.

In construing a note "payable in Tennessee money" the court said: "The word 'Tennessee' was used to qualify and describe the kind of money in which the note was intended to be paid. There was not then, and never was, any other money answering to the description of 'Tennessee money,' except the notes of banks issued under the au-

thority of Tennessee. Tennessee bank notes were therefore intended by the phrase 'Tennessee money.' The payors agreed to pay 'Tennessee bank note dollars.'" *Taylor v. Neblett*, 51 Tenn. (4 Heisk.) 491, 494.

TENOR.

See "According to Tenor and Effect."
Of like tenor, see "Like."

"Tenor" of an instrument imports identity. *State v. Townsend*, 86 N. C. 676, 679.

The word "tenor" imports an exact copy. *McDonnell v. State*, 24 S. W. 105, 58 Ark. 242; *Thomas v. State*, 2 N. E. 808, 812, 103 Ind. 419; *Commonwealth v. Wright*, 55 Mass. (1 Cush.) 46, 65; *Beeson v. Beeson's Adm'rs* (Del.) 1 Har. 466, 472; *Dana v. State*, 2 Ohio St. 91, 94; *Edgerton v. State* (Tex.) 70 S. W. 90, 91; *State v. Callendine*, 8 Iowa (8 Clarke) 288, 296.

By setting forth an instrument according to its tenor in an indictment is meant an exact copy of the instrument, while by setting it forth according to its purport and effect the import or substance only is indicated. *State v. Bonney*, 84 Me. 383, 384; *Fogg v. State*, 17 Tenn. (9 Yerg.) 392, 394; *State v. Atkins* (Ind.) 5 Blackf. 458; *State v. Pullens*, 81 Mo. 387, 392; *State v. Fenly*, 18 Mo. 445, 454; *State v. Chinn*, 44 S. W. 245, 246, 142 Mo. 507; *Commonwealth v. Wright*, 55 Mass. (1 Cush.) 46, 65; *Miller v. State* (Tex.) 84 S. W. 267, 268.

"Tenor," as used in pleadings alleging that the instruments are set out according to their tenor, binds a party to a strict recital. *Commonwealth v. Stevens*, 1 Mass. 203, 204.

"Tenor of the bill," as used in speaking of the tenor of a bill of exchange, "relates merely to the time and manner of payment." *Lindley v. First Nat. Bank of Waterloo*, 41 N. W. 381, 76 Iowa, 629, 2 L. R. A. 709, 14 Am. St. Rep. 254.

The "tenor of a will" means its purport and effect, as opposed to the exact words thereof. *Jones v. Casler*, 139 Ind. 382, 390, 38 N. E. 812, 815, 47 Am. St. Rep. 274.

TENT.

As building, see "Building."
As house, see "House."

A "tent," in the ordinary acceptation of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material. *Killman v. State*, 2 Tex. App. 222, 224, 28 Am. Rep. 432.

TENURE.

The word "tenure," in its technical sense, is the manner whereby lands or tenements are

holden, or the service that the tenant owes to his lord, and there can be no tenure without some service, because the service makes the tenure. Again, tenure signifies the estate in land. The most common tenure by which lands are held in this country is "fee simple," which is an absolute tenure of land, to a man and his heirs, forever, without rendering service of any kind; and therefore the expression "according to the tenure of his patent," in a conveyance, by a patentee holding under a patent purporting to grant the fee, meant that the grantee was to hold the land free from any kind of service, and entitled him to a conveyance in fee with covenant of general warranty. *Bard v. Grundy's Devisees*, 2 Ky. (Ky. Dec.) 168, 169.

The word "tenure," when used in connection with the expression "tenure of office," means the term of office. *Territory v. Ashenfelter*, 12 Pac. 879, 897, 4 N. M. (Johns.) 85.

The word "tenure," as used in Act 1823 (Laws 46th Sess. p. 244), authorizing all commissioners to hold office by the same tenure as justices of the peace, was intended to include the duration of the term of office, in addition to the manner of the holding, and the commissioners held for the term given by the Constitution to justices of the peace. *People v. Waite* (N. Y.) 9 Wend. 58.

The word "tenure" is one of very extensive signification. It may import a mere possession, and may include mere holding of an inheritance. *Richman v. Lippincott*, 29 N. J. Law (5 Dutch.) 44, 59.

Const. art. 15, § 2, providing that "the General Assembly shall not create any office the tenure of which shall be more than four years," does not prevent one who holds an office created by the General Assembly, the term of which is four years, from holding over, after the expiration of his term, until his successor be elected and qualified, as the Constitution (article 15, § 3) also provides that officers holding for a given term, except members of the General Assembly, shall continue to hold, after the expiration of their term, until their successors be elected and qualified. *State v. Harrison*, 16 N. E. 384, 118 Ind. 434, 3 Am. St. Rep. 663.

TERCERONES.

The term "tercerones," as used in the Spanish and French West Indies, applies to persons who are the production of a white person and a mulatto; that is, a person of white and negro blood. *Daniel v. Guy*, 19 Ark. 121, 131.

TERM.

Worcester says that some of the meanings of the word "term" are condition, proposition, or stipulation. Webster, as an illus-

tration, uses this as an example: "The terms of a proposition; the four members of which it is composed." *Platter v. Elkhart County*, 2 N. E. 544, 555, 103 Ind. 300.

The word "term" or "terms," in its general signification, denotes "words," "phrases," and "expressions," by which the definite meaning of language is conveyed and determined. *Hurd v. Whitsett*, 4 Colo. 77, 84.

Definite period implied.

"Term," as applied to time, signifies a fixed period, or a determined or prescribed duration. *State v. Twichell*, 38 Pac. 134, 135, 9 Wash. 530; *State v. Tallman*, 64 Pac. 759, 760, 24 Wash. 426 (citing *People v. Brundage*, 78 N. Y. 403).

"Term," as used in Rev. St. c. 143, § 50, providing that a person who shall break prison may be punished by imprisonment in addition to the unexpired portion of the term for which he was originally sentenced, cannot apply to persons lawfully imprisoned, but not under conviction and sentence, but only to those who are imprisoned for a definite term. *Commonwealth v. Homer*, 46 Mass. (5 Metc.) 555, 557.

Succession implied.

"Term," as used in St. 1817, § 8, requiring a residence for the term of seven years in a town to acquire a settlement therein, imports *ex vi termini* a succession of years. *Town of Lincoln v. Town of Warren*, 19 Vt. 170, 171.

"Term of seven years," as used in a statute giving a settlement to a pauper after a continued residence for that length of time, means a continuous residence. This is the set construction in leases, in contracts for service, and in analogous cases of settlement. It is the more obvious import of the words in their ordinary and popular signification. *Town of Royalton v. Town of Bethel*, 10 Vt. 22, 23.

Hutch. Code Miss. 495, § 3, providing that willful, continued, and obstinate desertion for the "term of three years" shall be a cause for divorce, implies a continued and uninterrupted desertion. *Gaillard v. Gaillard*, 23 Miss. (1 Cushm.) 152, 153.

Estate synonymous.

An indispensable legal requirement to the creation of a lease or a term of years is that it shall have a certain beginning and a certain end. Blackstone says that such an estate is frequently called a "term" because its duration or continuance is bounded or limited and determined. *Gay Mfg. Co. v. Hobbs*, 38 S. E. 26, 128 N. C. 46, 83 Am. St. Rep. 661.

The estate of a lessee for years is called a "term," because its duration is limited and determined; for every such estate must have

a certain beginning and a certain end. *Austin v. Huntsville Coal & Mining Co.*, 72 Mo. 535, 542, 37 Am. Rep. 448; *Delaware, L. & W. R. Co. v. Sanderson*, 1 Atl. 894, 397, 109 Pa. 583, 58 Am. Rep. 743; *Delaware, L. & W. R. Co. v. Sanderson*, 2 Pa. Com. Pl. 203, 209.

Term is the name applied to the estate demised by a lease. *Sanderson v. City of Scranton*, 105 Pa. 469, 472.

The word "term," in speaking of the term of a tenant, means the duration or extent of the interest in the premises acquired by the tenant from his landlord as the term of his lease. *Grizzle v. Pennington*, 77 Ky. (14 Bush) 115, 116.

"Term," as it is used in speaking of a term for years in land, is both an interest and an estate in such land. *Chicago Attachment Co. v. Davis Sewing Mach. Co.* (Ill.) 25 N. E. 669, 670.

The word "term," when used in respect to tenancies, has in law a distinct and technical definition, signifying time or duration, and it means not only limitation of the estate granted as to time, but it signifies the estate also and interest that passes by the lease. *Hurd v. Whitsett*, 4 Colo. 77, 84.

"Term" does not merely signify the time specified in the lease. It means that and more. It means the time in the lease, and the interest conveyed by the lease, and the estate vested in the lessee by the possession. *Wood, Landl. & T.* p. 103, § 65. The term of the lease is the period granted to the tenant for occupancy, and does not include the time previous thereto, though it includes the estate of the tenant in the land during such period. *Gear, Landl. & T.* § 23. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself, by virtue of the lease, from the time it vests in possession. *Baldwin v. Thibaudau*, 17 N. Y. Supp. 532, 534, 28 Abb. N. C. 14 (citing *Young v. Dake*, 5 N. Y. [1 Seld.] 465, 467, 55 Am. Dec. 330).

The time between the making of a lease and its commencement in possession is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the terms. It is the estate or interest which he has in the land itself, by virtue of the lease, from the time it vests in possession. *Taylor v. Terry*, 11 Pac. 813, 814, 71 Cal. 46.

Terms distinguished.

The word "terms," as used in *Rev. St. 1868*, p. 333, § 7, authorizing a landlord, on notice to a tenant holding from month to month, to enlarge the "terms," does not give authority to enlarge the "term" or duration of a tenancy, as the words "term" and "terms" cannot legitimately be used synonymously. They are not generic in their rela-

tions to each other, but have a technical and specifically distinct meaning as applied to estates in the nature of tenancies. They are both derived from the Latin "terminus," but their application is technically distinct; "term" meaning, in brief, limited estate, and "terms" the limitations in the use of that estate, arising out of the covenants and conditions thereto annexed. *Hurd v. Whitsett*, 4 Colo. 77, 89.

Patent.

The "term" of a foreign patent, referred to in *Rev. St. § 4887* [U. S. Comp. St. 1901, p. 3382], which requires letters patent issued for an invention previously patented abroad to be limited "to expire at the same time with the foreign patent," or, if there be more than one, "with the one having the shortest term," is not the original term expressed in the foreign patent, but its period of actual existence; and the United States patent expires when the foreign patent having the shortest term is terminated by lapse or forfeiture, by failure of the patentee to comply with the requirements of the foreign patent law. *Pohl v. Anchor Brewing Co.* (U. S.) 39 Fed. 782.

The "term" of a foreign patent is the space of time during which the monopoly is placed within the patentee's control, without reference to whether he sees fit to retain it for the whole time or not. *Diamond Match Co. v. Adirondack Match Co.* (U. S.) 65 Fed. 803, 804.

The "term of a patent" is the period of duration expressed in the grant of the patent. It may be terminated by operation of law, or by the act of the parties at an earlier time. Under *Rev. St. § 4887* [U. S. Comp. St. 1901, p. 3382], a patent for an invention which had been previously patented in England for the term of 14 years does not expire, therefore, until 14 years from the date of the English patent, notwithstanding the grant of the English patent has terminated by the failure of the patentee to pay the stamp duty required as a condition of the continuance of the grant beyond the term of 3 years. *Paillard v. Bruno* (U. S.) 29 Fed. 864, 865.

TERM AT WHICH CAUSE COULD BE TRIED.

Under Act 1875, c. 137 (18 Stat. 470), providing that the petition for removal must be filed at or before the term at which the cause could be first tried, and before the trial, it is held that the expression "term at which the cause could be tried" means the first term at which the cause is in law triable; that is, the first term in which the cause would stand for trial, if the parties had taken the usual steps as to pleadings and other preparations. *Gregory v. Hartley*, 5 Sup. Ct. 743, 745, 113 U. S. 742, 28 L. Ed. 1150.

Act March 3, 1875, providing that a party seeking a removal of a cause from a state

court to a federal court must make his application at the term "at which cause could be first tried" in the circuit court, means the term in which, according to the rules of procedure of the court, whether they be statutory or the rules of the court's adoption, the cause would stand for trial, if the parties had taken the usual steps as to pleading and other preparation; that is, the first term at which the cause is in law triable. *Pullman Palace Car Co. v. Speck*, 5 Sup. Ct. 374, 376, 113 U. S. 84, 28 L. Ed. 925.

"Term at which said case could be first tried" must be construed to mean (in a cause existing at the time of the passage of the act) a term occurring after the passage of the act, and not a term before. *Merchants' & Manufacturers' Nat. Bank v. Wheeler* (U. S.) 17 Fed. Cas. 40.

TERM AT WHICH VERDICT IS RENDERED OR TRIAL HAD.

The term at which the verdict is rendered or trial had, within the meaning of Circuit Court Rule 97, requiring the bill of exceptions to be made up and signed at such term, means the spring term, in a case in which there is a verdict and motion for new trial at the fall term, which is denied and the motion renewed during same term and not disposed of or judgment entered till the spring term. *Greeley v. Percival*, 21 Fla. 428, 430.

TERM FOR DELIBERATING.

By "term for deliberating" is understood the time given to the beneficiary heir to examine if it be for his interest to accept or reject the succession which has fallen to him. Civ. Code La. 1900, art. 1033.

TERM IN WHICH CASE IS TRIED.

The phrase "the term in which the case is tried" means the term at which final judgment is rendered; and hence a bill of exceptions, which must be filed at the term in which the cause is tried, may be filed at a term subsequent to the rendition of the verdict, at which the motion for a new trial is argued, the judgment not being rendered till after the motion is argued. *People v. Gary*, 105 Ill. 264, 270.

TERM OF COURT.

See "Adjourned Term"; "Appearance Term"; "Appellate Term"; "Entire Term"; "Equity Term"; "First Term"; "General Term"; "New Term"; "Next Term"; "Regular Term"; "Special Term"; "Subsequent Term"; "Succeeding Term."

Before next term, see "Before."

"Terms of court are those times or seasons of the year which are set apart for the dispatch of business in the superior courts of common law." *Tidd, Prac.* 105. Sir Henry Spelman traces their origin to the canonical constitutions of the church, which the four ordinary feasts of Hilary, Easter, Trinity, Michaelmas, being the names of the four terms of the courts of common law in England, very clearly indicate to be their true origin. These terms are described by him as being no other than those leisure seasons of the year which were not occupied by the great festivals or feasts, and which were not liable to the general avocations of rural business. Civilization and its attending commerce has in more modern times extended the administration of the law by courts of justice much beyond the limits of merely leisure periods; but still terms, definite and fixed, are prescribed and are absolutely necessary to the successful administration of judicial duties. *Horton v. Miller*, 38 Pa. (2 Wright) 270, 271; *State v. McHatton*, 25 Pac. 1046, 10 Mont. 370.

In England "the term," according to the common law, is understood as the term of a day, and that day is the first day of the term, to which all the proceedings have reference. This interpretation is there given in criminal, as well as in civil, proceedings. *Bell's Case* (Va.) 7 Grat. 646, 649.

The word "term," as used in a statute authorizing an appeal from a justice within six days after judgment, if the judgment is rendered during the term of the circuit court to which the appeal is taken, signifies the entire period, from the first day of a term as fixed by law to its final close. *Hadley v. Bernero*, 71 S. W. 451, 452, 97 Mo. App. 314.

A term of court continues "until the call of the next succeeding term, unless it should affirmatively appear that before that time it had been adjourned sine die." *Dees v. State*, 28 South. 849, 78 Miss. 250 (quoting *Townshend v. Chew*, 31 Md. 247).

A term, in law, is regarded as one day, and to inspect and contest a return of a garnishee the plaintiff must generally be allowed a day beyond it. He cannot be regarded as resting satisfied with a return, which may not be filed until the last moment of the term, by not filing his suggestion during the term. *Martin v. Parham* (S. C.) 1 Hill, 213, 215.

Under Rev. St. c. 77, § 1, providing that there shall be no priority of the lien of one judgment over that of another "rendered at the same term," judgments by confession, entered before the clerk as in vacation during an intermission, stand on the same footing as judgments rendered by the court during the term, either before or after the in-

termission. *Hallam v. Coe*, 74 Ill. App. 255, 257.

As fixed term.

A term of court is a definite and fixed term prescribed by law for the administration of judicial duties. Terms may be extended to a period of time outside of their proper limits by adjournment, but the fixed term is not thereby enlarged. In re Upper Mahanoy Tp. Road, 12 Pa. Co. Ct. R. 618, 619 (citing *Horton v. Miller*, 38 Pa. [2 Wright] 270).

As regular term.

The words "terms of court" imply periods of prescribed duration, and should receive such construction in Rev. St. 1894, § 8071 (Rev. St. 1881, § 5990), providing that all vacancies in the office of township trustee should be filled by the board doing county business in the term time or by the auditor in vacation; and hence "a session," authorized by another section to receive the report of trustees in regard to school revenues at a time other than the regular term time, cannot be considered a term, so as to give the court authority to fill a vacancy in the office of township trustee. *Helm v. State*, 44 N. E. 638, 639, 145 Ind. 605.

"Term," within the meaning of Revenue Laws, c. 7 (Rev. St. p. 479), which provides for the publication of delinquent tax lists, and enacts that the tax collector must publish with the delinquent tax list a notice that he will apply to the district court of said county, at the next term thereof, for judgment against the property described in said list, and shall also give notice that on the Monday next succeeding the day fixed by law for the commencement of such term all the property will be exposed to public sale, means the regular term of court as fixed by statute. It does not refer to special terms of court. *Territory v. Apache County Delinquent Tax List*, 21 Pac. 888, 889, 3 Ariz. 69.

Gen. St. 1866, c. 66, § 200, providing for notice of trial, etc., for the term, includes a special term at which the action noticed may properly be tried. *Colt v. Vedder*, 19 Minn. 539 (Gil. 469).

Session distinguished.

"Session" and "term," as applied to courts, are not convertible or synonymous, and where a statute provided that the court, at its first regular session after the filing of a petition with the clerk, should order an election, etc., the court said: "If the word 'term' had been used, and the regular term of the court had expired without a session, after the filing of a petition, then the petition could not be acted upon, according to the strict letter of the law, at a

subsequent term." *Robertson v. State*, 70 S. W. 542, 543, 44 Tex. Cr. R. 270 (citing *Lipari v. State*, 19 Tex. App. 431).

As time of session.

The word "term," in practice, means the time during which the court holds its sessions. Sometimes a term is monthly, and at others it is a quarterly period, according to the constitution of the court. The whole term is considered but one day, so that judges may at any time during the term revise their judgments. *Bouv. Law Dict.* A day to which a court was adjourned is part of the same term at which the adjournment was made. *Leib v. Commonwealth (Pa.)* 9 Watts, 200. Terms of court are those terms or sessions of the year which are set apart for the dispatch of business in the superior courts of common law. *Commonwealth v. Thompson*, 18 Pa. Co. Ct. R. 487, 490, 491 (citing *And. Law Dict.*).

The word "term," when used with reference to a court, signifies the space of time during which the court holds a session. *Lipari v. State*, 19 Tex. App. 431, 433.

The word "term" is used, not only to designate the time appointed for holding court, but to convey the idea of a court actually held or in session. *Byrd v. State*, 2 Miss. (1 How.) 163, 169.

"Term" is defined as a space of time during which a court holds a session. Under the early organization of courts in England, terms of the courts were four periods in each year. They commenced on fixed days, and had a fixed time of termination, and they aggregated 91 days. All the days of the year not embraced in the terms are regarded as vacation. *Conkling v. Ridgely*, 1 N. E. 261, 262, 112 Ill. 36, 54 Am. Rep. 204.

"Term," as used in Act Feb. 18, 1785, providing that if any person shall be committed, and shall not be indicted and tried at some time in the next term, he shall be set at liberty, does not mean a mere period of time in which the court might have sat, but an actual session, available in law and in fact for the trial; and all circumstances of physical, moral, or legal necessity which prevent trial are exceptions which take the case out of the statute. *Commonwealth v. Brown (Pa.)* 11 Phila. 370.

As time set.

For some purposes the term of a court and the time appointed by law for the holding of the court have the same legal import and meaning. Thus the law may require process to be returned, pleadings to be filed, notices to be given, or other steps to be taken, a certain number of days before a given term of the court. A party of whom such a requirement is made has no right to wait till

the time for holding the court arrives, and then, if for any cause the court is not held, avail himself of the omission to hold it as an excuse for not having performed an act which the law required to be done a certain number of days before the court could have been opened. In such cases the day on which the act is to be done is fixed by reference to the named term of the court with as much certainty as if it had been designated by its place in the calendar. In other instances the word "term" is considered as meaning, not the stated time when a court should be held, but the actual session of the court. *Brown v. Hume* (Va.) 16 Grat. 458, 462.

A term of court is the period of time fixed by law for the hearing of causes and the transaction of judicial business therein. The term, as fixed by the statute, commences upon a particular day, and after its commencement it continues, whether the court sits during the days composing it or not. A day may therefore be one of the days of the term, notwithstanding the court may not sit upon that particular day, and it can make no difference whether the failure of the court to sit results from an adjournment by the court from one day over to another day in the same term, or because the intervening day is dies non. *Brown v. Leet*, 26 N. E. 639, 640, 136 Ill. 203.

As trial term.

The word "term," as used in rule 54 of the Supreme Court of the District of Columbia requiring bills of exceptions to be settled before the close of the term, means the trial term; that is, the term in which the verdict was had. *Brown v. Bradley* (U. S.) 6 App. D. C. 207, 223.

TERM OF INSURANCE.

The words "term of insurance," in Laws 1892, c. 690, § 150, providing that makers of deposit notes given by persons taking out insurance in certain mutual insurance companies shall only be liable on such notes till the expiration of the term of insurance, means the time for which the policy has been issued or the time it is in force, if it has been canceled as provided by its terms. *Raegener v. Willard*, 60 N. Y. Supp. 478, 482, 44 App. Div. 41.

"Term of insurance," as used in the act incorporating the Jefferson County Mutual Insurance Company (Laws 1836, c. 41, § 6), requiring every person becoming a member of the corporation to deposit a note for such sum as the directors shall determine, and that at the expiration of the term of insurance the note or a certain part of the same as shall remain unpaid, after deducting all losses and expenses occurring during

said term, shall be given up to the maker thereof, refers to the term or time for which by the policy the insurance should continue. *Bangs v. Skidmore*, 21 N. Y. 133, 140.

TERM OF OFFICE.

See "Constitutional Term"; "During Term of Office"; "Full Term"; "Official Term"; "Probationary Term"; "Unexpired Term."

As contract, see "Contract."

"Term of office" means the period or limit of time during which the incumbent is permitted to hold. *People v. Le Fevre*, 40 Pac. 882, 886, 21 Colo. 218.

The words "term of office," as used in the Constitution with reference to the duration of office of a county judge, refer to the tenure or duration of the office, and not to the incumbent. *Jameson v. Hudson*, 82 Va. 279, 281.

The word "term," when used in reference to the tenure of office, means ordinarily a fixed and definite time. *Crovatt v. Mason*, 28 S. E. 891, 894, 101 Ga. 246; *State v. Breidenthal*, 40 Pac. 651, 652, 55 Kan. 308; *State v. Tallman*, 64 Pac. 759, 760, 24 Wash. 426; *State v. Twichell*, 38 Pac. 134, 135, 9 Wash. 530 (citing *People v. Brundage*, 78 N. Y. 403); *State ex rel. Withers v. Stonestreet*, 12 S. W. 895, 897, 99 Mo. 361.

The word "term," when used with reference to the tenure of office, ordinarily refers to a fixed and definite time, and does not apply to an appointive office, held at the pleasure of the appointing power. *Field v. Malster*, 41 Atl. 1087, 1088, 88 Md. 691; *People v. Tierney*, 52 N. Y. Supp. 871, 872, 81 App. Div. 309; *Ida County Sav. Bank v. Seidensticker* (Iowa) 92 N. W. 862, 866; *Somers v. State*, 58 N. W. 804, 806, 5 S. D. 321.

It is, strictly speaking, hardly correct to speak of the term of office of a pro tem. judge, for perhaps he may not technically have a term of office, and yet such an expression does no great violence to language. It clearly comes within the spirit and purpose of Laws 1850, c. 85, § 1, relating to the settling of a case on appeal, and providing that in all cases, when the term of a trial judge shall have expired, it shall be his duty to settle the case as if it had not expired, and requires the judge before whom the case is tried, before the time allowed for settling and signing the case, to so settle and sign it. His judicial life is ended, yet he may and must prepare for review a record of the proceedings before him. *Missouri, K. & T. Ry. v. City of Ft. Scott*, 15 Kan. 435, 476.

The word "term," in Ky. St. § 161, providing that the compensation of any city of-

ficer shall not be changed after his election or appointment, or during his term of office, refers to a fixed period of time, and applies only to officers having a specified term, and hence does not forbid the reduction of the salary of a policeman, removable by the board of police commissioners at pleasure. *Lexington v. Rennick*, 49 S. W. 787, 788, 105 Ky. 779, 20 Ky. Law Rep. 1609, 1610.

The word "term," as used in Const. art. 11, § 7, providing that no county officer shall be eligible to his office more than two terms in succession, does not apply to the time of holding an office under Const. art. 27, § 6, continuing in office all statutory officers until suspended by authority of the state. *Smalley v. Snell*, 32 Pac. 1062, 6 Wash. 161.

Officers who may be removed at the pleasure of the chancellor, and must be removed whenever by change of political opinion on their part or on the part of the mayor they cease to agree, cannot be said to hold their offices for a term. The word "term" is universally used to designate a fixed and definite period of time. *Speed v. Crawford*, 60 Ky. (8 Metc.) 207, 213 (citing *Trustees of Owensboro v. Webb*, 59 Ky. [2 Metc.] 576).

Under Const. art. 14, § 8, providing that the compensation or fees of no state, county, or municipal officer shall be increased during his term of office, and under the charter of the city of St. Louis, providing to the same effect and also declaring that the salary of no officer shall be changed during the term for which he is elected, the salary of an assessor and collector of water rates of St. Louis, whose term of office is four years and until a successor shall be duly appointed and qualified, cannot be increased during the term for which he was appointed, and the time he holds over the designated period of four years is as much a part of his term of office as that which precedes the date to which the new appointment should be made, and no increase of salary made during his term can be allowed him for such time so held over. *State ex rel. Stevenson v. Smith*, 87 Mo. 158, 159.

Under the charter prohibiting any change in the salary of a city officer during his term of office, and providing that an officer's term of office shall be four years and until his successor shall be elected and qualified, an officer is entitled to an increase in the salary of his office for a time during which he holds over after the expiration of his four-year term, where the salary of the office is increased during his four-year term. *State v. Smith*, 14 Mo. App. 589.

The expression "term of office," as applied to a charter providing: "No member of the common council shall, during the period for which he was elected, be appointed to or be competent to hold any office of

which the emoluments are paid from the city treasury"—means the time for which he was elected to serve, whether he serve the time or not; and a member of the council, resigning before the expiration of such time, is, under the charter, ineligible to hold any office so prohibited. *Ellis v. Lennon*, 49 N. W. 308, 311, 86 Mich. 478.

Const. art. 4, § 9, providing that no senator or representative shall, during the "term for which he is elected," hold any office under the authority of the United States or the state of Minnesota, except that of postmaster, may very properly be construed to mean during his term of office, and this may be the full time during which the office may be held, or such shorter period as the incumbent may consent to hold it. The term of every elective office, in the absence of any express enactment of law to the contrary, may be terminated, at the pleasure of the incumbent, by resignation or by the acceptance of an incompatible office. The clause "during the term for which he is elected" cannot properly be construed as enlarging the scope of the prohibition, so as to include persons not in fact members of the Legislature. The express purpose of the provision was to prohibit senators and representatives from holding any other office than postmaster, and not to disqualify for a definite period of time persons who may become such, whether they remain in office or not. *Barnum v. Gilman*, 8 N. W. 875, 27 Minn. 468, 38 Am. Rep. 804.

TERM OF YEARS.

"Term of years," as used in St. 1817, c. 176, §§ 5, 6, providing that whenever any person, who shall be convicted of any crime the punishment whereof shall be confinement at hard labor for any term of years, shall have been before sentenced to a like punishment, etc., means a period of time not less than two years. *Ex parte Seymour*, 31 Mass. (14 Pick.) 40, 43.

"Term of years," as used in St. 1827, c. 118, §§ 19, 20, providing that whenever any person, who shall be convicted of any crime the punishment whereof shall be confinement at hard labor for any term of years, shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offense of which he shall be convicted, embraces the case of a party who has been sentenced to confinement at hard labor for life. *Commonwealth v. Evans*, 33 Mass. (16 Pick.) 448, 450.

TERM TIME.

See "During Term Time."

The phrase "term time," as contained in Code, § 2039, providing that in certain

proceedings an appeal from the board of county commissioners to the superior court may be made "at term time," means the next term of the appellate court; and where an order of the board of commissioners is entered on the 8th of May, and appeal bond given on the 15th, with the request that it should be sent up to the "next term" of the superior court on the 21st, and after two terms had passed it was discovered that the appeal had not been docketed, the appeal will be dismissed. *Brown v. Plott*, 40 S. E. 45, 46, 129 N. C. 272.

TERMS.

See "General Terms."

Accommodating terms, see "Accommodate—Accommodation."

The word "terms" is an expression applicable to the conveyance and covenants to be given, when used in a letter of attorney to sell land "on such terms in all respects as the agent deems advantageous," as much as to the amount of and the time of paying the consideration. *Bouvier*, in his *Law Dictionary*, says that in contracts the word is used in the civil law to denote the space of time granted to the debtor for paying his obligation. On the other hand, the word "terms" is susceptible of a very varied signification, dependent upon the subject-matters spoken of, where or in the sentence in which it is used. *Webster* construes it to mean a limit or boundary, any limited time; in law, the limitation of an estate, or the time in which a court is held, and in contracts terms (in the plural) are conditions, propositions stated, or provisions made, which, when assented to or accepted by another, settle the contract and bind the parties. *Hutchinson v. Lord*, 1 Wis. 286, 313, 314, 60 Am. Dec. 381.

The word "term" signifies, amongst other things, a limit, or a boundary. *Beus v. Shaughnessy*, 2 Utah, 492, 500.

Code 1891, c. 39, § 24, provides that, when the people have voted a subscription in aid of the construction of a railroad, the county court shall make it "on such terms as they may deem advisable." Held, that the imposing of a reasonable limitation in time for the completion of the work falls within the meaning of the word "terms." *West Virginia & P. R. Co. v. Harrison County Court*, 34 S. E. 786, 789, 47 W. Va. 273.

"Terms," as used in a power of attorney to grant, bargain, and sell land for such sum or price and on such terms as to the attorney should seem meet, empowers the attorney to sell on reasonable credit and to receive the purchase money. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the offer and the time of paying the con-

sideration. The word "terms" means the terms upon which the sum or price is to be paid. *Carson v. Smith*, 5 Minn. 78, 90 (Gil. 58, 65), 77 Am. Dec. 539.

"Terms," as used in a letter of attorney granting authority to the attorney to sell on such terms as to him should seem meet, in ordinary acceptance means the times and amounts of the payments, and does not mean the substance in which payment is to be made, so as to authorize the attorney to take bonds in payment, instead of money. If there are any deferred payments, the word "terms" may also embrace stipulations as to how such payments shall be secured. It certainly does not import that the attorney has license to take anything he pleases as payment, whether it is value or not. The use of this word does not authorize the attorney to subvert the rule of law applicable in such cases, and substitute for money, which the law implies, specific property of any kind. *Paul v. Grimm*, 30 Atl. 721, 722, 165 Pa. 139, 44 Am. St. Rep. 648.

"Terms," as contained in an act of appropriation, reciting that the railroad company, "having attempted and failed, and being unable, to agree with respondent in regard to the terms or in regard to the compensation therefor," etc., does not allege any attempt to agree as to the point and manner of the railroad crossing, but refers merely to the compensation therefor. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. R. Co.*, 19 N. E. 440, 444, 116 Ind. 578.

"Terms," in a statute providing that a railroad company may agree with the public authorities as to the manner, terms, and conditions under which the railroad may be constructed on a highway, means the boundary, limit, or extent of the grant. *Cleveland, C., C. & St. L. R. Co. v. City of Cincinnati*, 1 Ohio Prob. 269, 278.

A complaint on a bond for the performance of a contract alleged that by the terms of the bond damages for breach of the contract were liquidated at \$5,000. The answer denied each of the allegations of the complaint not admitted, and then admitted the execution of a bond with the condition mentioned in the complaint, and alleged a defense growing out of the contract. Held, that the word "term" has a great variety of definitions, and among them means condition, or stipulation; but in its legal signification, as applied to an instrument, it is generally employed to state a result or conclusion, and not the condition or stipulation. The word is frequently found in points, arguments, and pleadings, thus: "The agreement, though not expressly, yet in terms, does," etc., thus giving the effect of all its provisions, and therefore may mean that by the contract a certain thing was agreed on, or that the whole agreement, construed together, in ef-

fect—that is, by its terms—contains the avowed condition, stipulation, or contract. The precise character in which the word “terms” is used is in general of little consequence; for, when the instrument is produced, as is generally done, the court determines the meaning of its covenants, conditions, or agreement as matter of law. *Walsh v. Mehrback* (N. Y.) 5 Hun, 448, 449.

The word “terms,” in the restricted and legal sense, and as used generally in reference to contracts, means the conditions, limitations, and propositions which comprise and govern the acts which the contracting parties agree expressly or impliedly to do or not to do. As employed in respect to leases, the word “terms” embraces the covenants and conditions which impose, confer, and limit the respective obligations and rights of a landlord and tenant during the continuancy of the tenancy. *Hurd v. Whitsett*, 4 Colo. 77, 84.

TERMS AND CONDITIONS.

The phrase “terms and conditions,” as used in the Nebraska statute providing generally what a receiver of a bank shall do, and, among other things, “sell all real and personal property belonging to the bank on such terms and conditions as the court or judge shall direct,” is perhaps ambiguous. If it means the time when and the manner of advertising, and the manner of making the sale, then an order by the court providing explicitly for all such matters is sufficient. If the phrase merely means the terms to the purchasers, then an order providing a sale for cash, by deposit of a certain percentage with the bid and payment of the remainder on confirmation, is sufficient. *State v. Fawcett*, 78 N. W. 636, 637, 58 Neb. 371.

“Terms and conditions,” as used in a fire policy forbidding the waiver or modification of any of the terms or conditions of this policy, means “those conditions and provisions of the policy which enter into and form a part of the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated ‘conditions,’ and has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proofs of loss.” *Rokes v. Amazon Ins. Co. of Cincinnati*, 51 Md. 512, 519, 34 Am. Rep. 323.

TERMS CASH.

The words “terms cash,” in a bill for goods, the bill not being receipted, sent from a wholesale to a retail dealer, cannot be held to imply that the goods were paid for before they were shipped; there being evidence that it was the custom with reference to such bills that a payment on delivery or

within 30 days thereafter was considered as cash. *Wellauer v. Fellows*, 4 N. W. 114, 116, 48 Wis. 105.

“Terms cash,” as used in a bill of goods purchased, in which the words stand by themselves, mean prima facie that the sale is for cash, but may be shown to have been used in a different meaning by the parties, in accordance with a usage by which the word had a different meaning, as only requiring a cash payment after the expiration of a given time. *George v. Joy*, 19 N. H. 544, 546.

By the use of the expression “terms cash,” all idea of credit is excluded, and a contract for the sale of goods, “terms cash less 1½ per cent,” is an agreement for a cash sale at a specified price, and not an agreement for a credit sale subject to a discount for cash. *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocer Co.*, 54 Atl. 634, 635, 97 Md. 1.

“Terms cash,” in a contract, do not make payment on delivery a condition precedent. *Nelson v. Patrick*, 2 Car. & K. 641, 642.

TERMS MOST ADVANTAGEOUS TO THE PUBLIC.

“Terms most advantageous to the public,” as used in Code Civ. Proc. § 211, providing that the Secretary of State, the Comptroller, and State Reporter, as a contracting board, shall advertise for, receive, and consider proposals for the publication of the Reports for the Court of Appeals, and to make a contract on terms most advantageous to the public, does not mean that the contract should be made with the lowest bidder, but implies that regard should be had to the proper execution of the work. *People v. Carr*, 23 N. Y. Supp. 112, 113, 5 Silvernail, 302.

TERMS OF SALE.

The phrase “terms of sale,” in a statute authorizing the board of commissioners to sell county property, but requiring the giving of notice thereof, stating the terms of sale, means the essential ingredients of the contract or transaction, and a notice which does not name a price or state what security will be accepted for deferred payments is not sufficient, and a sale made on such notice is void. *Platter v. Elkhart County*, 2 N. E. 544, 555, 103 Ind. 360.

TERMINAL POINT.

A terminal point of an interstate shipment is the place of consignment, or the point at which the carriage of one common carrier ends and that of another begins. *Great Northern R. Co. v. Welsh* (U. S.) 47 Fed. 406, 409.

TERMINALS.

A fuse, as used in an electric car, consists of a piece of metallic alloy similar in nature to soft solder, one or more inches in length, connected at each end with a small circular piece of copper. These pieces of copper are called the "terminals," and they are so cut that they can be easily slipped under the thumbscrews and clamped in place. The fuse and thumbscrews are held in what is called the "fuse box." *Cassady v. Old Colony St. Ry. Co.*, 68 N. E. 10, 184 Mass. 156, 63 L. R. A. 285.

TERMINATE—TERMINATION.

Employment.

Two persons entered into a contract whereby one was to enter into the service of the other as collector and salesman, and he was to deposit \$100 with his employer to secure the honest and faithful performance of his duty as collector, salesman, and otherwise; this sum to be returned to him within 60 days after the termination of his employment. Held, that "termination of his employment," as here used, was intended to mean final termination of his employment, and a mere change from one branch of his employer's service to another would not constitute a "termination of his employment." *Edelsohn v. Singer Mfg. Co.*, 20 N. Y. Supp. 655, 1 Misc. Rep. 166.

Lease.

The ending of a lease, by the exercise of a landlord's option after condition broken, is the "termination of a lease," not the expiration of it. *Kramer v. Amberg*, 4 N. Y. Supp. 613, 15 Daly, 205.

The term "expire and terminate," as used in a lease providing that it should expire and terminate for nonpayment of rent, is merely equivalent to the expression "shall become void." *Bowman v. Foot*, 29 Conn. 331, 338.

Prosecution or suit.

The suspension of sentence indefinitely by the court on conviction of misdemeanor, and the allowing of defendant to be discharged from his recognizance and to go without day, constitute a termination of the prosecution, within Act 1887 (P. L. 133), which provides that the costs of prosecution in every case of misdemeanor shall, on the termination of the prosecution by verdict of a traverse jury and sentence of the court, be immediately chargeable to and paid by the proper county. *Wright v. Donaldson*, 27 Atl. 867, 868, 158 Pa. 88.

The entry of judgment in one party's favor, without costs, he consenting, is a termination of the suits within the meaning

of the word "terminated," as used in an agreement to pay an attorney for services when two suits pending against the party were terminated. *Hubbard v. Woodbury*, 89 Mass. (7 Allen) 422, 424.

Voyage.

The "termination of a voyage" is understood to be when the vessel arrives at her port of destination and has been moored there in safety for 24 hours. *Gracie v. Marine Ins. Co. of Baltimore*, 12 U. S. (8 Cranch) 75, 82, 8 L. Ed. 492.

A final port of discharge or "termination of the voyage" of a vessel is a port where either cargo or ballast are discharged, or some other act done which in effect terminates the voyage. *Schermacher v. Yates* (U. S.) 57 Fed. 668, 669.

TERMINATING SOCIETY.

The simplest form of a building and loan association was one in which all the stock matured at the same time, and was known as a "terminating society." The face value was paid to the members, and the organization thereupon came to an end. *Cook v. Equitable Building & Loan Ass'n*, 30 S. E. 911, 914, 104 Ga. 814.

TERMINUS.

See "Final Terminus."

TERMINUS A QUO.

"Terminus a quo" is the point or place from which the grantee of a private right of way is to set out any order to use the way. *Garrison v. Rudd*, 19 Ill. 558, 563.

TERMINUS AD QUEM.

"Terminus ad quem" is the place where a private right of way ends. *Garrison v. Rudd*, 19 Ill. 558, 563.

TERRE-TENANT.

Not every one who happens to be in possession of land is a "terre-tenant." There can be no terre-tenant who is not a purchaser of the estate, mediately or immediately, from the debtor while it was bound by the judgment; and, when he has taken title thus bound, he must in ejectment show how the lien of it has been discharged, whether by payment, release, or efflux of time. *Dengler v. Klehner*, 13 Pa. (1 Harris) 38, 41, 53 Am. Dec. 441.

A terre-tenant, in a general sense, is one who is seised of the actual possession of lands, as the owner thereof. In a *acre facias sur mortgage or judgment*, a terre-

tenant is in a more restricted sense one other than the holder who becomes seised or possessed of the holder's lands subject to the lien thereof. Those only are terre-tenants, therefore, in a technical sense, whose titles are subsequent to the incumbrance. *Hulett v. Mutual Life Ins. Co.*, 6 Atl. 554, 555, 113 Pa. 142, 18 Wkly. Notes Cas. 374, 375 (citing *Chahoon v. Hollenback* [Pa.] 16 Serg. & R. 425, 16 Am. Dec. 587).

Where a husband deeded land to his wife, and subsequently, but prior to the recording of the deed, mortgaged it to a third person, and after the mortgage the land was deeded to a child of the husband and wife, in which conveyance both joined, such child may be named as a terre-tenant in a scire facias to foreclose the mortgage. *Hulett v. Mutual Life Ins. Co.*, 6 Atl. 554, 555, 113 Pa. 142.

TERRIBLE.

The word "terrible," in its ordinary signification, means "frightful, adapted to excite terror, or dreadful." *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 754, 41 C. C. A. 22, 49 L. R. A. 77.

TERRITORIAL JURISDICTION.

The tract of land or district within which a judge or magistrate has jurisdiction is called his "territory," and his power in relation to his territory is called his "territorial jurisdiction." Every act of jurisdiction exercised by a judge outside of his territory, either by pronouncing sentence or carrying it into execution, is null. *Phillips v. Thralls*, 26 Kan. 780, 781.

TERRITORIAL PRISON.

"Territorial prison," as used in the Penal Code, includes territorial prisons; also any other prison, in any other territory or state, in which this territory has the right, by contract or otherwise, to incarcerate persons convicted of crime in this territory; also county jails and every place designated by law for the keeping of persons held in custody under process of law or under any lawful arrest. *Rev. St. Okl. 1903*, § 2068.

TERRITORY.

See "Foreign Territory."
Like territory, see "Like."

The word "territory" is used as synonymous with "country" and "domain," and lexicographers so define it. *Plummer v. Jarvis*, 23 Me. (10 Shep.) 297, 301.

In an act settling the boundaries between towns, providing the territory and ju-

risdiction on either side of the said lines as hereby established are accordingly confirmed to the said city and town, respectively, the term "territory" was properly used, and it fixed the civil and political rights of those who might build and become inhabitants on the one or other side of the line, but had no bearing on the question of property. *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 501.

The term "territory," as used in *Comp. St. Dak. § 1115*, which provides that on a petition signed by not less than three-fourths of the legal voters and by the owners of not less than three-fourths of the property in any territory within any incorporated city, and being on the border and within the limits thereof, the city council may disconnect and exclude such territory from the city, includes all the various pieces or parcels of land sought to be excluded; and it is sufficient that the territory described lies upon the border of such city, and that any piece or parcel of land is within that territory. It is not necessary, therefore, that each particular tract or parcel of land sought to be excluded is upon the border of the city, provided it is a part of the territory sought to be excluded. *Oehler v. Big Stone City* (S. D.) 91 N. W. 450, 451.

The words "territory of a state," in a resolve of January 24, 1839, authorizing and requiring a land agent to prevent trespassing on the territory of the state as bounded and established by the treaty of 1783, means the territory that is comprised within the limits of the state; and the resolve is equally applicable to such as may commit trespass on the lands of private persons and to such as trespass upon the public lands of the state. *Plummer v. Jarvis*, 23 Me. (10 Shep.) 297, 301.

As jurisdiction.

The tract of land or district within which a judge or magistrate has jurisdiction is called his "territory." *Phillips v. Thralls*, 26 Kan. 780, 781.

"The word 'territory,' as generally used, describes a jurisdiction and district of a country. Thus we speak of the territories of the United States, of the Northwest Territory, and the territory of Alaska, etc. The word refers to the jurisdiction. It is not limited, when speaking of any particular district as territory, to the line of high-water mark along the shores of navigable rivers or bays or straits. The territory of a jurisdiction of our country extends to its boundaries. It describes the possessions of a country." *The Danube* (U. S.) 55 Fed. 993, 995.

As locality.

"Territory," as used in *Rev. St. U. S. § 5134* [U. S. Comp. St. 1901, p. 3454], requiring national banking associations in their

certificates to name the place where their operations of discount and deposit are to be carried on, designating the state, territory, or district, means simply the place, the locality, in which the business is to be carried on. *Silver Bow County Com'rs v. Davis*, 12 Pac. 688, 690, 6 Mont. 306.

Conquered or ceded territory.

The clause in the Constitution of the United States authorizing Congress to make all needful rules and regulations for the government of its territory and other property applies only to territory within the chartered limits of some one of the states when they were colonies of Great Britain, and which was surrendered by the British government to the old confederation of the states in the treaty of peace. It does not apply to territory acquired by the present federal government by treaty or conquest from a foreign nation. *Dred Scott v. Sandford*, 60 U. S. (19 How.) 393, 395, 15 L. Ed. 691.

TERRITORY.

See "Indian Territory."

"A territory, under the Constitution and laws of the United States, is an inchoate state; a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress, with a separate Legislature, under territorial governor and other officers appointed by the President and Senate of the United States. The word 'territory,' when used to designate a political organization, has a distinctive, fixed, and legal meaning under our political institutions. We find a continental resolution of October 10, 1780, to be the foundation of our territorial system. This declares the demesne or territorial lands shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal Union and have the same rights of sovereignty, freedom, and independence as other states. Schouler, U. S. Hist. 98. Again, in 1784, an ordinance was adopted by the Congress of the federation, providing for the division of all the country ceded, or to be ceded, into states, with boundaries ascertained by ordinance. This plan for the establishment of governments for the territories provided for their temporary government by the laws of any one of the states. This ordinance was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest of the River Ohio. These ordinances were all adopted prior to the adoption of the Constitution. Then came the clause of the Constitution giving to Congress the power to dispose and make all needful rules and regulations respecting the

territory or other property belonging to the United States." *Ex parte Morgan* (U. S.) 20 Fed. 298, 304.

"Territories" are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for the municipal organizations. Congress may not only abrogate laws of the territorial Legislatures, but may legislate directly for the local government. It may make a void act of the territorial Legislature valid, and a valid act void. *Per Wait, C. J., in First Nat. Bank of Brunswick v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046.

The term "territories" is frequently used as not including all of the territorial possessions of the United States, but only the portions thereof organized and exercising governmental functions under act of Congress. It is so used in Act Cong. Feb. 9, 1889, c. 120, 25 Stat. 658 [U. S. Comp. St. 1901, p. 3630], making certain acts criminal, but exempting the territories from the operation of such act. *In re Lane*, 10 Sup. Ct. 760, 761, 135 U. S. 443, 34 L. Ed. 219.

As dependent governments.

Of the status and rank of territorial governments the Supreme Court of the United States, in the case of *Snow v. United States*, 85 U. S. (18 Wall.) 317, 21 L. Ed. 784, said: "The government of the territories of the United States belongs primarily to Congress, and secondarily to such agencies as Congress may establish for that purpose. During the term of their pupillage as territories they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government. It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for that purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt." A territorial government is an agency employed by Congress to aid in governing people of the territory in the same way as a municipal government is employed by the Legislature of a state to aid in the government of the population of a city. The Supreme Court further said of them, in the case of *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the

United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations." *People v. Daniels*, 22 Pac. 159, 160, 6 Utah, 288, 5 L. R. A. 444.

A territory is a distinct political society, and therefore sovereign in its action, except as limited by the organic act; but its action is subject to approval or disapproval by Congress. To the people of a state in the Union is secured the right of self-government, while the people of the territories have not this right, and depend for their government on the will of Congress. The state regulates its own internal concerns, while Congress directs the internal affairs of a territory. In a territory the courts have no final jurisdiction. The power of the executive and the tenure of his office are likewise subject to this sovereign power and will of Congress and of the President, and in nothing pertaining to the existence, organization, or power of a territory is it sovereign and master of itself, and it has no authority to impose disabilities upon aliens within its limits, and much less has it the right to confiscate to its own use and benefit their property. Therefore an act by the Legislature of the territory of Montana "to provide for the forfeiture to the territory of placer mines held by aliens," was void. *Territory v. Lee*, 2 Mont. 124, 133, 134.

"The territories are not the political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations. It is certainly now too late to doubt the power of Congress to govern territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded." *First Nat. Bank of Brunswick v. Yankton County*, 101 U. S. 129, 133, 25 L. Ed. 1046.

District of Columbia.

The term "territory," when used generally to include every territory of the United States, includes also the District of Columbia. *Laws N. Y.* 1892, c. 677, § 23.

Whenever the word "territory" shall be used in the civil practice act, it shall be held to include and apply to the District of Columbia. *Comp. Laws Nev.* 1900, § 3687.

Indian nation.

In holding that the term "territory," in the statute in reference to a certificate by the Governor of a state or territory annexed to certain deeds, included the Cherokee Nation, the court said: "This term is anomalous. It

is certainly not a foreign territory, but is a part of the United States territory, using 'territory' in its general sense. It is not a state in the sense in which the other states are called, nor yet is it a recognized territory as the other recognized territories are, and yet it is a territory of the United States, set apart for the Cherokee Nation, with a recognized government, legislative, executive, and judicial, under the protection of the United States government, and under its tutelage and guardianship, and for the purposes now under consideration it must be considered a territory within the United States." *Whitsett v. Forehand*, 79 N. C. 230, 232.

As state.

See "State."

TERROR.

See "Circumstances of Terror."

"Terror" signifies more than "alarm" or "force." It is agitating or excessive fear, which usually benumbs the faculties. It is one of the passions the existence of which will sometimes reduce a homicide from murder to manslaughter, but it is never necessarily an element of self-defense. *Arto v. State*, 19 Tex. App. 126, 136.

TEST.

"Test," as used in the Constitution, providing for giving the form of an official oath, that no other oath, declaration, or test shall be required as a qualification for any office of public trust, includes inquiries into party affiliation or religious opinions, but does not include other qualifications often required for public services, such as education and scientific knowledge required in surveyors and other specialists, and legal knowledge in all the officers of the law. *Attorney General v. Detroit Common Council*, 24 N. W. 887, 889, 58 Mich. 213, 55 Am. Rep. 675.

"Test," as used in Const. art. 5, § 25, requiring all officers to take and subscribe a certain prescribed oath, and providing that no other oath, declaration, or test shall be required as a qualification, refers to the English test act, passed in the reign of Charles II, directing "all officers, civil and military, to take the oaths and make the declaration against transubstantiation, in any of the king's courts" and to "receive the sacrament of the Lord's supper, according to the usage of the Church of England, in some public church, immediately after divine service," and deliver into court a certificate thereof. *People v. Hoffman*, 5 N. E. 596, 605, 116 Ill. 587, 56 Am. Rep. 793.

The examinations provided for in the civil service act are not such "tests" as are

contemplated by Const. art. 5, § 25, which, after subscribing the oath to be taken by civil officers, provides that no other oath, declaration, or test shall be required. *People v. Loeffler*, 51 N. E. 785, 789, 175 Ill. 585.

The section of the Constitution describing the form of oath to be taken by officers, and providing that "no other oath, declaration, or test shall be required as a qualification for any office or public trust," was evidently intended to prevent the subjection of an official to any ordeal to ascertain his political, religious, or social views. It was probably incorporated because of the obnoxious test oaths to which the civil and military officers were subjected under the English laws. "Test" being used in connection with the words "oath" or "declaration," it is evident that it was intended to have a restrictive meaning. The requirement that a health and street inspector shall take the examination and otherwise comply with the rules and requirements of the civil service before he can take the office is not requiring an additional test, within the meaning of the word as here used. *Rogers v. City of Buffalo*, 3 N. Y. Supp. 671, 674.

The term "testing with the polariscope," as used in the tariff act of 1897, relating to the fixing of the duty on raw sugars, etc., must be construed as meaning the polariscopic test which had at the time of the passage of the act been in commercial use for 20 years, and had been employed under the prior tariff act since 1883, by which an actual reading of the scale was taken as the value of the sugar for sale or duty purposes; and the Secretary of the Treasury was not authorized to adopt a different method of making such test, which had been used for two years under the sugar bounty act of 1890, by which certain arbitrary corrections, determined mathematically and varying with the temperature at which the test was made, were added to the scale readings. *Bartram Bros. v. United States* (U. S.) 123 Fed. 327, 329.

TESTABLE CAPACITY.

"Testable capacity," in a person in whom insanity is not supposed, amounts to nothing more than a knowledge of what he is about, and how he is disposing of his property, and the purpose so to do. *Sutton v. Sutton* (Del.) 5 Har. 459, 461.

TESTAMENT.

See "Inofficious."

"Swinburne defines a testament to be a just sentence of our will touching that we would have done after our death." *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495 (quoting *Turner v. Scott*, 51 Pa. [1 P. F. Smith] 126, 132); *In re Nadal's*

Will, 2 Hawaii, 400, 403; *White v. Helmes* (S. C.) 1 McCord, 430, 438.

A "testament" is a testimonial in which is contained and set forth the will of him who makes it, establishing or appointing his heirs, and disposing as he thinks fit of his property after death. *Pluche v. Jones* (U. S.) 54 Fed. 860, 865, 4 C. C. A. 622.

The words "will" and "testament" and the phrase "last will and testament" are exactly synonymous by common usage all over the world. *Hill v. Hill*, 35 Pac. 360, 7 Wash. 409.

By the law of France, testaments are of two kinds, viz.: (1) By public action, which must be executed before two notaries in the presence of two witnesses, or before one notary in the presence of four witnesses; and (2) by holograph, which is not valid unless it has been written, dated, and signed exclusively by the testator. An acte de notariete, disposing of a wife's property as follows: "To A., her husband, who accepts it, here present, the whole of her property," etc., "that A., in case of his survivorship, may dispose of said property as something belonging to him in full ownership from the date of the death of said donatrix"—is not under the law of France a testament, but is rather a donatio inter vivos. *Appeal of Aubert*, 1 Atl. 336, 338, 109 Pa. 447.

A "testament" in strictness concerns personal property. Until the Revised Statutes it needed no witness of its publication. It belongs to the ecclesiastical jurisdiction. It might by the canon law be made at the age of 14, and the executor could not act in all respects as such till he obtained letters testamentary of the ordinary; and it cannot be executed except by an executor or administrator. A will, or, as it more properly called, a "devise," of real estate, is of an entirely different and opposite character to a testament. *Conklin v. Egerton's Adm'r* (N. Y.) 21 Wend. 430, 436.

A "testament" is the legal declaration of a man's intentions, which he wills to be performed after his death. An instrument in writing, by which the donor, in consideration of natural love and affection, gave certain slaves to be equally divided among all his children at his death, was a testament, and not a deed. *Ragsdale v. Booker* (S. C.) 2 Strob. Eq. 348, 352, note (citing 2 Bl. Comm. 500; *Rich. Wills*, 3).

A "testament" is the act of last will, clothed with certain solemnities, by which the testator disposes of his property, either universally, or by universal title, or by particular title. *Civ. Code La.* 1900, art. 1571.

By "testament" is understood the expression of the will of a man or woman, who, being in possession of a sound mind and en-

the judgment, provides verbally or in writing for the disposal of his or her property interests and rights, with legacies and benefits to his or her heirs, after his or her death. Comp. Laws N. M. 1897, § 1946.

Devise distinguished.

See "Devise."

TESTAMENTARY CAPACITY.

"Testamentary capacity" exists where the testator has understanding of the nature of the business he is engaged in, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires it to be distributed. *Nicewander v. Nicewander*, 87 N. E. 698, 700, 151 Ill. 156.

"Testamentary capacity" means such capacity on the part of a testator as to enable him to know his estate, his children and heirs at law, their natural claims on his bounty, and to take a rational survey of his estate and dispose of the same according to a fixed purpose of his own. *Oberdorfer v. Newberger*, 23 Ky. Law Rep. 2323, 2325, 67 S. W. 287.

"Testamentary capacity" is the ability to comprehend the condition of one's property and the testator's relations to those who may naturally expect to become the objects of his bounty. *Godden v. Burke's Ex'rs*, 35 La. Ann. 160, 173.

Testamentary capacity "implies that the testator fully understands what he is doing and how he is doing it. He must have mind and memory sufficiently strong to understand the business in which he is engaged when he executes the will." *Clark's Heirs v. Ellis*, 9 Or. 128, 129.

Under the law, as now settled, "testamentary capacity" is not determined by what one believes; but the test is, putting aside all perversion, peculiarities, and hallucinations of the mind, does there remain in the subject an untrammelled intellect, sufficiently strong and rational to know the value and extent of his property, the number and names of those who are the natural objects of his bounty, their deserts with reference to their conduct and treatment towards him, and memory sufficient to carry these things in mind long enough to have his will prepared and executed? *Wait v. Westfall*, 68 N. E. 271, 276, 161 Ind. 648.

In order to possess testamentary capacity, it is essential that the testator should have sufficient capacity to comprehend perfectly the condition of his property, his relation to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without

prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. *Delafield v. Parish*, 25 N. Y. 9, 29.

Any person capable of recollecting of what his property consists, and who by ties of blood or friendship have claims upon his bounty, and whose mind is sufficiently sound to enable him to know and understand what disposition he wishes to make of his property after his death, has testamentary capacity. *Bennett v. Bennett*, 26 Atl. 573, 50 N. J. Eq. (5 Dick.) 439.

"It may be stated as a general proposition that if a testator, when he writes or dictates a will, is possessed of sufficient mind and memory to understand and direct the business in which he is engaged, he can perform a valid testamentary act. In ordinary cases, and as a general rule, mere feebleness of intellect, which does not deprive a testator of an understanding of what he intends to do with his property, is insufficient to invalidate a will. This is also true of one who entertains erroneous, foolish, and even absurd ideas on some subjects, unless such vagaries of the mind operated on the testamentary disposition of his property, the mind being otherwise apparently sound and clear. The courts have gone very far in the effort to sustain wills, where it appears that a testator had intelligence enough to know what he was doing. This at times may only be seen as through a glass darkly; yet, if so much can be made to appear, a testamentary disposition of property will be sustained. A lunatic, even, may make a good will, if it be shown that it was executed when he enjoyed a lucid interval, and at the time was in possession of his faculties. A disposing mind and memory is one in which the testator is shown to have had, at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the act he was engaged in, a full knowledge of the property he possessed, an understanding of what he wished to do with it, and of the persons and objects whom he desired to participate in his bounty." *Yardley v. Cuthbertson*, 108 Pa. 395, 405, 1 Atl. 765, 56 Am. Rep. 218.

To constitute "testamentary capacity," the intellect of a testator need not be in its most perfect state of integrity and possess all its original force and vigor. "Testamentary incapacity does not necessarily suppose the existence of insanity, properly so called. Weakness of intellect from extreme age, from great bodily infirmity, from intemperance to the extent of disqualifying a testator from knowing and appreciating the nature, effect, and circumstance of the act he is engaged in, is as much testamentary in-

capacity as raving madness. If from any cause an alleged testator is so enfeebled in mind as to be incapable of knowing the property he possesses, of appreciating the effect of any disposition made by him of it, and of distinctly understanding to whom he intends to bequeath it, he is without the testamentary capacity required to make a valid will." *Leech v. Leech*, 21 Pa. (9 Harris) 67, 68.

To be possessed of "testamentary capacity," one must have a sound, disposing mind and memory, to be able to converse rationally and act with judgment and reflection in reference to the matter he was about. He must have sufficient mind to know that he was making a will, and to understand what was implied in that act. If the testator was at the time the victim of insanity, or a maniac laboring under a fixed delusion in regard to some subject, which no rational mind could entertain, and which had a direct influence or bearing on the will, he was not possessed of testamentary capacity. "A perfect capacity is usually tested by this: that the individual talks rationally and sensibly, and is fully capable of any rational act requiring thought, judgment, and reflection. This is the standard of a perfect capacity, but the question is not how well a man can talk or reason, or how much judgment he can display, or with how great propriety and sense he can act. It is, only, has he mind and reason, can he talk rationally and sensibly, or has he thought, judgment, and reflection? Weakness of mind may exist in many different degrees without making a man intestable. Courts will not measure the extent of place, understandings, or capacities. If a man be legally compos mentis, be he wise or unwise, he is the disposer of his own property, and his will stands as the reason for his actions." *Duffield v. Robeson* (Del.) 2 Har. 375, 379.

Testamentary capacity "means a sound and disposing mind and memory. The testator must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very imperfect. It may be greatly impaired by age or disease. He may not be able at all times to recollect the names of persons or the families of those with whom he had been intimately acquainted. He may at times ask idle questions, and repeat those which had been before asked and answered. Yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will; but the question is not so much what was the degree of memory possessed by the testator as

this: Had he a disposing memory, and was he capable of recollecting the property he is about to bequeath, or manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged?" *Lowe v. Williamson*, 2 N. J. Eq. (1 H. W. Green) 82, 85.

In order to possess testamentary capacity testator must be possessed of sound and disposing mind and memory. He may not be able at all times to recollect the names of the persons or the families of those with whom he had been intimately acquainted, but must possess sufficiently sound understanding to enable him to know and understand the business in which he was engaged at the time he executed his will; and, if he was capable of recollecting what property he was about to bequeath, the manner of distributing it, and the object of his bounty, he possessed testamentary capacity. *Stackhouse v. Horton*, 15 N. J. Eq. (2 McCart) 202, 206.

To have the capacity to make a will, a man must be able to know the number of his children, or other dependents on his bounty, their deserts with reference to conduct and capacity, as well as need, and what he has before done for them relatively to each other, and the amount and condition of his property. If he has an insane delusion in respect to one of his children or other natural object of his bounty, and the instrument presented for probate is the product of such insane delusion, it is void, because he has not the testamentary capacity which the law requires. In *re Segur's Will*, 44 Atl. 342, 343, 71 Vt. 224.

No better definition of what constitutes "testamentary capacity" can be given than that in *Wilson v. Mitchell*, 101 Pa. 495, 503: "The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he engaged at the time when he executed the will?" In *re Yorke's Estate*, 6 Pa. Dist. R. 321, 322.

In *Brinkman v. Rueggessick*, 71 Mo. 553, the court quoted with approval Judge Redfield's conclusion as to the extent of mental capacity required to make a will, as follows: "The result of the best considered cases on the subject seems to put the quantum of understanding requisite to the valid execution of a will on the basis of knowing and

comprehending the transaction, or, in popular phrase, that the testator should at the time know and understand what he was about." And the court then proceeds to say: "And it is conceded in most of the cases that a man may be capable of making a will, and yet incapable of making a contract or managing his estate." *Crossan v. Crossan*, 70 S. W. 136, 138, 139, 169 Mo. 631 (citing *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890).

In the case of *Wise v. Foot*, 81 Ky. 10, in discussing testamentary capacity, the court uses this language: "Testable capacity does not rise to the high degree of extending to an ability necessary to render a person capable of making a contract where the parties deal at arm's length; but exists where the testator has mind and memory enough to understand that he is selecting the persons whom he wishes to have his property, and to know his property and the natural objects of his bounty, and his duties to them and the persons upon whom his bounty is bestowed by the testamentary paper which he signs." *Howat v. Howat's Ex'r* (Ky.) 41 S. W. 771, 772.

The test of "testamentary capacity" in this state is, not whether the testator is entirely sane, but whether he is of sound and disposing mind and capable of executing a valid deed or contract. In *Davis v. Calvert* (Md.) 5 Gill & J. 269, 25 Am. Dec. 282, and *Colvin v. Warford*, 20 Md. 357, the meaning of these words has been defined to be that the testator must have had sufficient capacity, at the time of executing the will, to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property and the relative claims of the different persons who should have been the objects of his bounty; and the court added: "But the meaning of the words 'judgment and understanding' is not that the jury should reject the will because they may believe that it was in its provisions unjust or injudicious, though those provisions may be considered by them in deciding the question as to the testator's capacity." In *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666, an instruction was approved in which the jury were told that neither age, nor sickness, nor extreme distress, nor debility of body, will disqualify a person from making a will, if sufficient intelligence remains. In *Whitney v. Twombly*, 136 Mass. 145, the court said: "The highest degree of mental soundness is not required in order to constitute capacity to make a testamentary disposition of property." *Jones v. Collins*, 51 Atl. 398, 399, 94 Md. 403.

Mere eccentricity of belief, including the belief in Spiritualism, is not evidence of want of testamentary capacity, provided the testator is not affected with any delusions respecting matters of fact. *McClary v. Stull*, 44 Neb. 175, 188, 62 N. W. 501.

TESTAMENTARY CONDITION.

A "testamentary condition" is a future and uncertain event, upon existence of which the testator has made his bounty to depend. In *re Wheeler's Estate*, 8 N. Y. Leg. Obs. 378, 380 (citing 13 Pothier, *Pandectes*, p. 265).

TESTAMENTARY DISPOSITION.

A gift of property to take effect after the grantor's death is a "testamentary disposition." *Chestnut St. Nat. Bank v. Fidelity Ins., Trust & Safe-Deposit Co.*, 40 Atl. 486, 487, 186 Pa. 333, 65 Am. St. Rep. 880.

A "testamentary disposition" of property is one which is not to take effect unless the grantor dies, or until that event. *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617, 699, 56 Hun, 639.

The meaning of the words "testamentary disposition," in the law relative to the property rights of married persons and the law of descent of real property, is "disposition by will." *Hill v. Hill*, 35 Pac. 360, 7 Wash. 409.

TESTAMENTARY GUARDIANSHIP.

"Testamentary guardianship," or, as it was sometimes called, "statutory guardianship," was established by St. 4 & 5 Phil. & M. c. 8, and St. 12 Car. II, c. 24, § 8, by which a father might appoint by deed or will a guardian for his infant children until their full age. This is in force in Maryland, and is recognized in Acts 1798, c. 101, subc. 12, § 1. *Mauro v. Ritchie*, 16 Fed. Cas. 1171, 1179.

TESTAMENTARY INSTRUMENT.

A "testamentary instrument" is one which declares the present will of the maker as to disposal of his property after death, without attempting to declare or create any rights therein prior to such event. *Templeton v. Butler*, 94 N. W. 306, 308, 117 Wis. 455.

TESTAMENTARY INVENTORY.

A "testamentary inventory" is the instrument containing a list of the property and other articles belonging to the estate of the deceased, making a will or dying intestate, made with regularity and order. *Comp. Laws N. M. 1897*, § 2021.

TESTAMENTARY SUCCESSION.

"Testamentary succession" is that which results from the institution of heir contained in a testament executed in the form prescribed by law. *Civ. Code La. 1900*, art. 876.

TESTAMENTARY TRUSTEE.

The expression "testamentary trustee" includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator. Code Civ. Proc. N. Y. 1890, § 2514, subd. 6; In re Clark (N. Y.) 5 Redf. Sur. 466, 468; In re Hazard, 4 N. Y. Supp. 701, 51 Hun, 201.

Where an executor is directed to sell testator's real estate, and invest the proceeds, and pay the income to his daughter, he is a "testamentary trustee," within Code Civ. Proc. § 2514, subd. 6. In re Valentine's Estate, 23 N. Y. Supp. 239, 291, 1 Misc. Rep. 491.

To constitute a "testamentary trustee," it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is in a sense a trustee, for he deals with property of others confided to his care; but he is not a trustee in the sense in which that term is used in courts of equity and in statutes. In re Hawley, 10 N. E. 352, 356, 104 N. Y. 250.

He is a trustee who takes a trust as a devisee under the will. He is an executor who takes under the probate of the will. The title of a devisee never depends on the probate. An executor is not vested with any title, until so vested by letters testamentary. In re Anderson's Estate, 5 N. Y. Leg. Obs. 302, 303.

TESTIFY.

The word "testify" means to bear witness to; to give evidence or testimony of. State v. Robertson, 1 S. E. 443, 445, 26 S. C. 117.

"To testify" means to be examined as a witness under oath or affirmation. Gannon v. Stevens, 13 Kan. 447, 459.

"Testifying" is making a solemn declaration on oath or affirmation, for the purpose of establishing or making proof of some fact. Naah v. Hoxie, 18 N. W. 408, 410, 59 Wis. 384.

The word "testify" has three definitions: (1) To make a statement or declaration in confirmation of some fact; to bear witness. (2) To give evidence or testimony in regard to a case depending in a court or tribunal. (3) In law, to make a solemn declaration under oath or affirmation, before a tribunal, court, judge, or magistrate, for the

purpose of proving some fact. O'Brien v. State, 25 N. E. 137, 139, 125 Ind. 38, 9 L. R. A. 323.

"Testify as a witness," as used in Rev. St. tit. 1, § 142, providing that any party to a civil action may compel any adverse party to testify as a witness in his behalf, means that such party may be compelled to give evidence on the trial or by deposition. Buckingham v. Barnum, 30 Conn. 358, 359.

To testify is to give evidence, and the reasonable and just interpretation of the word, in a statute declaring that a party to an action may be examined as a witness and subjected to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission (Code, § 390), requires that he give evidence in the same manner as other witnesses are bound to do. Mudge v. Gilbert (N. Y.) 43 How. Prac. 219, 221 (citing Bonesteel v. Lynde [N. Y.] 8 How. Prac. 226, 233).

Every mode of oral statement under oath or affirmation is embraced by the term "testify." Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; Civ. Code Mont. 1895, § 4662; Pen. Code Mont. 1895, § 7; Code Civ. Proc. Mont. 1895, § 3463; Pol. Code Mont. 1895, § 16; Pen. Code Cal. 1903, § 7; Civ. Code Cal. 1903, § 14; Code Civ. Proc. Cal. 1903, § 17; Rev. St. Utah 1898, § 2498; Rev. St. Okl. 1903, § 2808.

Affidavits.

In Rev. St. § 1694, requiring sureties to testify as to their responsibility, the word "testify" signifies the giving of testimony, whether orally or in writing, and is satisfied where the sureties testify through affidavits as to their responsibility. Case v. James, 63 N. W. 237, 90 Wis. 320.

Appearance for identification.

The word "testify" comprehends an intelligent, active performance, in which a person, by words or writing or other comprehensible signs, communicates facts within his own mind to another. Under Code Civ. Proc. § 831, rendering a husband or wife incompetent to testify against the other upon the trial of an action, etc., a simple appearance for identification cannot be held to be testifying within the meaning of the section. Jacobson v. Jacobson (N. Y.) 12 Civ. Proc. R. 198, 202.

Production of documents.

Code, § 390, provides for the examination of a party as a witness at the instance of the adverse party, and declares that for that purpose he may be compelled, in the same manner and subject to the same rules for the examination of any other witness, to testify either at the trial or conditionally or on commission. Held, that the word "tes-

tify" means to give evidence, and the party may at the instance of an adverse party be compelled to appear and produce papers and books, as other witnesses may be compelled to do. *Bonesteel v. Lynde* (N. Y.) 8 How. Prac. 228, 233.

TESTIFY THE WHOLE TRUTH.

A certificate of an officer to a deposition, stating the deponent was first sworn "to testify the whole truth," is not a sufficient compliance with the statute, requiring the certificate to show that the deponent was sworn "to testify the truth, the whole truth, and nothing but the truth." *Western Union Telegraph Co. v. Collins*, 25 Pac. 187, 188, 45 Kan. 88, 10 L. R. A. 515.

TESTIMONIO.

A "testimonio" is an authentic copy of a deed or other instrument, given to an interested party as evidence of his title, the original of which is left in the public archives. *Gullbeau v. Mays*, 15 Tex. 410, 414.

TESTIMONY.

See "Direct Testimony"; "Incompetent Evidence"; "Negative Testimony"; "Oral Testimony"; "Positive Testimony."

The word "testimony," in its ordinary meaning, means the statement made by a witness under oath. *Baker v. Woodward*, 6 Pac. 173, 183, 12 Or. 3; *Nash v. Hoxie*, 18 N. W. 408, 410, 59 Wis. 384.

The term "testimony" is defined to be words uttered by witnesses in court. *Schultz v. Bower*, 59 N. W. 631, 57 Minn. 493, 47 Am. St. Rep. 630.

"Testimony" is the statements given by witnesses; and, if relevant, they are evidence. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 456.

The word "testimony," in its restricted legal sense, means a statement made under oath in a legal proceeding, and does not embrace a document or private writing. *Webst. Dict.*; *Black, Law Dict.* But the word "testimony," as often and possibly generally used, embraces more than mere legal statements made under oath in a legal proceeding. In *re Brown's Estate*, 60 N. W. 659, 661, 92 Iowa, 379.

"Testimony," strictly speaking, means the evidence of a witness given under oath, and, even when used in its widest sense, it still has reference to some living agent as its author. *McEntyre v. Tucker*, 25 N. Y. Supp. 95, 96, 5 Misc. Rep. 228.

The word "testimony" does not include documentary evidence. *Barley v. Dunn*, 85 Ind. 338, 339.

"Testimony" is defined as the statement made by a witness under an oath or affirmation. Testimony cannot be taken without administering an oath to the witness. *Peters v. United States*, 33 Pac. 1031, 1033, 2 Okl. 116.

"Testimony" embraces only the declarations of witnesses made under oath or averment. *Wyoming Loan & Trust Co. v. W. H. Holliday Co.*, 24 Pac. 193, 194, 8 Wyo. 386.

"Testimony," as used in Code, § 4604, permitting interested witnesses to testify to transactions with a decedent where the latter's testimony is admitted in evidence, has reference to the facts related by a witness under proper oath or affirmation, and the application of the language must be confined to the sworn testimony of the deceased taken in his lifetime before some court or officer in due form of law. Admission of book entries of advancements made by a testator does not render his children competent to testify to such advancements in partition to divide his estate pursuant to his will, taking into consideration advancements received by them; such evidence not being testimony of the deceased. *Whisler v. Whisler*, 89 N. W. 1110, 1111, 117 Iowa, 712.

Affidavit.

Testimony is the statement or declaration of a witness. It is merely a species or class of evidence. *McDonald v. Elfe*, 61 Ind. 279. While it may be true that the word "testimony" means the statement of a witness under oath, yet it does not necessarily mean that it is delivered to a judicial tribunal. A deposition, made and affirmed, does contain testimony in a cause, and yet may never be delivered or read to the tribunal in which the cause is pending. Webster defines the word "testimony" as a solemn declaration or affirmation, made for the purpose of establishing or proving some fact. "Affidavit" is defined to be a statement or declaration, reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation. By general practice affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action. According to this definition of the word "affidavit," it may be evidence; and, if it is evidence, then it is in a sense testimony. So that a juror who has formed an opinion as to the guilt or innocence of a defendant in a criminal case, based on reading an affidavit of a witness to the transaction, is within the letter of the Criminal Code, which renders incompetent jurors who have formed or expressed opinions based on conversation with

witnesses to the transaction, or reading their testimony, or hearing them testify. *Woods v. State*, 83 N. E. 901, 903, 134 Ind. 85.

Deposition.

The word "testimony," as used by a police judge, in his statement binding a person over for trial, to the effect that it appeared by the testimony that the offense mentioned had been committed and that there was sufficient cause to believe a designated person guilty thereof, was used for the word "depositions," which he took and which he was required to return as provided by law. The word "testimony" is used as a synonym for "deposition." *People v. Lee Ah Chuck*, 6 Pac. 859, 860, 66 Cal. 662.

Evidence distinguished.

The term "testimony," in common language, is frequently used synonymously with "evidence," though "testimony," strictly speaking, means only that evidence which comes from living witnesses, who testify orally, and is included in the word "evidence," which is a more comprehensive term. *Mann v. Higgins*, 23 Pac. 206, 207, 83 Cal. 66.

"Testimony" is a species of evidence by means of witnesses. The broader term "evidence" includes that which is given by witnesses or offered by documents. *Carroll v. Bancker*, 10 South. 187, 192, 43 La. Ann. 1078, 1194.

The words "evidence" and "testimony" are synonymous in meaning, though evidence includes testimony, as well as all other kinds of proof. *Noyes v. Pugin*, 27 Pac. 548, 550, 2 Wash. St. 653.

The term "testimony" is not synonymous with "evidence." So that a statement that a bill of exceptions contains all of the testimony offered does not affirmatively show that it contains all of the evidence in the case. *Central Union Telephone Co. v. State*, 12 N. E. 136, 137, 110 Ind. 203; *Kleyla v. State*, 13 N. E. 255, 112 Ind. 146; *Downs v. Downs*, 17 Ind. 95, 96; *McConaha v. Carr*, 18 Ind. 443; *Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 206, 27 N. E. 448; *Gazette Printing Co. v. Morss*, 60 Ind. 153, 157; *Ingel v. Scott*, 86 Ind. 518, 521; *McDonald v. Elfes*, 61 Ind. 279, 284; *Craggs v. Bohart* (Ind. T.) 69 S. W. 931, 934.

Where the word "testimony" was used as synonymous with "evidence" in making the case on appeal, though its use was an inaccurate one, and was not the correct one, it should be considered as meaning evidence. *Lilly v. Russell & Co.*, 44 Pac. 212, 213, 4 Okl. 94 (citing *Miller v. Wolf*, 63 Iowa, 233, 18 N. W. 889).

"Testimony" and "evidence" are not synonymous terms. Testimony is a kind or

species of evidence. It is, in a trial, the portion of the evidence which may be given orally by witnesses. The use of the word "testimony" for "evidence" in the certificate of the trial judge in the allowance of a bill of exceptions, if the meaning is obvious or it is clear that the latter is intended, will not render the document inoperative. *Columbia Nat. Bank v. German Nat. Bank*, 77 N. W. 346, 347, 56 Neb. 803.

The word "testimony" is not a synonym of the word "evidence," but it is held that where a bill of exceptions recited that the plaintiff introduced the following testimony, and the context made it clear that the word "testimony" referred to documentary evidence, the misuse of the word would not defeat the operation of the instrument. *Harris v. Tomlinson*, 30 N. E. 214, 215, 130 Ind. 426.

The word "testimony," in *Laws 1894*, p. 125, § 30, providing that the court may state the testimony and declare the law, is equivalent to the term "evidence." *United States v. Clark*, 14 Pac. 288, 291, 5 Utah, 226.

TEXAS.

Citizen of, see "Citizen of Texas."

TEXAS MONEY.

"Texas money," as used in a note for \$125, Texas money, at its current price at New Orleans, does not mean gold or silver. The term "Texas money" means that the amount named in the note should be paid in Texas money or its equivalent in specie, or the amount should be in specie by paying enough of Texas money to be equivalent to that amount. *Roberts v. Short*, 1 Tex. 373, 383.

TEXT-BOOK.

A "text-book" is a book or manual used in teaching; a book for students, containing the principles of a science or any branch of learning (Webster); a book to be used as a standard book for a particular branch of study for the use of students (Stormonth); and hence, as used in *School Law*, art. 5, § 26 (*Hurd's Rev. St. 1889*, p. 1235), providing that the board of directors of each district shall not permit text-books to be changed oftener than once in four years, will be construed to include writing or copy books. *People v. Board of Education of Aurora*, 51 N. E. 633, 636, 175 Ill. 9.

School supplies.

"Text-books," as used in the title of *Sess. Laws 1891*, p. 334, c. 46, being "An act to provide cheaper text-books and for dis-

strict ownership of the same," will not be given a technical meaning, but will be held to include globes, maps, charts, and appliances which are proper to be used in the schools, and would come within the meaning of the term "school supplies"; and hence a section of the act authorizing the purchase of school supplies does not make the act invalid, as not expressing its subject in its title. *Affholder v. State*, 70 N. W. 544, 545, 51 Neb. 91.

TEXT-BOOK BOARD.

The term "text-book board," as used in the title of Act March 2, 1901, "An act to establish a text-book board for the public schools of C. county and to define its powers and duties," has not by either technical or ordinary usage acquired a meaning which could of itself indicate that the creation of a board bearing that name would be attended by the selection and exclusive use of text-books of uniform series in the public schools referred to, and even less does the title imply such use would be unchangeable for a long time, and would be compelled under forfeitures and penalties or otherwise. If it be conceded that the creation of a body bearing the name of "text-book board" might imply that its duty would be the selection of text-books, yet the exercise of that function would of itself be wholly ineffective to accomplish the main legislative purpose. *State v. Griggin*, 81 South. 112, 118, 132 Ala. 47.

TEXTILE FABRIC.

A "textile fabric" is a fabric which is woven or may be woven; a fabric made by weaving. *Wood v. Allen*, 111 Iowa, 97, 100, 82 N. W. 451.

"Textile fabrics," as the term is used in Tariff Act Oct. 1, 1890, § 373, would include embroidered handkerchiefs which are not hemstitched. *In re Gribbon* (U. S.) 53 Fed. 78, 81.

THALWEG.

The "thalweg" is the middle of the deepest channel of a river. *State of Iowa v. State of Illinois*, 13 Sup. Ct. 239, 242, 147 U. S. 1, 37 L. Ed. 55; *Keokuk & Hamilton Bridge Co. v. People*, 84 N. E. 482, 483, 145 Ill. 596.

THAN.

See "Other Than."

THAT.

"That," as used in a charter party stipulating that the ship was to carry out 700

tons measurement of assorted cargo, or more, if that does not make her draw over 14 feet of water, must be construed as relative to both the preceding words. As ordinarily used, in conformity to the established rules of the language, it would relate to what is signified by the antecedent word "more," which from its own connection or relation, or relation to the preceding word "cargo," clearly implied more cargo than 700 tons; but to restrict it to that alone would be productive of irrational results. *Roberts v. Opdyke*, 40 N. Y. 259, 261.

"That," as contained in a deed to a trustee, to hold as the absolute property of the grantor's wife, "that she may have a permanent home for her life, and his children by her a pittance after her death," is equivalent to "in order that," "to the end that," and was never designed to vest any interest or estate in his children by her after her death. *Fackler v. Berry*, 25 S. E. 887, 888, 93 Va. 565, 57 Am. St. Rep. 819.

THE.

An order authorizing an election as to the issuance of bonds provided that those voting in favor of the issue should deposit ballots "For the bonds." The ballots read "For bonds," and it was held that the two expressions were equivalent. *State v. Metzger*, 26 Kan. 395, 396.

A count, in stating that defendant broke and entered the iron foundries, machinery, and apparatus, and tore up, broke down, pulled to pieces, prostrated, and destroyed "the same," may mean all these, or some one of these, things; that is, the statement may be taken disjunctively. *Hare v. Horton*, 5 Barn. & Adol. 715, 729.

Under Acts 25th Gen. Assem. c. 62, § 17, providing that, in order to sell intoxicating liquors, a written statement or consent from all resident freeholders owning property within 50 feet of the premises where such business is carried on must be filed, the words "the premises" mean such premises as are actually occupied for the business, and would not include the whole of a building, where a partition separated the saloon from the other portion. *State v. Mateer*, 62 N. W. 684, 685, 94 Iowa, 42.

"The company," as used in a telegraph blank limiting the liability of the company for error or delay in the transmission of any message, and providing that no liability is assumed for the error or neglect of any other company, etc., means the company to whom the message was originally delivered, and applies only to the contract with the first company for service to be rendered on its line alone. *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. Dec. 157.

The use of the word "the" in a legacy of 10 shares of the stock of a certain railroad company is ambiguous, and may as well refer to the stock of the company in general as to the stock owned by the testatrix, and does not operate to make the legacy specific. *Harvard Unitarian Soc. v. Tufts*, 23 N. E. 1006, 1007, 151 Mass. 76, 7 L. R. A. 390.

As all.

As used in an insurance policy providing that, if the property insured shall hereafter become mortgaged or incumbered, the policy becomes null and void, "the" refers to the whole property mortgaged; and hence the policy is not forfeited by a mortgage of a portion thereof. *Born v. Home Ins. Co. of New York*, 81 N. W. 676, 678, 110 Iowa, 379, 80 Am. St. Rep. 300.

As any.

In all our uses of the article "the," it directs what particular thing or things we are to take or assume as spoken of. "The," says Dr. Lowth, "determines what particular thing is meant; i. e., what particular thing we are to assume to be meant." Yet this article is not always used to mean but one. Take the well-worn and well-wearing quotation, "The man that hath not music in his soul is fit for treason," etc., the meaning of the article is not exhausted when one man is found with no music in himself. "The man" means "any man." So, in a statute giving the surrogate the right to give costs to the party entitled, it means any party entitled. *Noyes v. Children Aid Soc. (N. Y.)* 3 Abb. N. C. 36, 40.

The article "the" directs what particular thing or things we are to take or assume as spoken of. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. Yet this article is not always to mean but one, and as used in 2 N. Y. Rev. St. p. 223, § 10, conferring on the surrogate a discretionary power to award costs to "the party" who in his judgment is entitled thereto, does not prohibit the award of costs to more than one of the parties. *Noyes v. Children's Aid Soc.* 70 N. Y. 481, 484.

As one.

A bill of lading providing that in no event should the holder of such bill of lading demand beyond the sum of \$50.00, at which "the article forwarded" is hereby valued, unless otherwise herein expressed, or unless specially insured by the carrier and so specified in the receipt, means the single package received, though the interior of the package was subdivided into three boxes or packages. Each of the three separate boxes cannot be "the article forwarded"; each of them containing the same substances. *Wetzel v. Dinsmore*, 54 N. Y. 496, 498.

As designating a particular object.

"The," as used in an instruction that, though plaintiff was negligent, he was not precluded from a recovery, unless his negligence was the proximate cause of the injury, designates one particular from a class or number, disassociating it from others of the same class, so that attention is thus called to the particular object singled out of the class and thus individualized; and hence such instruction is erroneous, as instructing that plaintiff should recover, unless his negligence was the sole causal agency in producing the injury. *Wastl v. Montana Union Ry. Co.*, 61 Pac. 9, 15, 24 Mont. 159.

"The" is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of "a" or "an." *United States v. Hudson (U. S.)* 65 Fed. 68, 71.

In an instruction, in an action to recover damages on account of a personal injury, stating that, in determining whether the injury was committed willfully, the jury might consider, with other circumstances of the case, the manner of the conductor, the force, if any used by him, and the effects of his acts, together with the presumption that every person intends the natural and probable consequences of his reasonable acts, and an unlawful intent may be inferred from the conduct, which shows a reckless disregard of consequences and willingness to inflict injury by purposely and voluntarily doing the act with knowledge that some one is in a situation to be unavoidably injured thereby, the word "the" does not convey to the mind the idea that the court was characterizing the conduct of the conductor, who was alleged to have inflicted the injuries for which the suit was brought, as reckless and in disregard of consequences, and as exhibiting a willingness to inflict an injury by doing an act purposely and voluntarily, with a knowledge that some one was in a situation to be unavoidably injured thereby. *Citizens' St. R. Co. v. Willoebey*, 33 N. E. 627, 628, 134 Ind. 563.

The use of "the" in *Liquor Tax Law* 1896, § 16, providing that a certified copy of the statement of the result of a vote shall be filed by the town clerk, etc., gives to those words precise and definite application, thus making the words refer to the formal return of the result of the canvass of the votes, which must be made and signed by the inspectors of the election. *People v. Hamilton*, 58 N. Y. Supp. 584, 586, 27 Misc. Rep. 308.

"The same," as used in a demurrer stating that the defendants demur to each paragraph of the complaint as amended, because "the same" does not state facts sufficient to state a cause of action, must be regarded as referring to each paragraph, and not to the entire complaint. *Terre Haute*

& L. R. Co. v. Sherwood, 132 Ind. 129, 31 N. E. 781, 782, 17 L. R. A. 839, 32 Am. St. Rep. 239.

Defendants accepted an order of a third person in favor of plaintiff to a certain amount, payable out of the certificates due the third person under a contract between him and defendants, and specified in the order, "the same not to be due" until September 1st. Held, that the words "the same not to be due" should be construed to refer to the certificates, and not to the order, and that defendants paid at their peril any person other than plaintiff for work for which such certificates were given. French Spiral Spring Co. v. New England Car Trust (U. S.) 32 Fed. 44, 46.

"The administrator," as used in St. 1857, c. 305, § 1, providing that, where an executor or administrator is a party to the suit, the other party shall not be permitted to testify in his own favor, except as to such acts or contracts as have been done or made before the probate of the will or the appointment of the administrator, construed to mean only the administrator bringing the suit, and not a former administrator; and hence the opposite party may testify as to contracts entered into or transactions had with the former administrator. Palmer v. Kellogg, 77 Mass. (11 Gray) 27, 28.

As thing first mentioned.

The use of the words "the county," in an indictment for a misdemeanor, in which the name of the county is first written in full and twice thereafter referred to as the county aforesaid, and then by the words "the county," is a sufficient designation of the county first mentioned, though it might be insufficient in an indictment for felony, as the use of the definite article "the" necessarily meant the county the name of which had been immediately before three times repeated. Sanderlin v. State, 21 Tenn. (2 Humph.) 815, 819.

THE FIELD.

See "Field."

THEATER.

See, also, "Opera House."

As house, see "House."

A "theater" is defined to be a building appropriated to the representation of dramatic spectrals; a place for show; a playhouse. Commonwealth v. Fox, 10 Phila. 204.

A "theater" is a house for the exhibition of dramatic performances, as tragedies, comedies, and farces; a playhouse, comprehending the stage, the pit, the boxes, galleries, and orchestra. Among the ancients it signified an edifice in which spectacles or shows

were exhibited for the amusement of spectators, as its derivation from the Greek verb "to see" plainly shows. Rowland v. Kleber, 1 Pittsb. R. 68, 71; Bell v. Mahn, 15 Atl. 521, 523, 121 Pa. 225, 1 L. R. A. 364, 6 Am. St. Rep. 786.

The word "theater" imports nothing more than a stage on which the actors play and the room in which the acting is done and seen, and does not import a place where valuable goods which may be the subject of larceny are stored; and an indictment for breaking into and entering a theater with intent to commit a larceny is insufficient. Lee v. State, 56 Ga. 477, 478.

A theater is a house for the exhibition of dramatic performances, but the word "theater" in Act 1850 (P. L. 773), providing a punishment for any person or persons attempting to show, hold, or exhibit any theater, circus, or menagerie, etc. without a license, refers, not to the place, but to the troupe or the exhibition itself—the language being "every other county within the bounds of which such theater may be shown, held, or exhibited"; that is, in every county in which the dramatic performance is exhibited the license shall be paid. Commonwealth v. Keeler, 3 Pa. Dist. R. 158, 161.

Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls rented or used occasionally for concerts or theatrical representations, shall be regarded as a "theater," within the meaning of the war revenue act of 1898. U. S. Comp. St. 1901, p. 2287.

Circus.

Although the term "theater" has an extended signification and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partake more or less of the character of the drama. The dramatic performances which are recognized as belonging to a theater are those adapted to the stage, with the appropriate scenery for their representation. The stage, with its machinery and appurtenances, forms an essential element in the definition of the term "theater." A circus, on the other hand, has no stage, but a ring, and the performances are of a character that can take place in the circle, in the absence of the stage and its appurtenances. A license to keep a theater will not protect one who by contract with the licensee exhibits therein feats of legerdemain or slight of hand, as it cannot be said to be a dramatic performance. Jacko v. State, 22 Ala. 73, 74.

Opera.

An opera company need not be licensed under an act fixing licenses for theaters. Rowland v. Kleber, 1 Pittsb. R. 68, 71.

THEATRICAL BUSINESS.

The term "theatrical business" includes, not only the pure drama, but also minstrel performances. Taxing Dist. of Shelby Co. v. Emerson, 72 Tenn. (4 Lea) 312, 314.

THEATRICAL PERFORMANCE.

A musical performance is not a theatrical, nor a dramatic, performance, within the meaning of Rev. St. Ohio, § 7032a, prohibiting any theatrical or dramatic performance of any kind or description on Sunday. State v. Fennessy, 10 Ohio S. & C. P. Dec. 608, 609.

THEFT.

See "Loss by Theft."
See, also, "Larceny."

Theft is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking. Pen. Code Tex. 1895, art. 358; Quiltzow v. State, 1 Tex. App. 65, 68; Sansbury v. State, 4 Tex. App. 99, 100; Chance v. State, 27 Tex. App. 441, 443, 11 S. W. 457.

Theft includes swindling and embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code. Code Cr. Proc. art. 714, subd. 6. Theft is the fraudulent taking of personal property under certain designated circumstances, and necessarily involves the idea of an unlawful acquisition. Whitworth v. State, 11 Tex. App. 414, 428, 429.

An ordinary indictment for theft will support a conviction for unlawfully taking into possession and driving from its accustomed range the animal of another, without the consent of the owner and with intent to deprive the owner of its value; for Pen. Code, art. 749, provides that if any person shall willfully take into possession and drive and remove from its accustomed range any live stock not his own, without the consent of the owner and with intent to defraud the owner thereof, he shall be deemed guilty of theft. Campbell v. State, 22 Tex. App. 262, 269, 2 S. W. 825.

Theft, under Pen. Code, § 3096, includes all unlawful acquisitions of personal property. Counts v. State, 37 Tex. 593, 594.

Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use, with intent to deprive the

owner of the value of the same, shall be guilty of theft. Brooks v. State, 26 Tex. App. 184, 189, 9 S. W. 562 (citing Willson, Tex. Cr. Laws, § 1292). It will be observed that, in defining this species of theft, the intention to appropriate the property is not expressly made an element of the offense, as it is in the definition of theft in general. Purcell v. State, 13 S. W. 993, 994, 29 Tex. App. 1.

"Theft" is the fraudulent taking of personal property from another with intent to appropriate the same to the taker's own use. That the taking may have been by assault, or by violence, and putting in fear of life or bodily injury, renders it no less a fraudulent taking. Skipworth v. State, 8 Tex. App. 135, 138.

As an accident.

See "Accident—Accidental."

Criminal intent.

"Theft" is the fraudulent taking of personalty, so that one who takes property under the belief that he has a right to take it, and that it is his, is not guilty of theft, though he takes it from an officer who has the possession thereof, who has levied thereon as the property of another. Bullard v. State, 53 S. W. 637, 638, 41 Tex. Cr. R. 225.

The term "theft" was construed not to include the taking of a saddle belonging to his cousin by defendant, who wished to leave the neighborhood to avoid a difficulty, but who left with the cousin more than sufficient property to pay for the saddle, with a letter directing him to take such property in payment; the decision being based upon want of felonious intent. Beckham v. State (Tex. Cr. App.) 22 S. W. 411.

"Theft" is the fraudulent taking of property with intent to deprive the owner of the value of the same and to appropriate it to the use of the person taking it. The taking must be a fraud upon the rights of another, and that must be an actual and intended fraud, and not a constructive or legal one. The crime of theft is not constituted by the taking, or the fraudulent taking; but it also includes the purpose and intent to defraud. There must be an intentional taking without the consent of the owner, an intentional fraud, and an intentional appropriation, or the theft is not complete. Mullins v. State, 37 Tex. 337, 338.

To constitute theft of lost property, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking, and in lost property the time of the taking is the time of finding the property. If the fraudulent intent did not exist at the time of taking, no subsequent fraudulent intent in relation to the property will constitute theft. State v. Riggs, 70 Pac. 947, 951, 8 Idaho, 630.

Embezzlement distinguished.

The terms "theft" and "embezzlement" cannot characterize the same act, because they are repugnant to and irreconcilable with each other. *United States v. Thomas* (U. S.) 69 Fed. 588, 590.

"Theft," as distinguished from "embezzlement," is taking property of another from the possession of the owner with intent to defraud. "Embezzlement," as distinguished from "theft," is taking property of another in the possession of the accused with intent to defraud. The crimes are essentially the same, but most unfortunately are, for the purposes of prosecution, entirely distinct. The one demands, as an essential element, a trespass, a breach of technical possession; the other cannot be committed unless the element of trespass or breach of technical possession is absent. The former is a crime at common law; the latter is a statutory offense. *State v. Hanley*, 39 Atl. 148, 149, 70 Conn. 265.

"Theft" is the fraudulent taking of personal property under certain designated circumstances, and necessarily involves the idea of unlawful acquisition, thereby differing from embezzlement, which is the fraudulent conversion of similar property after its possession has been lawfully acquired. *Simco v. State*, 8 Tex. App. 406, 407.

Fraudulent taking.

See "Fraudulent Taking."

Larceny synonymous.

"Theft" is a popular name for larceny. *State v. Boyce*, 65 Ark. 82, 83, 44 S. W. 1043.

Blackstone regards "theft" as synonymous with "larceny." It is the felonious taking and carrying away of the personal goods of another. *Mathews v. State*, 36 Tex. 675, 676 (citing 4 Bl. Comm. 230).

"Theft" is defined as a proper term for larceny, and is used by Blackstone as synonymous with the latter word, and as descriptive of one and the same offense. Hence it is held that the word "theft" describes a crime, and is synonymous with larceny; so that a recital in an executive warrant for extradition, stating that the party sought to be extradited was charged with theft, was sufficient. *People v. Donohue*, 84 N. Y. 438, 442.

Swindling.

See "Swindle—Swindling."

THEFT BOTE.

"Theft bote" as defined by Blackstone, occurs "where the party robbed not only knows the felon, but also takes his goods again, or other amends, on the agreement

not to prosecute." This is frequently called "compounding a felony," and was formerly held to make a man an accessory. *Forshner v. Whitcomb*, 44 N. H. 14, 16; *Commonwealth v. Pease*, 16 Mass. 91, 93.

THEFT FROM THE PERSON.

See, also, "From the Person."

"Theft from the person" is an offense distinct from any other theft, and the punishment prescribed therefor is not limited the same as for other thefts. The two essential elements of theft from the person are that the property was taken from the person, and that it was so taken without the knowledge of the person from whom it was taken, or so suddenly as not to allow the injured person time to resist. It can transpire only in the county of the actual overt act of taking, and hence that county is the county of the venue. *Gage v. State*, 22 Tex. App. 123, 127, 2 S. W. 638.

THEFT OF ANIMALS.

The words "theft of animals," in a bail bond, describing the offense of which the principal is accused, imports the theft of a species of animals which are subject to theft, and therefore, as the words necessarily mean an offense known to the law, their use is sufficient, without describing the nature of the animals alleged to have been stolen. *Vivian v. State*, 16 Tex. App. 262, 264.

THEFT ON LAND OR AFLOAT.

A bill of lading recited that a ship company would not be liable for any loss or injury, etc., of goods transported, from theft on land or afloat, etc. Held, that the clause, "theft on land or afloat" should not be construed to exempt the company from a theft committed by the purser, who was placed in charge of the articles by the company itself. *Spinette v. Atlas S. S. Co.* (N. Y.) 14 Hun, 100, 105.

THEIR.

As all.

"Their roads," as used in Act Ill. Feb. 12, 1855, providing that all railroad companies incorporated under the laws of the state were empowered to make contracts and arrangements with each other and with railroad corporations of other states for leasing or running their roads or any part thereof, by the grammatical and natural construction, includes roads of Illinois corporations as well as roads of corporations of other states. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 12 Sup. Ct. 953, 955, 145 U. S. 393, 36 L. Ed. 743.

"Their," as used in a will directing trustees to pay annually from the income of the estate the proper sum for the respectable maintenance of the testator's son and his wife and his children, to them jointly or to either of them, during their joint lives, or for their use and benefit, etc., should be construed to apply to the children, as well as to the parents. *Sargent v. Bourne*, 47 Mass. (6 Metc.) 32, 49.

"Their," as used in an indictment charging the defendant with the taking of property belonging to two owners from a house, with intent to take the property from the possession of the owners, or either of them, without their consent, refers to them collectively, and is not tantamount to negating the consent of each of them, and therefore the indictment is insufficient. *Young v. State*, 59 S. W. 890, 891, 42 Tex. Cr. R. 301.

As importing joint obligation.

The word "their" imports a joint obligation. *Cottrell v. Hathaway*, 66 N. W. 596, 597, 108 Mich. 619 (citing *Edwards v. Hughes*, 20 Mich. 289; *Miller v. Bay Circuit Judge*, 41 Mich. 326, 2 N. W. 26; *Geiges v. Greiner*, 68 Mich. 153, 155, 36 N. W. 48; *Sword v. Lenawee Circuit Judge*, 71 Mich. 284, 285, 38 N. W. 870).

As implying ownership.

A fire policy to insured on "their four-story stone or brick building" is an assertion by the insured that they were the owners of the property, but it did not mean that they held it by a technical legal title. It did not mean that the insured had the conveyance of the perfect title at law. If the insured were the owners of the property, in so far as to have the entire beneficial interest, and in case of loss to lose the whole value of the property, then they were owners as set forth in the policy, and the property was their property as stated in the policy. *Gaylor v. Lamar Fire Ins. Co.*, 40 Mo. 13, 17, 93 Am. Dec. 289.

THEIR CHILDREN.

"Their children," as used in a life policy payable to the wife of the assured, and, in the event that she died before him, then to their children, mean the children common to the assured and his wife. *Evans v. Opperman*, 13 S. W. 312, 76 Tex. 293.

THEIR DEATH.

A will devising land to two sons named, "and after their death to their children," meant the death of the survivor, and created a life estate, with remainder to their children as purchasers on the death of the survivor. *Jones v. Cable*, 7 Atl. 791, 792, 114 Pa. 586.

THEIR JOINT AND NATURAL LIVES.

A marriage settlement between parties "during their joint and natural lives" means during their joint lives and the life of each of them. *Smith v. Oakes*, 14 Sim. 122, 124.

THEIR LIVES.

Where a testator directed his executors to procure a suitable residence for his daughter at an expense not exceeding \$6,000, and to hold the same in trust for her and her son during their lives, devising the property over, the term "during their lives" clearly imported an intention on the part of the testator to give an interest during their joint lives and the life of the survivor, which, on her death before the testator's death, did not lapse, but went to the son for life. *Dow v. Doyle*, 103 Mass. 489, 491.

An agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife and during the life of the survivor. *Douglas v. Parsons*, 22 Ohio St. 526.

THEIR OWN LAND.

In Act Me. March 16, 1836, authorizing a corporation to erect and maintain a mill-dam on their own land, across the head of Little River Harbor, the words "on their own land" merely meant to exclude any inference that the Legislature intended to authorize the corporation to take the lands of others for that purpose, and did not limit the words "across the head of [the] harbor," so as to prevent the dam from crossing the main channel. *Parker v. Cutler Milldam Co.*, 20 Me. 353, 356, 37 Am. Dec. 56.

THEIR PART.

"Their part," as used in a will devising property to testator's children, and directing that, in the event of the death of any of them, "their part" be given to their children, means "the part of such dead child." *Andrews v. Andrews*, 54 Tenn. (7 Heisk.) 234, 243.

THEM.

"Them," as used in a will reciting: "I give and bequeath to my daughter Catherine, married to Samuel Melsenheiter, the one-eighth part of my estate to them. Those that I have advanced to them in my lifetime towards their legacies shall be all equalized, that they all may share alike"—means the same and refers to the same persons as the previous pronoun "those," and makes the bequest one to the husband and wife, to which the husband, surviving the wife, is entitled. "Them" is a pronoun, and in grammar comes in instead of repeating the two

last named persons. Every person uses the word "him," instead of repeating the name of the person referred to, and uses the word "they" or "them," instead of repeating the names of the persons spoken of. "He" or "him," "they" or "them," in writing or in conversation, are not unmeaning, nor even vague, when they refer to persons just named before. *Hamm v. Melsenbelter* (Pa.) 9 Watts, 349, 351.

As all.

"Them," as used in a will directing trustees to pay annually from the income of the estate the proper sum for the respectable maintenance of the testator's son and his wife and his children, to them jointly or to either of them during their joint lives, or for their use and benefit, etc., should be construed to apply to the children, as well as to the parents. *Sargent v. Bourne*, 47 Mass. (6 Metc.) 32, 49.

The use of the word "them," instead of "it," in Consolidation Act, § 1769, providing that the board of coroners may, for cause, remove the physicians appointed by them, warrants the construction that one coroner cannot remove an incumbent, even though the latter was appointed by such coroner. *People v. Zucca*, 78 N. Y. Supp. 311, 312, 86 Misc. Rep. 280.

As themselves.

In a deed reading that "B. and wife, party of the first part, for them—, heirs, executors, and administrators, do covenant," etc., the covenants are somewhat obscure, but are susceptible to being made clear. The word "them" should be read "themselves." The following words, "heirs, executors, and administrators," are under our statute surplusage, and it is unnecessary to insert them in order to bind them, on the principle, recognized by our statute, that the heir is bound for all demands against his ancestor to the extent of the real estate which he may inherit. *Baker v. Hunt*, 40 Ill. 264, 265, 89 Am. Dec. 346.

THEM ALL.

The use of the words "them all," in a will devising a slave and her child to A., but directing that, in case of the death of A. without a child, testator leaves "them all" to other designated beneficiaries, cannot be restricted to the children of the slave born after the death of the testatrix, but includes the slave and her family. *Moye v. Moye*, 58 N. C. 359, 360.

THEM AND THEIR HEIRS AND ASSIGNS.

The use of the phrase "to them and their heirs and assigns, forever," in the devise of a contingent remainder to certain devisees,

does not describe the devisees, but the quantity of their estate, or, in other words, that the estate to be taken by virtue of the previous words is an estate in fee. *Thomson v. Lundington*, 104 Mass. 193, 194.

THEN.

The word "then" means, when used as a word of reasoning, "in that event," or "in that case," or "therefore." It also means "at that time," or "immediately afterwards." *Dudley v. Porter*, 18 Ga. 613, 617.

"The word 'then' may be used either as a word of reasoning or of time, when it is used in the limitation of estates or in framing contingencies, unless something in the context makes a different meaning for it necessary. 'It is to be regarded,' said Lord Hardwicke, in *Beauclerk v. Dormer*, 2 Atk. 311, 'as a word of reference, but it may be used on such occasions in its grammatical sense; that is, as an adverb of time.' In such case the context should plainly show that it was so used before effect is thus given to it. When it is employed in the former sense, it is synonymous with the phrase 'in that event,' or 'in that case'; when in the latter, with the words, 'at that time.'" *Harris v. Smith*, 16 Ga. 545, 557.

In a grammatical sense "then" is an adverb of time; but in limitations of estates, in framing contingencies, it is a word of reference, and relates to a determination of the first limitation in the estate where the contingency arises. *Beauclerk v. Dormer*, 2 Atk. 308, 311; *Bigge v. Bensley*, 1 Brown, Ch. 187, 190.

"Then," in a will, is not ordinarily a word which points to the time, but only to the event which has taken place. *Gundry v. Pinniger*, 7 Eng. Law & Eq. 148, 151.

"Then," as used in Code Civ. Proc. § 2458, providing that, to entitle a judgment creditor to maintain proceedings supplementary to execution, the execution must have been issued, if the judgment debtor is then a resident of the state, refers to the commencement of the special proceedings. *Schenck v. Irwin*, 15 N. Y. Supp. 55, 56, 60 Hun, 361.

As at that time.

The word "then," as an adverb, means at that time, referring to a time specified, either past or future. It has no power in itself to fix a time. It simply refers to a time already fixed. *Mangum v. Piester*, 16 S. C. 316, 329.

"Then," as used in a contract containing a proviso that, if defendant shall sell or lease certain machines in any foreign country at less rates than those in this country, then the royalty rate to be paid shall be a

certain per cent. in lieu of the per cent. thereinbefore provided, is used as an adverb of time, bearing the meaning of "at that time." *National Sewing Mach. Co. v. Willcox & Gibbs Sewing Mach. Co. (U. S.)* 74 Fed. 557, 559, 20 C. C. A. 654.

The word "then" may mean: First, at that time; secondly, afterwards, or soon afterwards. A bill of exceptions showed the following entry: "Defendant then filed motion for new trial, as follows." As it is the settled law that the bill of exceptions must show affirmatively that the motion for new trial was filed within four days, excluding intervening Sundays, after the trial, the use of the word "then" is insufficient; for the word "then" does not show that the motion was filed at the time of the trial, and therefore within the statutory limit, or afterwards; for that is not necessarily limited to the four days allotted for such motion. *Bruns v. Capstick*, 62 Mo. App. 57, 59.

"Then," as used in a conveyance describing the land by a course from a certain point to another point, then to a tree, then to another tree, etc., "means afterwards, immediately afterwards, or at that time, and such is the meaning in all surveys; that is, as soon as the surveyor comes to a determination of one line, he commenced running the next." *Hammond v. Ridgely's Lessee (Md.)* 5 Har. & J. 245, 259, 9 Am. Dec. 522.

The word "then," in a clause in a will giving property to testator's wife during her life, and after her death or remarriage "I give * * * the same unto all my children then living," etc., was used as an adverb of time, and not as a conjunction, signifying merely "in that case," or "in that event or contingency." *Thran v. Herzog*, 12 Pa. Super. Ct. 551, 559.

The word "then," in a will giving testator's property to certain beneficiaries, and providing and directing that, "if either beneficiary die without child or children, then all the legacies given them shall vest and be considered as my estate," means "at the time," which is the natural, plain, simple construction of the word. *Gibson v. Hardaway*, 68 Ga. 370, 378.

The word "then," in a devise of property to a certain beneficiary, but providing that, "should the beneficiary die without leaving any issue, then the property should go to another," plainly refers to the event, to the happening of that contingency, and not to the time at which the last beneficiary's right should commence. *Hennessy v. Patterson*, 85 N. Y. 91, 101.

The word "then," in a will directing that, if testator's grandson should "die leaving no lawful heirs, then in that case it is my will," etc., is plainly used as an adverb of time, because it is in immediate juxtapo-

sition with the phrase "in that case." *Harris v. Smith*, 16 Ga. 545, 557.

A chattel mortgage provided that the mortgagee might take possession whenever he deemed himself insecure, and authorized him to "then dispose of the property by sale," etc. Held, that the word "then" applied to and meant the time when the mortgagee deemed himself insecure, and did not relate to the time when he was permitted to foreclose after default, thus giving the mortgagee the right to sell at once after taking possession on deeming himself insecure. *Schmittziel v. Moore*, 60 N. W. 279, 280, 101 Mich. 590.

As immediately.

"Then or at any time after," as used in Laws 1882, c. 197, § 5, authorizing water commissioners of Amsterdam to condemn lands, and providing that, in case the commissioners take possession of land without having the same condemned, the owner may "then or at any time after" apply for the appointment of commissioners to ascertain his compensation, are used in the sense of "immediately," "forthwith," or "at once," so that the statute of limitations begins to run against the owner's claim immediately on the taking possession of the land by the commissioners. In *re Clark*, 26 N. Y. Supp. 214, 215, 74 Hun. 294.

Death of taker referred to.

On the devise of certain property to testator's widow, and on her death "then my said estate shall be equally divided," the term "then" refers to the death of the widow. *Schwencke v. Hafner*, 45 N. Y. Supp. 937, 938, 18 App. Div. 182.

In a will devising certain property to testator's son during life, remainder to his children, if any, but, in the event of his leaving no children, the property then to revert to testator's estate, the word "then" is an adverb of time, and relates to the time of the death of the son and to his leaving no child or children at that time. *Sanford v. Sanford*, 58 Ga. 259, 260.

The word "then," in a clause in a will devising property to testator's grandson, and directing that, "in case of his death at any time without issue, I then give and bequeath" the property given to him to another, refers to the time of the death of the grandson. *Appeal of Snyder*, 95 Pa. 174, 182 (quoted in *Re Miller's Estate*, 22 Atl. 1044, 145 Pa. 561).

The word "then," in a will in which testator gives real estate to his son, and directs that, if the son die without issue, then at his decease the said property shall go to others, is to be construed as referring to the time of the death of the son. *Sinnickson v. Snitcher*, 14 N. J. Law (2 J. S. Green) 53, 59.

In *Wilkins v. South*, 7 Term R. 555, involving a will in which a leasehold was bequeathed to P. and the heirs of his body lawfully begotten, and their heirs and assigns, forever, but, in default of such issue, then, after his decease, to go over, etc., Lord Kenyon considered the words "then after his decease" as clearly pointing to the death of P. as the time when the estate would vest. *Chism's Adm'r v. Williams*, 29 Mo. 288, 296.

Where a will directed that the residuary estate of the testator at the death of his daughter should be divided "equally amongst all my nephews and nieces, and also all the children of my said nieces and nephews, who may then be living, so that each of my said nieces and nephews and grand nieces and nephews shall receive and be paid an equal share thereof," the words "who may then be living" refer to the time of the daughter's death, and apply equally to nieces and nephews and grand nieces and nephews, each one of whom, living at the time of the daughter's death, should receive an equal share. *Bigelow v. Clap*, 43 N. E. 1037, 1038, 166 Mass. 88.

"Then," as used in a will giving property to the widow as long as she lives, and after her decease to be equally divided between children then living, referred to the time of his wife's death; and the children who are living at that time were the only children entitled to take, unless it should appear that on the true construction of the whole will, and to effectuate a clear intention appearing in other parts of it, the words "then living" ought to be rejected as repugnant. *Tawney v. Ward*, 1 Beav. 563, 565.

Where a testator directed that the residue of his estate should remain in the control of his executors and their successors until the decease of the last survivor of the life annuitants, and that then the said residue, with all accumulated interest, should be equally divided among his grandchildren, so distributed, and to their heirs, etc., forever, the word "then" in the residuary clause has reference, not only to the period of distribution, but also to the persons who shall take, though in some instances it is construed in the former sense only, and hence the grandchildren will take a contingent remainder in such residue. *Hale v. Hobson*, 45 N. E. 913, 915, 167 Mass. 397.

"Then," as used in a deed conveying property to a certain person and to the heirs of his body, and in default of such issue then to the surviving sons and daughters of a certain other person, etc., denotes the time when the interest vests in them as at such grantee's death, as well as the persons to take; that is, those who shall then be the survivors of such grantee. *Westbrooke v. Romeyn* (U. S.) 29 Fed. Cas. 732, 734.

"Then be living," as used in a will providing for the distribution of the surplus at the death or marriage of the testator's widow among the nearest relatives, or the heirs of their bodies, as then be living, refers to the time when the distribution is to be made, and limits it to the surviving issue, or deceased's nearest relatives. *Hall v. Wiggin*, 29 Atl. 671, 673, 67 N. H. 89.

Where testator's will directed that on the happening of a certain contingency a trust fund should be conveyed to H., or, if he be dead, to his then heirs at law, "then heirs" meant his heirs who would have been entitled as of the time when the conveyance would have been made to him, had he then been living. *Proctor v. Clark*, 27 N. E. 673, 674, 154 Mass. 45, 12 L. R. A. 721, 724.

Death of testator referred to.

The word "then" is an adverb of time, and usually relates to some antecedent period or event. As used in a will devising the testator's residuary estate to all his children who might then be living, it relates to the death of the testator. In *re Cresson's Estate* (Pa.) 8 Phila. 207, 208.

"The cases are common which hold that adverbs of time, such as 'when,' 'then after,' 'from and after,' etc., in the devise of a remainder limited upon a life estate, are to be construed merely as relating to the time of the enjoyment of the estate, and not to the time of its vesting in interest, and that the law favors such a construction of a will as will avoid the disinheritance of remaindermen, who may happen to die before the determination of the precedent estates. In *Connelly v. O'Brien*, 168 N. Y. 406, 60 N. E. 20, the Court of Appeals carried this doctrine so far as to hold that, where testator gave his property to his widow during her life and to such of his children that should then be alive, the adverb was intended by him to refer to the time of his own death, and not to that of his widow, and that consequently a daughter, who survived him, but died before the widow, took a vested share." *Ackerman v. Ackerman*, 71 N. Y. Supp. 780, 781, 63 App. Div. 370.

As in that case or event.

"Then," as used by a testator in bequeathing a fund in trust for the benefit of his four children, each to receive one-fourth of the income for life, "and upon the decease of each then" one-fourth of the corpus or residue to go to the use of his child or children who should attain the age of 25 years, is not an adverb of time, but merely means "in that case." *Appeal of Coggrins*, 16 Atl. 579, 581, 124 Pa. 10, 10 Am. St. Rep. 565.

"Then," as used in a will providing that, on the death of any child, then its share

should go to the issue of the child so dying, is not an adverb of time, but should be construed to mean "in that event," and the child to take a vested estate. *Colonial City Traction Co. v. Kingston City R. Co.*, 47 N. E. 812, 813, 153 N. Y. 540.

"Then," as used in a will by which testatrix gave property to two devisees, providing that, in case of the death of one of them, then the property should go to the survivor, refers to the event itself, and not to the time of its occurrence. One of the interpretations of "then" by lexicographers is "in that case." *Ash v. Coleman* (N. Y.) 24 Barb. 645, 647.

"Then," as used in a will devising real estate to testator's wife to hold during her lifetime, and then to descend to testator's heirs, is to be construed as meaning "in that event," referring to the death of the wife. *Bunting v. Speck*, 21 Pac. 288, 298, 41 Kan. 424, 3 L. R. A. 690.

"Then," as used in a will providing that "if my wife, the said Mary Anne, shall remain single during the minority of her children, then she shall at their maturity give to said children," etc., is to be understood, not as indicating the point of time when the payment to the children is to be made, for that is fixed at their maturity, but is simply equivalent to the phrase "in that event." *Rose v. McHose's Ex'rs*, 26 Mo. 590, 596.

The word "then," as used by a testator, who, after having used expressions which, though containing no word of inheritance, would, standing by themselves, have given a fee simple absolutely to his grandchildren, added a provision "that the property willed by me to the said grandchildren should be held in common, and, if either of them should depart this life without leaving living issue, then and in that case the survivor, or the heirs of his body, shall inherit all the property and estate devised to both of them," is used as an adverb of time, so that the latter words referred to a death either before or after testator's death, and each grandson took a determinable fee, defeasible by his death without leaving issue, leaving the other grandson surviving. *First Nat. Bank v. De Pauw* (U. S.) 75 Fed. 775, 780.

The word "then," in a bequest of personal property in trust to A. and his heirs and assigns, forever, but directing, in case he should die before arriving at the age of 21 years, then the property shall go to other beneficiaries, only emphasizes the event upon which the gift becomes absolute, and refers back to the words relating to A., which precede. It is as though the testator had said, "In case of the death of my son A., in that event, or in such case, I give." *Baker v. Southerland* (N. Y.) 6 Dem. Sur. 220, 223.

In construing a clause in a will that, "in case my said son C. decease leaving issue,

then to provide and distribute said share to and among said issue in the same way the laws of the commonwealth for the time being would divide and distribute the same," the court said: "The word 'then,' although in a strictly grammatical sense an adverb of time, is nevertheless often used for the purpose of denoting an event or contingency, and is equivalent to the words 'in that event,' or 'in that case.' Such is often its popular signification, and in this sense it is frequently used in legal instruments to designate limitations of estates or future contingencies on which they are made to depend. In this sense, to point out a contingency or event, and not to mark a precise time, we think it was used by the testator in the sixth clause of his will." *Hall v. Priest*, 72 Mass. (8 Gray) 18, 24.

The word "then," as used in a will whereby a testator devised the residue of his estate to his executors, in trust to be invested and the income applied to the use of his children until the youngest child became 21 years of age, when the estate was to be divided equally among the children, and providing that, should either of the children die, leaving issue, before the testator's death and before the time fixed for distribution, then such issue should take the share to which the parent of such child would be entitled, if living, means merely "in that event." *In re Moloughney*, 78 N. Y. Supp. 598, 599, 67 App. Div. 148.

"Then," as used in a lease of a farm, including a peach orchard, for a term of three years, which lease provided that the tenant might use the peach orchard for a longer period, unless a sale of the farm was made, and, if so, then the orchard was to be appraised, was not employed as an adverb of time, fixing the period when the appraisal was to be made, but of contingency, to wit, the sale of the farm. *Pintard v. Irwin*, 20 N. J. Law (Spencer) 497, 505.

Time of enjoyment referred to.

The word "then," when used in a devise of a remainder limited upon a particular estate, determinable on an event which must necessarily happen, and used to designate the time of the happening of such event, is to be construed as relating merely to the time of the enjoyment of the estate, and not to the time of its vesting. *Haug v. Schumacher*, 64 N. Y. Supp. 310, 313, 50 App. Div. 562; *Ackerman v. Ackerman*, 71 N. Y. Supp. 780, 781, 63 App. Div. 370; *Moore v. Lyons* (N. Y.) 25 Wend. 119, 144; *Sheridan v. House*, *43 N. Y. (4 Keyes) 569, 589, 4 Abb. Dec. 218, 219; *Livingston v. Greene*, 52 N. Y. 118, 123; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Nelson v. Russell*, 31 N. E. 1008, 1009, 135 N. Y. 187; *Canfield v. Fallon*, 57 N. Y. Supp. 149, 154, 43 App. Div. 561, 26 Misc. Rep. 345; *Hersee v. Simpson*, 48 N. E. 890, 891, 154 N. Y. 496.

"Then," as used in the grant of a remainder, did not import a contingency, or make anything necessary to precede the vesting of a remainder, but only expressed the time when the remainder shall take effect in possession, and not when it should become vested. *Middleton's Heirs v. Middleton's Devisees* (Ky.) 43 S. W. 677 (citing *Williams v. Williams*, 91 Ky. 547, 554, 555, 16 S. W. 361; *Williamson v. Williamson*, 57 Ky. [18 B. Mon.] 329, 375).

In a bequest wherein the testator gave a certain sum in trust for his son, the interest to be used for such son's benefit until he was of lawful age, then the principal to be his, or his heirs and assigns forever, "then" has reference to the time when the property shall come into such son's possession, so that the property vested in such son upon the death of the testator; such son having survived the testator, but dying during his minority. *Newberry v. Hinman*, 49 Conn. 130, 132.

Testator's will, after devising the residue of his real estate to his daughters, and the survivors of them, until death or marriage, provided as follows: "After the marriage or death of my surviving daughters, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." Held, that the word "then" designated the time when they should come into the enjoyment of that which was devised to them, and was not inserted by way of description of the persons who were to take. *Dove v. Torr*, 128 Mass. 38, 40.

A conveyance to one for life, and on his death "then to go" to C., creates a present estate in remainder in C.; the words "then to go" meaning that the possession and enjoyment of the property shall go to him on the death of the life tenant. *Chambers v. Chambers*, 38 N. E. 334, 337, 139 Ind. 111.

"Then," as used in a will directing that, if any of the testator's children should die without heirs, then the property bequeathed to them should be equally divided among the balance of his heirs, shows that the limitation over is to take effect at the time of the death of the first taker, the immediate offspring of the testator, without issue then living. *Gray v. Bridgeforth*, 33 Miss. 312, 335 (citing *Evans v. Wells*, 26 Tenn. [7 Humph.] 559, 568; *Loving v. Hunter*, 16 Tenn. [8 Yerg.] 4, 29; *Hickman v. Quinn*, 14 Tenn. [6 Yerg.] 96).

"Then," as used in a will giving a legacy to the testator's wife of the dividends of certain stock for her life, which he directed should be continued in the same stock, then to be shared equally by his children that should be then living, refers to the death of the wife. *Reeves v. Brymer*, 4 Ves. 693, 698.

As used in a will by which testator bequeathed the residue of his real and personal

estate to his daughter absolutely on her attaining 21, or, in case of her decease before that time, to the testator's wife, if living, then in further trust to pay the produce of the residuary estate to and among the children of my sister Ann, to be divided among them share and share alike, the word "then" meant the period at which the gift was to take effect in possession, and not the period of the daughter's death. *Hetherington v. Oakman*, 2 Younge & C. Ch. 299, 301.

Where testator devised land to his executors, to hold the same in trust for the lives of testator's two grandsons, but not to exceed 16 years, and at the end of the 16 years to sell the land and divide it between such grandsons and the issue of such of them as may be then dead, leaving such issue or servants then surviving, the words "then dead" and "then surviving" should be construed as referring to the end of the 16-year period, unless shortened by death of both grandsons before that time. In *re Valentine*, 13 N. Y. Supp. 444, 445, 59 Hun, 619.

"Then," as used in a will wherein a husband devised his personal estate, to be laid out in securities and the interest of the whole to be paid to his wife for her life, and after her decease the principal to be paid to his sister and her children, or such of them as should be then living, means the same as the precedent words, "after her decease," and those words are not to be construed to mean after her natural death, but after the determination of her interest by natural death, civil death, forfeiture, or otherwise. *Dansen v. Hawes*, 1 Amb. 276.

A testator left his property to trustees, the income to be paid to his wife and children during their lives; the will providing: "At the decease of the last survivor of my said children, if my said wife shall not then be living, but, if living, then upon her death this trust shall cease; and I give, devise, and bequeath all the estate which shall then be held in trust under this will to my grandchildren, who shall then be living," etc. In construing this will the court said: "The grammatical, as well as the legal, import of the words 'I give, devise, and bequeath,' etc., gives a vested interest. The death of the last survivor of the trustees refers, not to the time of the vesting, but to the time for the trust to cease. The words are not to be carried over, so as to qualify the words of the gift therein represented in connection with the gift. They are not repeated in connection with the gift, nor even referred to by use of the adverb 'then,' as 'I then give, devise,' etc.; but all reference to them is omitted. The sentence is complete, and conveys to the professional mind a distinct and unequivocal legal meaning, a present gift. Time is in no sense attached to its substance. Later in the sentence the word 'then' is used: 'All the estate which shall

then be held in trust.' But it is there used for the purpose, not of indicating the time when the estate is to vest, but for the purpose of pointing out the subject of the gift. The word 'then' is again used in this connection: 'To my grandchildren who shall then be living.' It is here used to point out the persons who are to take, and not to indicate the time when the estate is to vest." *Farnam v. Farnam*, 2 Atl. 325, 332, 53 Conn. 261.

Where a testator devised a portion of his estate in trust to his executors to pay the income to his grandson during his life, and the principal at their discretion, and, in case he should die without issue, then on his death to pay said principal to W. and S., by the words "then to pay" he merely indicated the time when the right of possession is to begin, and did not postpone the vesting. *Roosa v. Harrington*, 64 N. E. 1, 4, 171 N. Y. 341.

Sequence denoted.

"Then," as used in a subdivision of a will, beginning with the words: "Further, my said executors and trustees shall then pay over the following gifts and bequests, namely," etc., does not denote anything more than an order of sequence, and will not be construed of itself to make the legacies following them residuary, nor to import a preference. *Porter v. Howe*, 54 N. E. 255, 257, 173 Mass. 521.

"Then," as used in a will, providing that "I give all my estate to my wife during her life, and then to such of my children," etc., is used in the sense of "second," and serves to indicate the order of a gift. *Connelly v. O'Brien*, 58 N. Y. Supp. 45, 46, 40 App. Div. 574.

Subsequent time imported.

In an action on account for goods sold, defendant pleaded as to a certain parcel that "on a certain day, at the plaintiff's request, he delivered certain goods to a third person; that it was then, to wit, on the day and year aforesaid, in consideration thereof, agreed between them that plaintiff should accept such delivery to a third person in discharge of the debt as to the certain parcel; and that plaintiff did then accept such delivery in full satisfaction and discharge." The word "then" was capable of being construed as meaning "at the same time," but was also susceptible of meaning that the alleged agreement took place subsequent to the delivery of the goods, and its use, therefore, rendered the plea ambiguous. *Stead v. Boyer*, 1 C. B. 782, 786.

THEN AND THERE.

"Then and there," when used in an indictment, must be referred to that antec-

edent to which the tenor of the indictment or the principle of law require it should refer, whether exactly according to the rules of syntax or not. *Jeffries v. Commonwealth*, 94 Mass. (12 Allen) 145, 152.

"Then and there," as used in indictments, specifying the time and place of the commission of the crime, is sufficient as an allegation that all the acts alleged in the indictment occurred at such time. "It is undoubtedly a rule in criminal pleading that every material fact must be alleged with the venue and be charged as done at some time and place. This is usually done, after the time and place have been definitely stated, by the words 'then and there.' In this indictment the assault is averred technically at a time and place, thereby giving, etc., the mortal blow. The present participle is often thus used as an express averment. We think that, without violation to the grammatical construction, the whole may be read as one sentence, averring acts done simultaneously, so that the term 'then and there' applies to all the facts thus averred." *Turns v. Commonwealth*, 47 Mass. (6 Metc.) 224, 234.

At the trial of a crime the averment of the date means at any time within the statute of limitations, and the subsequent reference, "then and there," means at any such time and at any place within the county. *Dreyer v. People*, 176 Ill. 590, 598, 52 N. E. 372.

Where one fact is alleged in an indictment with time and place, the words "then and there," subsequently used as to the occurrence of another fact, necessarily import that the two were co-existent, and are a sufficient statement of the time and place of the second occurrence. *Palmer v. People*, 28 N. E. 130, 131, 138 Ill. 356, 32 Am. St. Rep. 146.

The allegation that, in consideration that the plaintiff had "then and there" delivered to the defendant a certain horse in exchange for a certain horse of the defendant, and that the defendant "then and there" promised that the latter horse was sound, meant that the acts or undertakings of the parties were concurrent and simultaneous. *Wightman v. Carlisle*, 14 Vt. 296, 299.

"Then and there," as used in an indictment charging that the defendant did then and there with force and arms beat the plaintiff, refers to the time and place where the assault was made, and not to the county in the margin of the indictment. *Kennedy v. Commonwealth*, 6 Ky. (3 Bibb) 490, 491.

"Then and there," as used in the concluding part of an indictment against one for being present and abetting a murder, refers to the act which caused the death, and not to the time and place of the death. *State v. Fley* (S. C.) 2 Brev. 338, 347, 4 Am. Dec. 583.

An indictment charging that B. unlawfully and willfully did in a certain room keep a certain slot machine is not defective because the words "then and there" do not precede the words "keep a certain slot machine"; the time and place being distinctly alleged. *Bobel v. People*, 50 N. E. 322, 323, 173 Ill. 19, 64 Am. St. Rep. 64.

A caption stating that "at a court of oyer and terminer and general gaol delivery held on the fourth Tuesday in May, 1827, by the oath and affirmation of good and lawful men sworn, affirmed, and charged to inquire, it is presented," is sufficient, though the caption omits the phrase "then and there," commonly inserted in such captions after the words "sworn, affirmed, and charged." *State v. Price*, 11 N. J. Law (6 Halst.) 203, 210.

Indefinite time indicated.

The words "then and there," in an indictment alleging that a charter election was duly held in a certain ward on the 7th of March, and duly continued until and including the 10th of March, and charging that A. did then and there illegally vote at such election, without otherwise designating the day on which the offense was committed, is insufficient to describe such day, as the words may refer to any day between the 7th and 10th of March, inclusive. *State v. Day*, 74 Me. 220, 221.

The use of the words "then and there," in an indictment, after several distinct times have been stated in the indictment, is bad for uncertainty. *State v. Hayes*, 24 Mo. 353, 360.

The words "then and there" are relative, and refer to some foregone averment, and their meaning is to be determined by the allegation to which they refer. If that is a single act done, and it then avers that "then and there" another fact occurred, it necessarily imports that the two acts were precisely co-existent, and the word then refers to the precise time. In the case of *Rex v. Williams*, 2 Leach, Cr. Cas. 529, the averment was that the accused on a certain day made an assault, and on the same day inflicted a wound. Non constat, said the court, that it was at the same time. But if the indictment had observed the usual form, that he made an assault and then and there inflicted the wound, it would be averred to be simultaneous, because the assault was a single act. But where the antecedent averment fixes no precise time and alleges no precise, single, definite act, the word "then," used afterwards, fixed no one definite time; and so, where an indictment averred that defendant on a certain day had in his possession 10 counterfeit bank bills, and that he had then and there aided and assisted in rendering current each of the said bills, the use of the

word "then" might be taken as meaning that he had 10 single bills, one at a time, at 10 different times on that day. *Edwards v. Commonwealth*, 36 Mass. (19 Pick.) 124, 126.

Unless an indictment states a time when as well as a place where the offense was committed, the adverbs "then" and "there" have no antecedent time, and the objection is good on motion in arrest. *State v. Slack*, 30 Tex. 354, 355.

Where a complaint in a prosecution for exposing for sale and selling intoxicants without a license charges that defendant, on the 1st day of June, 1894, and divers other days and times between that day and the filing of the complaint, exposed and kept for sale, without license or authority to then and there expose or keep for sale, the words "then and there" apply to the whole period from the stated time to the filing of the complaint, and cannot be construed as charging the commission of an offense only on the day named. *Commonwealth v. Manning*, 42 N. E. 95, 164 Mass. 547.

As instantly.

"Then and there," as used in an indictment for murder, alleging an assault on R. on a certain day and that it resulted in a mortal wound, "of which said mortal wound the said R. then and there died," will be construed to mean "instantly," and, hence, to state with sufficient accuracy the time of death. *Commonwealth v. Robertson*, 38 N. E. 25, 26, 162 Mass. 90.

As time and place previously mentioned.

Where an indictment specifies a certain date in the caption and another date in the body thereof, and the phrase "then and there" is afterwards used in the indictment, it will be construed as referring to the date last mentioned. *Commonwealth v. McKenney*, 80 Mass. (14 Gray) 1, 2.

"Then and there," as used in an indictment, means the time and place last previously mentioned therein. *State v. Hurley*, 71 Me. 354, 355.

The words "then and there," as used in an indictment, are words of reference, and, when time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words, and they will have the same effect as if the time and place were actually repeated. These words also refer to the time and place last specified, unless there be some phrase connected therewith which shows that a different reference is intended. *State v. Cotton*, 24 N. H. 143, 146.

When time is once mentioned in any part of the information or indictment, it may subsequently be laid as the time of the

commission of the offense by words of reference, as "then and there," with the same effect as if it were actually repeated, and likewise, where the time is laid in one count, it may be laid in subsequent counts by such words of reference; but such reference is not sufficient where more than one time is laid in the part of the pleading referred to by the words, because it would not appear to which time such words applied. *United States v. Peuschel* (U. S.) 116 Fed. 642, 648 (citing *Jane v. State*, 3 Mo. 61; *State v. Hayes*, 24 Mo. 358; *Commonwealth v. Moore*, 85 Mass. [11 Oush.] 600; *State v. Day*, 74 Me. 220).

"Then and there," as used in an indictment, after stating the date of the assault and that the deceased then and there died therefrom, the word "then" has relation to that time, and the word "there" to the place previously stated. *State v. Luke*, 16 S. W. 242, 248, 104 Mo. 563.

"Then and there," as used in an indictment, are words of reference, and mean a time and place last previously stated in an indictment, and have the same effect as if the words designating time and place were actually repeated. *State v. Cotton*, 24 N. H. (4 Fost.) 143, 146.

"Then and there," as used in an indictment, subsequent to an allegation of an occurrence alleged with time and place, refers to the same point of time. *Commonwealth v. Butterick*, 100 Mass. 12, 17.

"Then and there" is a reaffirmation of allegations of time and place in traversable averments. The rule requiring time and place to be repeated in traversable averments, though strictly required in capital cases, is not so much regarded in indictments for inferior offenses. "Then and there" need not be repeated to an averment which merely declares a legal conclusion. *State v. Willis*, 2 Atl. 848, 849, 78 Me. 70.

The words "then and there," in an allegation in an indictment for arson that defendant burned a certain house then and there occupied, controlled, and owned by him, refers to the time and county previously stated, and is a sufficient statement of the locus in quo of the house burned. *Baker v. State*, 8 S. W. 23, 24, 25 Tex. App. 1, 8 Am. St. Rep. 427.

THEN BEING.

Where a testator directed his wife's debts and funeral expenses to be paid out of the estate, then gave the rest then being unto trustees, by the phrase "then being" the testator meant that which the trustees would hold after the payment of the wife's debts and funeral expenses. *Bauernschmidt v. Bauernschmidt*, 54 Atl. 637, 642, 97 Md. 35.

THEN DUE.

The words "then due," as contained in a mortgage, stating that it was given to secure the sum of \$100 "and other indebtedness which may then be due" the mortgagee by the mortgagor, refer to the time when the \$100 was to become due. *Moore v. Terry*, 50 S. W. 998, 1000, 66 Ark. 393.

THEN IN FORCE.

"Then in force," as used in Act Feb. 4, 1857, providing that the provisions of the act should not apply to any actions commenced, nor to any cases where the rights of action or of entry should have accrued, before the time when the act took effect, but that the same should remain subject to the "laws then in force," means the laws in force when the statute was passed and has no reference to the laws in force at the time of the accrual of a cause of action. *Gilker v. Brown*, 47 Mo. 105, 110.

THEN IN OFFICE.

"Then in office," as used in Gen. Law 1872, § 3, providing that the city officers then in office should continue to exercise the powers conferred upon like officers in this act until their successors should be elected and qualified, in case the act is adopted by the people of a city at an election in lieu of a special charter, is to be construed as meaning the officers of the city holding their office at the time of such election, and not candidates elected for such offices at such election. *Crook v. People*, 106 Ill. 237, 246.

THEN NEXT.

Rev. St. c. 85, § 13, providing that an appeal from a judgment of a justice may be taken at any time within 24 hours after the entry of the judgment in the court of common pleas "then next to be held in the same county," means the court held next after the entry of judgment by the justice, though before the taking of the appeal. *McIniffe v. Wheelock*, 67 Mass. (1 Gray) 600, 603.

THEN STOCKHOLDERS.

Where the report of a corporation gives its assets and debts on a certain date, and the names of its then stockholders, the term "then stockholders" has reference to the existing stockholders at the date fixed in the report. *American Grocery Co. v. Pratt*, 55 N. Y. Supp. 467, 468, 36 App. Div. 152.

THENCE.

See "From Thence."

"Thence," as used in the description of land, means from that place; and where a

call for land is west to the west line of said block, thence south along the east line of said block, it is an impossible and insufficient description of land. *Tracy v. Harmon*, 43 Pac. 500, 501, 17 Mont. 465.

THENCEFORTH.

See "From Thenceforth."

THEOLOGICAL EDUCATION.

A will by which testatrix provided for the payment of the expenses of a "collegiate and theological education" for certain of her relatives in case they chose to take advantage of such provisions, means "such an academic and theological training as is practical and suitable to prepare a person to be a minister of the gospel, and it would be improper to construe the phrase disjunctively, so as to permit a collegiate education not followed by a theological course." *Shepard v. Shepard*, 17 Atl. 173, 174, 57 Conn. 24.

THEORETICAL INCH.

A "theoretical inch," in reference to water power, is a stream of water having a cross-section area at right angles with its flow of one square inch and moving with a velocity due to the given head. *Jackson Milling Co. v. Chandos*, 52 N. W. 759, 761, 82 Wis. 437 (citing *Janesville Cotton Mills v. Ford*, 52 N. W. 764, 82 Wis. 416, 17 L. R. A. 564).

THEORY.

The terms "theory" and "theories," as used in a pleading, relate to the basis of liability or the grounds of defense. *South Bend Mfg. Co. v. Liphart*, 39 N. E. 908, 909, 12 Ind. App. 185.

THERAPY.

"Therapy" is the treatment of disease, and surgery is therapy of a distinctly operative kind. *Stewart v. Raab*, 55 Minn. 20, 21, 56 N. W. 256.

THERE.

See "Then and There."
There is given, see "Give."

"There," as used alone, is a word of very uncertain meaning. It must in some way be confined as to locality before it conveys any definite idea; and thus a letter authorizing a party, if he is still there, to draw a draft on the writer, would be sufficient to authorize the payment of the draft upon presentation wherever the party was and render the writ-

er liable. *Posey v. Denver Nat. Bank*, 42 Pac. 684, 686, 7 Colo. App. 108.

THERE BE, AND HEREBY IS, GRANTED.

"There be, and hereby is, granted," as used in an act of Congress which declares that there be, and hereby is, granted certain lands, etc., should be construed as words which import a grant in present, and not in futuro, or the promise of a grant. *Board of Trustees v. Cuppett*, 40 N. E. 792, 795, 52 Ohio St. 567.

THERE BEING IN.

The expression "there being in the lot hereby conveyed 135 acres," in a deed which had before sufficiently described the premises, means the same as though the expression had been "containing 135 acres," and does not amount to a covenant that the land shall contain 135 acres, but is merely descriptive of the land conveyed. *Roat v. Puff* (N. Y.) 3 Barb. 353, 354, 356.

THERE IS HEREBY APPROPRIATED.

The phrase "there is hereby appropriated the sum," etc., is customarily used in bills appropriating money for the payment of salary and other expenses of government; but it is not essential to the validity of an appropriation that those words, or any of them, should be used, if the Legislature has clearly designated the amount and the fund out of which it is to be paid. *Humbert v. Dunn*, 24 Pac. 111, 84 Cal. 57.

THERE SITUATE.

"There situate," as used in an indictment charging that defendant, in a certain county and town, broke and entered a house there situate, are not words of form or addition merely, which need not be proved, or strictly proved, but are words descriptive of the dwelling house, and constitute a material part of its description, and are required to be strictly proved. *State v. Kelley*, 29 Atl. 843, 845, 66 N. H. 577.

THEREABOUTS.

A declaration alleged that certain work was reasonably worth \$1,000 or thereabouts, and that defendants had only paid \$500 or thereabouts. It was held that, as "thereabouts" is defined as nearly, or near that number, degree, or quantity, the amount claimed would be construed as less than \$1,000, so as to give jurisdiction, rather than as above that sum. *Dwyer v. Rathbone, Sard & Co.*, 2 N. Y. Supp. 170, 172, 49 Hun, 609.

"Of the measurement of 180 tons to 200 tons or thereabout," as used in a charter

party in which plaintiff was described as "of the ship A., of the measurement of 180 tons to 200 tons or thereabout," was a matter of description only, and did not amount to a warranty. *Barker v. Windle*, 6 Bl. & Bl. 675, 680.

Where a lot of land is conveyed by boundaries, and it is stated in the conveyance that the contract contains a certain number of acres or "thereabouts," the whole tract will pass, although it contains more than the specified number of acres. *Mann v. Pearson* (N. Y.) 2 Johns. 37, 44.

THEREAFTER.

The adverb "thereafter" means "afterwards," or "after that"; and as used in Rev. St. 1889, § 2168, providing that a bill of exceptions may be filed during the term at which it is taken, or within such time thereafter as the court may by order allow, which may be extended in vacation for good cause shown, or within the time the attorneys may thereafter agree upon, refers to the making of the order of court extending time beyond the judgment term, so that an order of the court first extending the time beyond the term is an essential condition to an extension by the attorneys. *State v. Ryan*, 25 S. W. 351, 353, 120 Mo. 88.

"Thereafter," as used in a note promising to pay on demand and after a certain date, and interest at a certain rate thereafter, limits the interest period; for, without it, interest would have run from the date of the note. *Larrabee v. Southard*, 50 Atl. 20, 95 Me. 385.

The word "thereafter," as used in a clause of a will by which testator gave stock for life to his wife and married daughter, and to the survivor, with the provision that, if his son-in-law survives, he should have the use for life, to be thereafter disposed of, does not postpone the vesting, but refers to the time of enjoyment of those beneficially interested. In *re Conger's Estate*, 81 N. Y. Supp. 733, 735, 40 Misc. Rep. 157.

Adverbs of time, as "where," "thereafter," "from," etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest. *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 475, 18 L. Ed. 869, 874.

Act June 1871, § 1, providing that the select and common councils of the city of Philadelphia should meet in joint convention at any stated meeting in every June thereafter and elect four persons, one of whom should represent the minority of city councils, to be members of the board of guardians of the poor of said city, to serve for three years, cannot be construed as meaning that the year 1871 was not to be included, but every year after 1871. *Commonwealth v. Armstrong* (Pa.) 9 Phila. 479, 480.

THEREBY.

"Thereby," as used in an instruction that if, while plaintiff was crossing a track, defendant ran its train upon the track recklessly, etc., thereby causing the plaintiff serious injury, plaintiff would be entitled to recover, etc., referred to all that preceded it, both as to the act of propulsion and the act of striking. *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52, 54.

As by that means.

"Thereby" signifies "by that means," or "in consequence of that," and is so used in an allegation of a complaint that defendants permitted fire to be taken from a threshing machine and placed upon the ground in and about the straw and stable, and thereby through wanton carelessness allowed and permitted the fire to spread and burn into the field of the plaintiff so that the negligence is sufficiently alleged. *Lieuallen v. Mosgrove*, 54 Pac. 200, 202, 33 Or. 282.

In a complaint for libel which alleged that defendant made the slanderous statement in the presence of two reporters, and thereby defendant caused such statement to be published, "thereby" will be construed as used in the sense of "by that means," or in consequence of the preceding allegations; and hence the averment was of a conclusion as to the effect or result of the facts previously alleged, and not a sufficient allegation that defendant caused the publication of the words spoken. *Schoepflin v. Coffey*, 56 N. E. 502, 503, 162 N. Y. 12.

As because.

"Thereby," as used in Code W. Va. c. 47, § 44, providing that any city, town, or village which shall fail for one year to keep its roads, streets, alleys, etc., in good repair and order, or which shall fail for one year to exercise its corporate powers and privileges, shall "thereby forfeit its charters, and all the rights, powers and privileges conferred thereby," means only that "by reason of" or "because of" such acts the charter shall be forfeited. It is only equivalent to the word "because," in the language "shall because of such failure forfeit its charter to the state," and does not amount to a legislative forfeiture in advance, without sentence. It merely specifies a cause of forfeiture, leaving its ascertainment to be governed by the general law on the subject. *Hornbrook v. Town of Elm Grove*, 21 S. E. 851, 852, 40 W. Va. 543, 28 L. R. A. 416.

THEREFOR.

Olympia City Charter, subd. 25, declares that, without a petition of a majority of property owners or a two-thirds vote of the city council, "there shall in no case a sidewalk be built and an assessment be made or

tax levied to pay therefor." Held, that the term "therefor" related to and meant "for the sidewalk being built" and not to the word "sidewalk" alone; hence it did not prohibit a repair thereof without vote or petition. *Hutchinson v. City of Olympia*, 5 Pac. 606, 607, 2 Wash. T. 314.

"Therefor," as used in Rev. St. c. 61, § 4, relating to causes of action against a wife, and providing that a suit may be maintained against her, or against her and her husband, therefor, refers to all the different causes of action before enumerated in that section. *Marcus v. Rovinsky*, 49 Atl. 420, 421, 95 Me. 106.

"Therefor," as used in Ky. St. 1894, § 2494, relative to mechanics' liens upon railroads, which provides that no lien shall attach unless the person who performs the labor, or furnishes the labor, materials, or teams, shall, within 60 days after the last day of the last month in which any labor was performed or material furnished, file a statement setting forth the amount due therefor and for which the lien is claimed, does not refer to the last labor that was performed or the last materials that were furnished by some other person, but means the time in which such party completes his own work. *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (U. S.) 68 Fed. 90, 96, 15 C. C. A. 273, 41 L. R. A. 459.

THEREFORE.

Where the record of a default of defendants proceeds immediately, "Therefore it is considered by the court," etc., the word "therefore," in such connection, is defined in Worcester's Dictionary as "for this reason; consequently"—and in Webster's Dictionary, "for that; for that or this reason; referring to something previously stated." *Thompson v. Gilmore*, 50 Me. 428, 433.

THEREIN.

"Therein," as used in an act granting the exclusive power to the authorities of a borough to enact and ordain streets, alleys, etc., therein, meant such only as begin and end within the limits of the municipality, and did not extend to public roads laid out through or to a point within the limits of a borough, of which only a part was within the borough lines. In re *Parkesburg Borough Streets*, 17 Atl. 27, 28, 124 Pa. 511.

"Therein," as used in Const. art. 8, § 6, providing that no municipal corporation shall become indebted beyond 1½ per cent. of its taxable property "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," merely qualifies the persons who might vote in the body of voters who must vote to constitute a lawful majority, and means voters residing

therein; i. e., within the city limits. *Metcalfe v. City of Seattle*, 25 Pac. 1010, 1013, 1 Wash. St. 297.

As word of reference.

As used in a notice of a motion for an order vacating and setting aside the judgment entered in said action and "all proceedings therein," the quoted phrase refers to all proceedings in the action, and not merely to proceedings in pursuance of or subsequent to the judgment. *Cummings v. Tabor*, 21 N. W. 72, 75, 61 Wis. 185.

"Therein," as used in Rev. St. U. S. § 5478 [U. S. Comp. St. 1901, p. 3696], defining the offense of entering a post office to commit larceny as forcibly breaking into or attempting to break into any post office, or building used in part as a post office, with intent to commit larceny therein, means in the post office. *United States v. Williams* (U. S.) 57 Fed. 201, 202.

In a will, in which the first clause indicates that the testator was then dealing with all his estate, and by the second clause he devised to his wife, "in lieu and satisfaction of all her dower and other right therein," certain houses named, it was clearly intended to debar the wife of dower in the whole of the testator's estate. *Knighton v. Young*, 22 Md. 359, 373.

In construing Rev. St. § 5478 [U. S. Comp. St. 1901, p. 3696], providing that "any person who shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit therein larceny or other depredation, shall be punished," etc., the court said: "The language employed, taken literally, may mean breaking with intent to commit a larceny in any part of the building; that is, when used in part for a post office. Thus construed, it would make the statute refer to and make criminal acts which might in no wise affect the postal service, and that, too, where the party charged had no intent to commit a larceny in that part of the building used for a post office. Such a construction is not admissible. In the words of the statute, 'with the intent to commit therein larceny or other depredation,' the word 'therein' obviously refers to that part of the building used for a post office. Under this construction, if there is a breaking into any part of a building used in part as a post office, with intent to commit larceny in the part so used, it constitutes an offense within the true meaning of the statute, and, so construed, the statute is open to no constitutional objection." *United States v. Saunders* (U. S.) 77 Fed. 170, 171; *United States v. Campbell* (U. S.) 16 Fed. 233.

"Therein," as used in an antenuptial contract whereby the wife agreed to accept a certain sum in settlement of her "rights

of dower and inheritance" in her husband's estate, both real and personal, and relinquish all claim therein, refers to dower inheritance, and not to estate, and the widow's right to occupy the homestead is not thereby barred. *Mahaffy v. Mahaffy*, 17 N. W. 46, 47, 61 Iowa, 679. See *Id.*, 18 N. W. 685, 690, 63 Iowa, 55.

The words "nothing therein," in Judiciary Act 1789, § 30, providing that nothing therein should be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, etc., was construed as equivalent to the words "nothing in this act." *United States v. Cameron* (U. S.) 15 Fed. 794, 795.

THEREOF.

"Thereof," as used in a lease, providing that the lessee would not make "any external alteration whatsoever in the premises, nor any internal alterations in the said dwelling house that may lessen the value thereof," applies only to the last antecedent, namely internal alterations; and in an action for breach of the covenant in regard to external alterations it is not incumbent on the lessor to prove that the same diminished the value of the premises. *Perry v. Davis*, 3 C. B. (N. S.) 769, 778.

The word "thereof" means "of that," or "of it." As used in Supreme Court Rule 36 (11 Sup. Ct. iv), providing that, where such writ of error is allowed in cases of conviction of infamous crimes, etc., the Circuit Court or District Court, or any justice or judge thereof, shall have power to admit the accused to bail, limits the words justice or judge to a justice or judge of the Circuit or District Courts. *United States v. Hudson* (U. S.) 65 Fed. 68, 71.

"Thereof," as used in Act March 3, 1797, c. 74, § 5, declaring that the claim of priority on the part of the United States shall accrue in cases where a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, refers to the word "property" as used. *United States v. Hoove*, 7 U. S. (3 Cranch) 73, 91, 2 L. Ed. 370.

"Thereof," as used in Baltimore City Ordinance March 9, 1807, § 13, declaring that, if the commissioners of health shall at any time report to the city commissioners that a nuisance exists in any street, lane, or alley in the city, which will endanger the health thereof, etc., relates not to the city of Baltimore, so as to make it mean a nuisance which will endanger the city, but relates to any street, lane, or alley, etc., and means a nuisance that will endanger the health of such street, etc. *City of Baltimore v. Hughes' Adm'r* (Md.) 1 Gill & J. 480, 495, 19 Am. Dec. 243.

"Thereof," as used in 16 Stat. 193, § 97, enacting that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, if it be a book, on the title page or the page immediately following, or if a map, chart, painting, etc., by inscribing upon some portion of the face or front thereof, the words "Entered according to act of Congress," etc., refers back to the words "the several copies," so that the words "Entered according to act of Congress," etc., should not be inscribed on a copyrighted painting, but on the photograph or other publication thereof. *Werckmeister v. Pierce & Bushnell Mfg. Co.* (U. S.) 63 Fed. 445, 454.

In a will providing that certain property should be held for certain children, who should have and receive one-half of the income therefrom, and that upon their decease their children are to have and receive one-half part or portion thereof, etc., "thereof" refers to the property, and not to the income. *Fussey v. White*, 113 Ill. 637, 643.

"Thereof," as used in a statute making a special partner who fails to pay the amount of capital agreed to be paid by him in cash liable for all engagements thereof as general partners, is to be construed as meaning "the engagements of the partnership as long as it has a legal existence." *Haviland v. Chace* (N. Y.) 39 Barb. 283, 287.

The word "thereof," in a deed of trust securing the payment of three promissory notes at different times, reciting its purpose to be to secure the prompt payment of said notes at the maturity thereof, is to be construed to have reference to each of said notes, and the clause may be read as "on or before the maturity of each of said notes." *Bridges v. Ballard*, 62 Miss. 237, 241.

"A sufficiency thereof," as used in a will in which testator gave to his wife, in lieu of her dower, the plantation on which they then resided during her natural life, and also the live stock of every description, as also all the household furniture and other items not particularly mentioned and otherwise disposed of in the will, during her natural life, "she, however, first disposing of a sufficiency thereof to pay my just debts as aforesaid," comprehends all the real and personal property. *Smith v. McIntire* (U. S.) 83 Fed. 456, 461.

In considering the first clause of St. 1852, c. 322, § 12, providing that "no person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly appointed or authorized," in answer to the argument that "thereof" means all liquors manufactured by the defendant, the court said: "This is ingenious, but we think not sound. Taking it in strict grammatical con-

struction, we cannot see how 'thereof' can include 'manufactured by himself.' The section, expressed more fully, would be thus: 'No person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller of spirituous or intoxicating liquors.' The article is not drawn with the highest degree of skill and precision. These two offenses are brought together, probably because they are punishable in the same manner." *Commonwealth v. Bralley*, 69 Mass. (3 Gray) 456, 457.

THEREON.

A deed describing the land as commencing at the west part of lot No. 10, thence east 20 feet, etc., "with a brick tenement thereon," was not a covenant that the tenement was on the lot, but was merely descriptive. *Dryden v. Holmes*, 9 Mo. 135, 136.

"Thereon," as used in the sixteenth section of the New Jersey act incorporating the Camden & Amboy Railway Company, authorizing the company to demand and receive such sum or sums of money for tolls and the transportation of persons and property thereon as they shall from time to time think reasonable and proper, provided that they shall not charge more than the rate of eight cents per mile for the transportation of property and more than ten cents per mile for the carriage of passengers, does not mean the railroad, but means the whole line of connection between the cities to which the company built their road, and the company is entitled to charge on this whole line the rate of toll per mile fixed by the act, and applies to a steamboat used by the company to take passengers and goods across the Delaware river. *Camden & A. R. & Transp. Co. v. Briggs*, 22 N. J. Law (2 Zab.) 623, 641.

The word "thereon," in a statute providing that, on the failure of a railroad to fence its track as required, it shall be liable for all damages which may be done by the agents, employes, engineer, or cars of such corporation to any cattle and other stock thereon, "seems to indicate that the animal must be injured on the track, and, if so, it is reasonable to conclude that the intention was that the injury should be done by the engine or cars. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 13 N. E. 403, 408, 112 Ind. 93.

The word "thereon" has exactly the same meaning as if the expression had been "on the same," as used in a policy insuring a ship for a voyage to a port on the north side of Cuba, with the liberty of a second port thereon. *Nicholson v. Mercantile Marine Ins. Co.*, 106 Mass. 399, 400.

THERETO.

In a writing on the margin of a contract for the shipment of purchased goods by a

certain vessel, which has been chartered, but which has not arrived in port, that, if the vessel be lost before reaching port of loading, other vessels will be substituted for same shipment, or as near thereto as practicable, the word "thereto" means as near to the date fixed in the original contract for shipment as is possible. *Browne v. Paterson*, 55 N. Y. Supp. 404, 408, 38 App. Div. 167.

The phrase "avenue leading thereto," in a statute making it criminal for any reputed thief to frequent any river, canal, dock, quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, means avenue leading to a street or highway. *Reg. v. Brown*, 17 Adol. & E. (N. S.) 833, 837.

THERETOFORE.

The word "theretofore," as used in an indictment alleging that defendant on a certain date, having theretofore fraudulently devised a scheme to defraud, etc., means "before then." *Hume v. United States (U. S.)* 118 Fed. 689, 696, 55 C. C. A. 407.

THEREUNTO BELONGING.

These words are, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or a field, with reference to the ownership, we say it belongs to such a one, meaning thereby that it is the property of that person; if with reference to any estate of a particular name, we say it belongs to such an estate, as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word "part," and not in the strictly legal sense, as part of the demesnes of that manor, or as holden of the manor, or of the lord thereof. *Doe v. Langton*, 2 Barn. & Adol. 680.

THEREUPON.

Webster defines "thereupon" to mean upon this, or that, and sometimes immediately, at once, without delay; and hence, where a case-made stated that parties in support of their motions introduced affidavits, and thereupon the court made an order, etc., it sufficiently appeared that the court's order was based on the affidavits, and nothing else, since, if the word "thereupon" had been used in one sense, it meant that on the testimony the court ordered, and, if it was used in another sense, it meant then that immediately on the reading of the affidavits, and without anything intervening, the court ordered. *Dewey v. Linscott*, 20 Kan. 684, 687.

In an action for malicious prosecution the declaration alleged in one count that

the defendant made a false and malicious complaint against the plaintiff before a trial justice, and testified falsely at the trial thereof before the justice, and thereupon the justice found the plaintiff guilty. Held, that the use of the words "and thereupon" marked the succession of events in order of time, and did not exclude the existence of other facts than those previously recited, and hence the declaration did not show that the conviction before the trial justice was obtained solely on the false testimony of the defendant. *Dennehey v. Woodsum*, 100 Mass. 195, 197.

As concurrently.

In a plea alleging that plaintiff had committed a forcible entry and breach of the peace in the presence of the constable, and that the defendant thereupon gave the plaintiff in charge, and the constable took him for the purpose of carrying him before a magistrate "thereupon" would indicate that the act was concurrent with the breach of the peace. *Derecourt v. Corbishley*, 5 El. & Bl. 188, 190.

As in consideration thereof.

"Thereupon," as used in a declaration that plaintiff delivered certain logs to the defendants at their request, and thereupon defendants delivered their agreement to the plaintiff, may fairly be considered as referring to the reason of the promise of the defendants. Wherever the connecting matter would seem to require such an interpretation, the word may be taken to mean "in consideration thereof." *Bean v. Ayers*, 67 Me. 482, 487.

As in consequence of.

"Thereupon," as used in a plea by defendant in an action on a bond of a corporate officer, alleging that the corporation had obtained a certificate of complete registration by and under a different name, and thereupon said officer ceased to be appointed as such, the word "thereupon" meant in "consequence of." *Groux's Improved Soap Co. v. Cooper*, 8 C. B. (N. S.) 800, 814.

"Thereupon," in Revision, p. 762, § 52, providing for inventory, appraisal, and selection of certain property for the family of a deceased person, and further providing that the goods and chattels, money, or effects so selected "shall thereupon become" the property of such family and remain for their use, means that, upon the selection, that which shall be selected, not having theretofore been the property of the family, shall thereupon become its property. Before the selection, it, with the other personal estate, is the property of the personal representative of the decedent for the execution of his trust, and therein primarily reserved for selection for the use of the family. Until the selection is made, and title to that which is selected is thereby secured to the family, all that the

family has is a personal right to take by selection. *Carey v. Monroe*, 35 Atl. 456, 458, 54 N. J. Eq. 632.

As immediately.

The word "thereupon" means without delay or lapse of time. *Putnam v. Langley*, 183 Mass. 204, 205.

"Thereupon," as used in Code Civ. Proc. § 1283, providing that a submission to arbitrators may stipulate that it be entered as an order of the Supreme Court, for which purpose it must be filed with the court, who must thereupon enter in his register of actions a note of a submission, with the names of the parties, the names of the arbitrators, and the dates, does not mean immediately. *California Academy of Sciences v. Fletcher*, 33 Pac. 855, 857, 99 Cal. 207.

The word "thereupon" means immediately, at once, or without delay; and hence, as used in Const. art. 5, par. 16, providing that a bill passed by the Assembly, being approved and signed by the Governor, shall thereupon become a law, it is and does become a law immediately after receiving such approval, though by express provisions it does not go into effect until a future time. *People v. Inglis*, 43 N. E. 1103, 1104, 161 Ill. 256.

"Thereupon," means immediately, at once, or without delay, and as used in Laws 1893, p. 301, § 31, relating to establishment of roads, and requiring the clerk of the county commissioners, when a certificate of the work of construction has been filed, to thereupon issue a warrant, requires the issuance of a warrant within less than 10 days. *State v. Van Wyck*, 54 Pac. 768, 771, 20 Wash. 39.

"Thereupon," as used in a record that, in rendering of judgment against defendant, he thereupon filed his motion for a new trial, means immediately after, and upon the same day of, the occurrence last before cited. *Hill v. Wand*, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288; *Hallam v. Huffman*, 48 Pac. 602, 603, 5 Kan. App. 303.

"Thereupon," as used in Code Civ. Proc. § 1039, requiring a justice to certify to the district court in certain cases and thereupon file the original papers, is an adverb of time, and signifies without delay or lapse of time. *Kaufmann v. Drexel*, 76 N. W. 559, 560, 56 Neb. 229.

"Thereupon," as used in Rev. St. 1841, c. 21, §§ 47, 48, providing that, whenever any highway shall be laid out by the county commissioners, they shall thereupon cause an assessment to be made on the tracts of land, township, or plantation, or divisions thereof, through which it runs, means immediately, or without delay. The word implies close connection, not disconnection. No period of time is to intervene between the steps

to be taken. *Mansur v. County Com'rs*, 22 Atl. 358, 359, 83 Me. 514.

"Thereupon," as used in St. 1891, p. 196, relating to street improvements, and providing that, after certain publications of notices of street improvements, the street superintendent shall thereupon cause to be conspicuously posted, etc., means upon those precedent conditions, and does not mean immediately, but that the posting shall follow within a reasonable time. *Porphyry Pav. Co. v. Ancker*, 37 Pac. 1050, 1051, 104 Cal. 340.

"Thereupon" is an adverb, signifying, according to Webster, "immediately, at once, or without delay"; and it is in that sense that it would ordinarily be understood in the connection in which it is used in a bill of exceptions setting out a copy of a deed, and then reading: "It was conceded on the trial that the plaintiffs were residents, etc., when this suit was begun, and thereupon the court announced that his finding was against the interpleader and garnishees." To say the least, it fails to give to the bill of exceptions that degree of certainty which the rules of pleading require. It is suggested that the word "thereupon" should be construed as meaning "upon the foregoing evidence"; but such, however, is not the usual signification which the rule of interpretation—I. e., that a bill of exceptions, like all other pleadings, is to be construed most strongly against the pleader—should give it. *First Nat. Bank of Michigan City v. Haskell*, 23 Ill. App. 616, 618.

As word of reference.

"Thereupon," as used in a statute declaring that in all actions of trespass brought against any person entitled to rent, relating to any entry by virtue of the act upon the premises chargeable with such rent, or to any debts or seizure, or to any sale or disposal of any goods, thereupon, it shall be lawful, etc., refers to the premises chargeable with rent, and not to the debts or seizure. *Oliver v. Phelps*, 20 N. J. Law (Spencer) 180, 193.

The word "thereupon," in Rev. Laws, 629, 635, providing that, if judgment is given against a freeholder for a sum exceeding \$60, no execution shall be issued thereon until after six months, unless the party in whose favor judgment may be given shall make it appear to the satisfaction of the justice that the debt will be in danger of being lost if such delay of execution is allowed, and making it the duty of the justice to issue execution immediately, unless the party against whom judgment is given shall thereupon give security, etc., means upon the justice being satisfied, as before mentioned. *Krumeick v. Krumeick*, 14 N. J. Law (2 J. S. Green) 39, 44.

8 Wds. & P.—11

As then.

In a will providing that the executor shall sell certain property and thereupon divide the whole as follows, "thereupon" will be construed to have been used in the sense of "then," and will not vest a present interest in the estate. *In re Cameron*, 27 N. Y. Supp. 1031, 1033, 76 Hun. 429.

As thereby.

Where a declaration, after stating certain facts, alleges that it "thereupon" became the duty of the defendant to do a certain act, such allegation is to be understood as a mere acceptance of the legal liability supposed to result from the previously stated facts as an assertion that the defendant became thereby bound to do the act, and not as a distinct substantive allegation. The word "thereupon" is to be understood, not merely as "afterwards," but is equivalent to "thereby." *Brown v. Mallett*, 5 C. B. 600, 614.

THEREWITH.

The word "therewith," according to the latest standard dictionaries of the English language, is the equivalent in meaning of the words "with that or this," or "at the same time"; and it is so used in Rev. St. 1899, § 4228, providing that every person who shall board any horse shall have a lien on the animal and on any equipment "coming into his possession therewith." It is plain that no other interpretation can be placed on all the words, other than that the liveryman is given a lien only on the vehicle or equipment when it comes into his possession at the same time with the animal. *Zartman-Thalman Carriage Co. v. Reid & Lowe*, 73 S. W. 942, 943, 99 Mo. App. 415.

THERMOSTAT.

A thermostat is a self-acting apparatus for the regulation of temperature. It includes the whole apparatus, as well as the expanding strip or strips of metal or other substance upon which the heat first acts, as the intermediate wires, magnets, or other apparatus, if any, by which the dampers of the furnace are open or closed as the strips expand or contract; and hence an application for a patent, stating that it was for a "thermostat" and an automatic machine, the automatic machine will be held to apply solely to the clockwork device, and not to the thermostat. *Murphey v. Weil*, 66 N. W. 532, 534, 92 Wis. 467.

THESE.

"These" is the plural of "this," and opposed to "those," and relates to the persons

or things nearest or last-mentioned, and "those" to the first-mentioned or most remote. *Illinois Cent. R. Co. v. Beebe*, 69 Ill. App. 363, 386 (citing *Worcester*).

A testator devised to his wife "the Draper place of 150 acres, and 125 acres of land on the where we now live, and the Smith lot and the Possession lot, to have the use of in the family," until certain parties should have their lands set off to them, and "these other two lots during her natural life, then to be divided amongst the children as she direct." Held, that the words "these other two lots" meant the lots first mentioned, instead of, as customary, referring to the nearest antecedent. *Russell v. Kennedy*, 66 Pa. 248, 251.

A newspaper advertisement, reciting that sundry houses and other buildings had been recently set on fire, and offering a reward of \$500 to any person "who shall give information so that the perpetrator of these outrages shall be convicted," meant past acts, and was not an offer of reward for the detection of a class of crimes to be afterwards committed, without limit of time. *Freeman v. City of Boston*, 48 Mass. (5 Metc.) 56, 59.

THEY.

"They," as used in Code 1873, § 4030, providing that if any persons, being within the prohibited degrees of consanguinity, carnally know each other, they shall be guilty of incest, will be construed to be equivalent to "both" or "each." *State v. Hurd*, 70 N. W. 613, 615, 101 Iowa, 391.

An agreement by two or more persons that they will desist from and discontinue their business is not shown to have been violated by an allegation that one of them has carried on the business, since the word "they," as used in the agreement, would thus be construed to mean that they and each of them would desist from, etc., which construction will not be given in the cases restricting trade. *Lawrence v. Kidder* (N. Y.) 10 Barb. 641, 655.

The word "they," may refer to a corporation. *Wiley v. Borough of Towanda* (U. S.) 26 Fed. 594, 595.

The relative pronoun "they," as used in the Penal Code, includes females as well as males, unless there is some express declaration to the contrary. *Pen. Code Tex.* 1895, art. 21.

THIEF.

See "Common Thief."

To call one a "thief" does not necessarily impute to him the crime of larceny,

so as to be actionable per se. *Egan v. Semrad*, 88 N. W. 906, 908, 113 Wis. 84.

Where the words used by a defendant in libel were shown to have been that "T. is a thief, and so was his father before him, and I can prove it," but it was also added, "T. received the earnings of the ship and ought to pay the wages," the word "thief" was not used in a sense imputing a felony, and was not actionable, though the word *prima facie* would carry such imputation. *Thompson v. Bernard*, 1 Camp. 48.

"Thieves," in law as in common parlance, means those who have committed either compound or simple larceny. *America Ins. Co. of City of New York v. Bryan* (N. Y.) 1 Hill, 25, 28.

The words, "He is a thief," import in themselves in their usual sense a charge of larceny. *Robinson v. Keyser*, 22 N. H. 323, 324.

The statement in regard to a person that he is a "thief" is a complete charge of slander in itself, sufficient to sustain the action, without proof of other allegations. *Smith v. Moore*, 52 Atl. 320, 74 Vt. 81.

Simply to call a man a thief is *prima facie* actionable, as it imputes felony; but if it appears that the word was used as a mere term of abuse, and that there was in point of fact no imputation of actual theft conveyed by it, there is no cause of action. Thus, where the defendant said of the plaintiff, "He is a damned thief, and so was his father before him," and it appears that the words were uttered in the heat of anger; during a conversation respecting plaintiff's refusal to pay over some money which he received as executor, Lord Ellenborough directed a nonsuit, saying that it was manifest from the whole conversation that the words as used did not impute felony. 2 Add. Torts, § 1119. If it is doubtful whether the term is used in an actionable sense, the question is for the jury; but if, from the plaintiff's own showing, it appears that they were not used in such a sense, he will be nonsuited. *Bridgman v. Armer*, 57 Mo. App. 528, 532.

To call a man a "thief" is not necessarily actionable, as importing a felony, when it is apparent, from the circumstances under which the words are spoken, that they are not intended nor understood to be used in such sense. *Quinn v. O'Gara* (N. Y.) 2 E. D. Smith, 388, 389.

A "thief" being one who steals, to charge another with being a thief is actionable, as importing that he is a criminal. *Little v. Barlow*, 26 Ga. 423, 425, 71 Am. Dec. 219.

The word "thief," in a charge that a man is a thief, is equivalent to the statement that he belongs to one of the class

known as "thieves," and is libelous, as importing a charge of being a criminal. *Tillman v. Willis*, 61 Ga. 433, 435.

A charge that plaintiff is a "thief" is not actionable per se, when it is made in connection with other language showing that the remark is predicated on a taking of marl, which in its natural state is a part of the freehold and not a subject of larceny. Formerly a distinction was made between saying, "You are a thief, you have stolen," or "and have stolen my trees," and saying, "You are a thief, for you have stolen," etc.; but latter opinions make no difference, if the words are spoken at the same time. *Ogden v. Riley*, 14 N. J. Law (2 J. S. Green) 186, 187, 25 Am. Dec. 513.

The charge that another man is a "thief," though actionable per se as charging a felony, is not actionable if spoken in relation to a subject as to which no larceny or felony was capable of being committed. *Fawsett v. Clark*, 48 Md. 494, 502, 30 Am. Rep. 481.

Eyre, O. J., in *Saville v. Jardine*, 2 H. Bl. 531, in holding that charging plaintiff with being a swindler was not slanderous, said: "Thief" always implies felony, but 'cheat' not always." *Chase v. Whitlock* (N. Y.) 3 Hill, 139, 140.

The term "thieves," as used in a marine policy insuring against thieves, etc., "is not intended as a mere translation of the word 'pillage,' used in the ordinance of Louis IX and the present Commercial Codes of France and other continental powers, and hence it is not confined to assaulting thieves, or those who assault and rob the ship by violence from without, but includes persons on ship-board as passengers who commit larceny without the fault of the assured." *American Ins. Co. v. Bryan* (N. Y.) 28 Wend. 563, 573, 37 Am. Dec. 278; *Id.*, 1 Hill, 25, 23.

THIEVING.

The adjective "thieving" imports an act committed, and not merely an inclination to commit it; and to charge one with being a thieving person is to charge him with being guilty of stealing. *Allen v. Neely* (Ind.) 5 Blackf. 200, 201; *Reynolds v. Ross*, 42 Ind. 387.

The words "He gets his living by thieving," are actionable per se. *Rutherford v. Moore* (U. S.) 21 Fed. Cas. 95.

The term "thieving puppy", or "thieving wretch," imports a felony, and would be so understood by any one of ordinary understanding; and therefore a charge that another is a thieving puppy is actionable. *Little v. Barlow*, 26 Ga. 423, 425, 71 Am. Dec. 219.

THIN.

"Thin" is defined as slender, slight, or filmy; so that an instruction that "I think it is a very thin case" expresses an opinion as to the merits of the case detrimental to the plaintiff, and is erroneous. *Stieling v. Clark*, 41 N. Y. Supp. 982, 985, 18 Misc. Rep. 464.

THING.

See "Incorporeal Thing."
Other thing, see "Other."

The word "thing" is of extensive signification, and in common parlance may intend all matters of substance, in contradistinction to person; but in a deed in which the grantor grants, assigns, bargains, and sells all goods, chattels, debts, moneys, and all other things whatsoever, as well real or personal, without any description or allusion to any particular tract of land, does not pass real estate. *Ingell v. Nooney*, 19 Mass. (2 Pick.) 362, 367, 13 Am. Dec. 434.

The civil law of Spain, after dividing things into those of divine right and those of human right, subdivides the former into things sacred and religious, and the latter (or human) things, into things common, things public, things of a corporation or a university, and things private. Things are also divided into those which are corporeal and those which are incorporeal. *Sullivan v. Richardson*, 14 South. 692, 703, 33 Fla. 1.

THING ADJUDGED.

"Thing adjudged" is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing has elapsed, or because it has been confirmed on the appeal. *Civ. Code La.* 1900, art. 3556, subd. 31; *New Orleans Nat. Bank Ass'n v. Adams* (U. S.) 18 Fed. Cas. 118, 120.

THING APPENDANT.

See "Appendant."

THING IN ACTION.

See "Chose in Action."

THING OF VALUE.

See, also, "Anything of Value"; "Valuable Thing."
Other thing of value, see "Other."

The term "thing of value," in 2 Hill's Pen. Code, § 234, providing for the punishment of any person who shall by false pretense obtain from any person anything of

value, includes a lady's beaver shoulder cape. *State v. Reiff*, 45 Pac. 318, 14 Wash. 664.

Cat.

A cat, which is kept as a household pet, may properly be considered a thing of value. It ministers to the pleasure of its owner and serves obviatæ solatium. *Ford v. Glennon*, 49 Atl. 189, 74 Conn. 6.

Check or note.

A check represents a certain sum of money, which the drawer of the check intends that the payee shall in fact have. While not money, a check is a thing of value, and therefore the subject of conversion. *Pawson v. Miller*, 72 N. Y. Supp. 1011, 1012, 66 App. Div. 12.

The release of a claim, on the settlement and payment thereof by notes, is not a "thing of value," within Pub. St. c. 157, § 93, providing that a discharge will not be granted a debtor if, within six months before the filing of the petition in insolvency, he has obtained on credit anything of value with intent not to pay for it, since such release did not constitute an asset in the debtor's estate. *Clarke v. Stanwood*, 44 N. E. 537, 539, 166 Mass. 379, 34 L. R. A. 378.

Chips.

Checks, or chips, which represent certain sums, which chips, when presented, are redeemed by the dealer of cards at the price they represent, are "things of value," within the statute making it gaming to play for money or other thing of value. They are representatives of value. The bet is really for money, and the check is merely to aid in keeping the account, as well as for convenience. *Porter v. State*, 51 Ga. 300, 301.

THING PATENTED.

"Thing patented," as used in Act July 4, 1836, § 18, giving a certain use to the owner of the thing patented, includes patent for a process, a machine, or a manufacture, and is not confined exclusively to machines. *Day v. Union India Rubber Co. (U. S.)* 7 Fed. Cas. 271, 276.

THINGS COMMON.

"Things common," within the classification of the Spanish civil law, included "those things which belong to birds, beasts, and all living creatures, as being able to make use of them, as well as to man. Such were the air, the water from heaven, the sea, and its shore. Any one might navigate on the sea and on its shore, where also he might build a cottage or a house for shelter." *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

Domat defines "things common to all" to be "the heavens, the stars, the light, the air, and the sea." *Morgan v. Negodish*, 3 South. 636, 637, 40 La. Ann. 246 (quoting 1 Dom. Civ. Law, § 1, art. 1, par. 115).

The "things common to mankind by the law of nature" are said by Justinian to be "the air, running water, the sea, and consequently the shores of the sea." *Morgan v. Negodish*, 3 South. 636, 637, 40 La. Ann. 246 (quoting Lib. 2, tit. 1, par. 1).

THINGS OF A CORPORATION.

"Things belonging to a corporation," within the classification of the Spanish civil law, "were those things belonging exclusively to the inhabitants of any city, town, or castle, or any other place where men reside; and of those things some might be used by any inhabitant of that city, town, or place, and others were for the particular use of the corporation, it being its duty to apply the fruits, produce, or rents to the common benefit of the city or town. Fountains or springs, places for holding markets and fairs, and places for the meetings of the corporation, sandy beaches or grounds on the banks of rivers, and commons or pasture ground, belonged to the former class, and were for the use of any inhabitant; and flocks, fields, and vineyards, also plantations and lands producing fruit and rent, were of the latter class." *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

THINGS PERSONAL.

"Things personal" are said to "not only include things movable, but also something more, the whole of which is comprehended under the general name of 'chattels.'" *People v. Holbrook*, 13 Johns. 90, 94 (quoting 2 Bl. Comm. 385).

"Things personal" are defined by Blackstone as things movable, or which may be carried about with and attendant on a man's person. *United States v. Moulton (U. S.)* 27 Fed. Cas. 11, 12 (citing 2 Bl. Comm. c. 24).

"Things personal" are goods, money, and all other movables, which may tend the owner's person wherever he thinks proper to go. *People v. City of Brooklyn (N. Y.)* 9 Barb. 536, 546.

THINGS PRIVATE.

"Things private," in the classification of the Spanish civil law, were those which belonged in particular to every individual, and of which he might acquire or lose dominion. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

THINGS PUBLIC.

"Things public," according to the classification of the Spanish civil law, were those which belonged only to mankind. Rivers, ports, harbors, and high roads were among things public. Not only might the inhabitants of a place make use of things public, but also strangers could do so. No new mill or any other thing could be built on any part of the river by which its navigation might be impeded, and old buildings, obstructing the common use of things public, might be destroyed or pulled down; neither could any building or thing be erected by which the common use of high roads, squares, or market places, threshing grounds for corn, churches, etc., would be obstructed. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

"Things public" are those the property of which is vested in the whole nation, and the use of which is allowed to all the members of the nation. Of this kind are navigable rivers, seaports, roadsteads and harbors, highways, and the beds of rivers as long as the same are covered with water. Civ. Code La. 1900, art. 453.

THINGS REAL.

"Things real" are such things as are permanent, fixed, and immovable, and which cannot be carried out of place, as lands and tenements. *People v. City of Brooklyn* (N. Y.) 9 Barb. 530, 546 (citing 2 Bl. Comm. 2, 18).

"Things real" are defined by Blackstone as lands, tenements, and hereditaments, taking hereditaments as comprising every species of things real or which may be inheritable, which consists, first, of corporeal hereditaments, as lands and tenements, and, second, of incorporeal hereditaments, as advowsons, rents, offices, etc. *Bates v. Sparrell*, 10 Mass. 323, 324.

THINK.

"Think," means believe, consider, or esteem. As used by a jury in a finding of fact, it sufficiently expresses the finding. *Martin v. Central Iowa Ry. Co.*, 13 N. W. 424, 425, 59 Iowa, 511.

"We think not," as used by jurors in answering questions in a special verdict submitted to them, is equivalent to "No." *Missouri Pac. Ry. Co. v. Reynolds*, 1 Pac. 150, 153, 31 Kan. 132.

As believe.

The word "think" is defined to mean "consider" or "believe," and as used in an instruction, authorizing the jury to find any fact to be proved "which they think may be rightfully and reasonably inferred from the evidence," restricts the inferences to be

drawn by the jury to such as may be rightfully inferred from the evidence; that is, to such inferences as the jury, in view of the evidence, consider or believe rightfully and reasonably arise from the evidence. *North Chicago St. R. Co. v. Rodert*, 67 N. E. 812, 813, 203 Ill. 413.

Under Code Civ. Proc. § 376, describing what shall be causes for challenges to jurors, and providing that the previous expression or formation of an opinion as to the guilt or innocence of defendant is not ground of challenge for actual bias to a person otherwise legally qualified, if he declares on oath that he believes such opinion will not influence his verdict, it is sufficient for a juror to swear that he thinks such opinion will not influence his verdict, inasmuch as the words "believes" and "thinks" are substantially equivalent. *People v. Martell*, 33 N. E. 838, 840, 138 N. Y. 595.

As expression of opinion.

The employment of the word "think" by a witness, in answering a question calling for his knowledge of certain facts that he thinks so and so, is not sufficient in itself to show that the witness is merely stating his opinion, instead of stating facts. *Voisin v. Commercial Mut. Ins. Co.*, 70 N. Y. Supp. 147, 154, 60 App. Div. 139.

As recollect or remember.

"Think," as used in the testimony of a witness testifying from recollection, in which he said, "I think," etc., means, according to Webster, "to recollect or call to mind," and does not make such testimony illegal. *Humphries v. Parker*, 52 Me. 502, 504.

"Think" as used in the testimony of a witness that he thought certain occurrences took place, is to be taken as a statement of what the witness remembered. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex.) 43 S. W. 536.

THINK BEST.

A trust deed authorized the trustee to sell the premises "entire, without division, or in parcels, as he may think best." Held, that such provision did not give to the trustee the right to sell the premises according to his arbitrary discretion, without regard to the benefits to be derived on the sale in another manner than that chosen, since the power given by its very terms implied that the trustee assumed the duty of thinking on the subject, and was obligated to adopt that course which he should think would be best to secure a good price. The clause does not mean that the trustee may do as he pleases, or that he may do that which would be most convenient for him; and hence such clause did not deprive the owner from insisting that it was the duty of the trustee to

offer the property in parcels, and when it is shown that a sale in parcels would have been more advantageous, and that the trustee was requested to so offer the property, a sale en masse would be set aside. *Cassidy v. Cooke*, 99 Ill. 385, 388.

THINK FIT.

A "power to appoint a fund in such portions as a party shall think fit" implies that he may apportion it out in such manner as he pleases. "Consequently he may give one interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit to a third child on a contingency, provided he doles out the whole in this various way among all the children only. The power does not require that he should distribute it in gross sums, and give each child an absolute interest in that gross sum; for such a power enables the gift of particular interests, and the appointment of such interests, and a general power to apportion lands receives the same construction. Therefore life estates or rent charges may in like manner, be given to any of the children." *Beardsley v. Hutchkiss*, 96 N. Y. 201, 219 (citing 2 Sugd. Powers, p. 294).

THINK PROPER.

A bequest in a will, by which testator bequeathed all his funds to his wife for life, for the benefit of herself and children, "to be used as she may think proper," means only such a use as is consistent with the life estate given; and an investment thereof in land by the husband gives the wife only a life estate therein, with the remainder to the testator's heirs in fee, free from her debts. *Johns v. Johns*, 10 S. E. 2, 3, 86 Va. 333.

"Think proper," as used in a will in which testator directed his executors to sell his real estate "in such manner as they may think proper," are entirely without force or efficacy, since, had the phrase been omitted, the executors would have been bound to exercise the same discretion. *Drummond v. Jones*, 13 Atl. 611, 612, 44 N. J. Eq. (17 Stew.) 53.

"Think proper," as used in a devise in trust to sell in such manner and at such time as the trustees shall think proper, did not render the period of the conversion of the property from realty into personalty dependent on an arbitrary discretion, or even a sound discretion, vested in the trustees in each case; but the trustees were required to sell within a reasonable time according to all the circumstances of the case. *Walker v. Shore*, 19 Ves. 386.

A bond for the plaintiff's maintenance, which required the obligor to furnish to the obligee money necessary for him to spend

"whenever he thinks proper" to visit his friends, means that whenever, in the honest and fair exercise of his judgment, the obligee thought proper to make such visits, the obligor was bound to furnish money, but not if exercised wantonly or capriciously. *Berry v. Harris*, 43 N. H. 376, 377.

THIRDS.

The word "thirds," as used in a devise and bequest of all testator's estate, both real and personal, subject to the dower and thirds of his wife, obviously meant the same thing as dower. *O'Hara v. Dever* (N. Y.) 46 Barb. 609, 614, 2 Abb. Prac. (N. S.) 418, 423, 41 N. Y. (2 Keyes) 558, 561; *O'Hara v. Dever* (N. Y.) 8 Abb. Dec. 407, 409.

"Thirds," as used in a devise of the residue of a testator's estate, real and personal, after his wife shall have taken her thirds, should be construed to mean the one-third of the personalty to which she was entitled by statute, together with her dower interest in the testator's realty. *Yeomans v. Stevens*, 84 Mass. (2 Allen) 349, 350; *Horsey v. Horsey's Ex'rs* (Del.) 1 Houst. 438, 440.

THIRD OPPOSITION.

Under the Code of Practice of Louisiana, when property not liable is seized on execution, the remedy of the owner is by an intervention called a "third opposition," on which, by giving security, an injunction or prohibition may be granted to stop the sale. A third opposition is a legal remedy, and reviewable by writ of error. *City of New Orleans v. Louisiana Const. Co.*, 9 Sup. Ct. 223, 129 U. S. 45, 32 L. Ed. 607.

THIRD PERSON.

The words "third person" include all who are not parties to the obligation or transaction concerning which the phrase is used. *Rev. St. Okl.* 1903, § 2796; *Code Civ. Proc. Mont.* 1895, § 3463; *Civ. Code Mont.* 1895, § 4663; *Rev. Codes N. D.* 1899, § 5123; *Civ. Code S. D.* 1903, § 2457.

In respect to a contract or judgment, third persons are all who are not parties to it. In case of failure, third persons are, particularly, those creditors of the debtor who contracted with him without knowledge of the rights which he had transferred to another. *Civ. Code La.* 1900, art. 3556, subd. 32.

The term "third persons," as used in Hill's Code, § 292, providing that, where a portion of the land to be sold under execution is claimed by third persons, such portion shall on his request be sold separately, evidently means one who was not a party to the judgment or decree, but who has acquired a title to a portion of the judgment

debtor's real property subsequent to the rendition of the judgment or decree, and is privy to and bound by it, but, having obtained his title subsequent to the lien of the judgment, is entitled, upon request, to have that portion of the debtor's estate claimed by him sold separately, in order that he may redeem it from the sale. *Balfour v. Burnett*, 41 Pac. 1, 2, 28 Or. 72.

Prior mortgagees of property of the purchaser, whose mortgage was also to attach to after-acquired property, are not "third persons," within the statute providing that conditional sales may be valid as between the parties, but are made with the risk on the part of the vendor of losing his lien, if it works a legal wrong to any third person. *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. Ed. 339.

The term "third persons," in Act Cong. March 3, 1851, "to ascertain and settle the private land claims" in California, and declaring "that for all claims finally confirmed by the said commissioners," etc., a patent shall issue to the claimant, but that such patent shall be conclusive between the United States and the said claimants only, and "shall not affect the interests of third persons," does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property. *Colorado Fuel Co. v. Maxwell Land Grant Co.*, 22 Colo. 71, 72, 43 Pac. 556, 557 (citing *Beard v. Federy*, 70 U. S. [3 Wall.] 473, 18 L. Ed. 88).

THIRD POSSESSOR.

A "third possessor" is one who buys the mortgaged property without assuming to pay the mortgage. If one buys real estate by notarial or other act, and does not assume the payment of the first mortgage, he is bound only as a third possessor. He must either give up the property or pay the amount for which it was mortgaged. He is limited to the one or the other alternative. *Thompson v. Levy*, 23 South. 913, 50 La. Ann. 751.

THIRDED.

A direction by testator that his widow, in case of a second marriage, shall be "thirded," means that she should have a third in the estate allotted, to which she would have been entitled by law, had there been no will, or had she elected to renounce the provisions which it offered her. *Baker v. Red*, 34 Ky. (4 Dana) 158, 162.

THIRTY DAYS.

Where a document was to be filed within "thirty days" after the adjournment of court, and the last day fell on Sunday, the

filing on the next day, Monday, will be construed to be a filing within the time prescribed. *Page v. Blackshear*, 75 Ga. 885, 886.

Where thirty days' notice of a sale is required to be published previous to the day of the sale, the rule is to exclude the day of publication and include the day of sale. *Magnusson v. Williams*, 111 Ill. 450, 455.

"Thirty days," as used in the statute requiring appeal to be taken within thirty days, is complied with by an appeal taken April 14th from a judgment rendered March 15th. *Faure v. United States Exp. Co.*, 23 Ind. 48.

Loc. Code Md. art. 4, § 874, requiring thirty days' notice of sale in a certain proceeding to be published twice a week, etc., for a sale which shall be held after the expiration of thirty days' notice, is not complied with where the notice of a sale was published March 15th, and the sale took place on the 14th of April following, the words "thirty days' notice" meaning that both the day of giving the notice and making its first publication and the day of sale should be excluded from the computation. *Steuart v. Meyer*, 54 Md. 454, 463.

Where notice of a sale under a trust deed was given by publication in a daily newspaper, the first insertion being on September 22d and the last insertion on October 22d of the same year, and the sale took place on October 23d, there was "thirty days' public notice" of the time, terms, and place of the sale by advertisement in a daily paper, as required by the trust deed. *German Bank v. Stumpf*, 6 Mo. App. 17, 18.

As consecutive days.

Rev. St. § 1175, providing that in no case shall a tax deed be issued upon a tax certificate upon land not occupied or possessed for the period of "thirty days" or more, at any time within the six months immediately preceding the time when the tax deed upon such sale shall be applied for, means thirty consecutive days. *Howe v. Genin*, 15 N. W. 161, 57 Wis. 268.

As equivalent to month.

"Thirty days," as used in Acts 1872-73, c. 115, § 15, providing that all persons who willfully fail to pay their poll tax shall be guilty of a misdemeanor and liable to imprisonment for not more than thirty days, should not be construed as synonymous with "month," since the word "month" in this state means calendar month, and may be less or more than thirty days. *State v. Upchurch*, 72 N. C. 140, 143.

THIS.

When "this" and "that" refer to different things, before expressed "this" refers to the thing last mentioned, and "that" to the

thing first mentioned. *Russell v. Kennedy*, 66 Pa. (16 P. F. Smith) 248, 251 (citing *Webst. Dict.*).

"This," as used in Act S. C. March 4, 1878 (16 St. at Large, p. 411), requiring that every lien shall be filed in the office of the register of mesne conveyances for the county in which the lienor resides, and he shall keep an index for all such liens so filed, and this shall be a sufficient record of the same, refers to the new mode of filing directed by this statute, and not merely to one of the incidents of the new mode, viz., the indexing, but to both the filing and the indexing. *Sternberger v. McSween*, 14 S. C. 35, 43.

THIS ACT.

In Sess. Laws 1855, c. 231, declaring that all acts and parts of acts inconsistent with this act are hereby repealed, the phrase "this act" should be construed only to include the portion of the act containing such repealing clause, which is not in conflict with the Constitution. *People v. Tiphaine*, 3 Parker, Cr. R. 241, 244.

THIS CASE.

See "Trial of This Case."

THIS DAY.

"This day," as used in a guaranty stating that, in consideration of "your having this day advanced to our client a certain sum," the guarantors undertake to pay the same, "may mean something which has been done or which is to be done this day," and hence parol evidence is admissible to explain its meaning. *Goldshede v. Swan*, 1 Exch. 154, 160.

Where the evidence showing the existence of a parol express trust consists in part of an agreement subsequently made recognizing the trust, the fact that such agreement uses the words, "We have this day entered into this agreement," does not show that the trust was not established at the date of the deed carrying the trust; the expression "this day" having reference merely to the time the writing was entered into. *Renshaw v. First Nat. Bank (Tenn.)* 63 S. W. 194, 205.

THIS IS TO CERTIFY.

"This is to certify," as used in the commencement of a deed, is equivalent to "All those to whom these presents shall come." *Evans v. Gifford*, 1 N. J. Law (Coxe) 197-199.

The words "This is to certify," although not in the form usual to deeds, are not essentially different from the more usual "This indenture witnesseth," and the words "I have

given" are sufficient in Georgia as words of conveyance of land. *Brice v. Sheffield*, 44 S. E. 843, 844, 118 Ga. 128.

THIS SECTION.

Rev. St. U. S. § 3894 [U. S. Comp. St. 1901, p. 2659], providing that no letter or circular concerning lotteries shall be carried in the mail, and that any person who shall knowingly deposit or send anything to be conveyed by mail "in violation of this section" shall be punishable, etc., means in violation of the general and sole prohibition on which it all rests—that is, that it shall not be carried in the mail; and no sending can conflict with this inhibition which is not effected in the mail. *United States v. Dauphin (U. S.)* 20 Fed. 625, 630.

THOROUGHbred.

No warranty will be implied from the statement of the seller of horses that the animals were thoroughbred, this being simply a descriptive term. *Burnett v. Hensley*, 92 N. W. 678, 679, 118 Iowa, 575.

The term "thoroughbred" was defined by a witness in an action involving thoroughbred cattle to mean an animal whose ancestry on both sides is perfect in blood and duly recorded in the American Herd Book. *Hamilton v. Wabash, St. L. & P. Ry. Co.*, 21 Mo. App. 152, 158.

THOROUGHFARE.

See "Public Thoroughfare."

A "thoroughfare," Mr. Webster says, is "a passage through; a passage from one street or opening to another." *Wiggins v. Tallmadge*, 11 Barb. 457, 462.

The term "thoroughfare," in its ordinary sense, cannot be applied to a road that has no outlet at one end thereof. *Cemetery Ass'n v. Meninger*, 14 Kan. 312, 315.

A "thoroughfare" is defined as a passage through, or a street or way open at both ends and free from any obstruction; so that a finding that a cul-de-sac was no thoroughfare was not inconsistent with a finding that it was used and occupied as a street by the public and adjoining property holders so much and so far as the necessity of the public and their convenience required. *City of Mankato v. Warren*, 20 Minn. 144, 150 (Gil. 128, 133).

"Thoroughfare" is the name applied to a narrow, tortuous, tidal stream, traversing a salt marsh, separating an island on the seacoast from the mainland. *Freeman v. Sea View Hotel Co.*, 40 Atl. 218, 220, 57 N. J. Eq. 68.

THOROUGHLY DRIED.

St. 1830, c. 99, § 6, declares that if any side or sides of sole leather shall weigh, when "thoroughly dried," 5 per cent. more or less than the weight marked thereon by an inspector, the inspector who inspected the same shall be subject to the payment of the whole variation at a fair valuation, to be recovered by the party injured thereby. Held, that the words "thoroughly dried," as there used, meant that the leather was suitably and sufficiently dried so as to be in a proper state for sale and use. *Tenney v. How*, 41 Mass. (24 Pick.) 335.

THOROUGHLY SATISFIED.

The court, in an instruction in an action for damages stating that the jury must be "thoroughly satisfied" that the accident did not occur in consequence of the carelessness of the plaintiff, meant that the jury must not only believe that the weight of evidence on the subject of contributory negligence was in plaintiff's favor, but that their belief must be so strong as to exclude every reasonable doubt of plaintiff's carelessness contributing to the injury. *Bradwell v. Pittsburgh & W. E. P. R. Co.*, 20 Atl. 1046, 1047, 139 Pa. 404.

THOS.

The abbreviation "Thos.," on the back of an indictment indorsed "Thos. M. Boston," is not a variance from his name in the body of the bill, where it is written as "Thomas M. Boston." *Studstill v. State*, 7 Ga. 2, 16.

THOUGH.

See "Even Though."

THOUSAND.

In a contract for the purchase of shingles, where it has been the custom in prior contracts between the parties to reckon a thousand shingles by measurement, instead of by actual count, such custom is binding upon the parties, and the number of shingles will be ascertained by measurement. *Bragg v. Bletz*, 7 D. C. 105, 110.

The term "thousand brick," within the meaning of a contract for the delivery of brick at so much per thousand, must be taken in its ordinary sense, in the absence of evidence of custom showing a particular meaning; but evidence is admissible that the term by custom means so many brick, to be ascertained, not by actual count, but by the measurement of the walls in which the bricks are laid. *Lowe v. Lehman*, 15 Ohio St. 179, 182.

As twelve hundred.

"Thousand," as used in a lease of a rabbit warren, providing that at the expiration of the term the lessee would leave 10,000 rabbits on the warren, the lessor paying for them £60 per thousand, means 1,200. *Smith v. Wilson*, 3 Barn. & Adol. 728.

The expression "a thousand a year," as used in contracts, has been held to mean \$1,200. *McCulsky v. Klosterman*, 25 Pac. 366, 370, 20 Or. 108, 10 L. R. A. 785 (citing *Lawson*, Usages & Cust. 368).

Under certain conditions, parol evidence is admissible of a custom showing that the term "a thousand" means 1,200. *Coquard v. Bank of Kansas City*, 12 Mo. App. 261, 265.

THREAD.

A small line or twist of any fibrous or filamentous substance, as flax, silk, cotton, or wool, particularly such as is used for weaving or for sewing; a filament; a small string. *Luckemeyer v. Magone* (U. S.) 38 Fed. 30, 34.

THREAD LACE.

"Thread lace" is that manufactured upon a cushion from thread wound on bobbins moved by hand, and it is equally thread lace whether made of cotton or silk, and whether white or black. *Arthur v. Lahey*, 96 U. S. 112, 114, 24 L. Ed. 766.

Thread laces, made wholly by machinery and composed of linen and cotton thread, first introduced into this country subsequent to the tariff act of July 30, 1846, which were invoiced and always known to the trade under the denomination of "thread laces," were within the description of "thread lace" in schedule E, and not within the enumeration of schedule D, of manufactures composed wholly of cotton not otherwise provided for. *Lottimer v. Lawrence* (U. S.) 15 Fed. Cas. 928, 929.

THREAD OF A STREAM.

The thread of a stream is the middle line of a channel; that is, of the hollow bed of running water, when the water is at its ordinary stages. *Dayton v. Cooper Hydraulic Co.*, 10 Ohio S. & C. P. Dec. 192, 205.

The thread of a stream is the line midway between the banks at the ordinary stage of water, without regard to the channel, or the lowest and deepest part of the stream. *State v. Burton*, 31 South. 291, 292, 106 La. 732.

The phrases "the middle of the river" and "the middle of the main channel," when applied to rivers as boundaries between states, mean the center line of the main channel, or, as it is most frequently express-

ed, the "thread of the stream." *Buttenuh v. St. Louis Bridge Co.*, 17 N. E. 439, 443, 123 Ill. 535, 5 Am. St. Rep. 545.

THREAT.

A threat in criminal law is a menace or declaration of one's purpose or intention to work injury to the person, property, or rights of another. *State v. Cushing*, 50 Pac. 512, 515, 17 Wash. 544.

A threat "is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent." *And. Law Dict.* "To hold up as a terror the expectation of evil, or to alarm with the promise of evil." *Webster.* A "threat," whether it be verbal, written, or printed, to be within Code 1873, § 3871, prescribing a punishment for the extortion of money by threats, need not be made personally to the one threatened. In order to be a "threat," it must be so made and under such circumstances as to operate at least on the mind of the one whom it is expected to influence. The meaning of the word implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected thereby. *State v. Brownlee*, 51 N. W. 25, 27, 84 Iowa, 473.

A "threat" of accusation, within the meaning of Gen. St. c. 160, § 28, making it criminal to extort money by threat, etc., comprehends a threat to use any of the preliminary means necessary to cause a person to be proceeded against for a criminal offense. A false statement that the warrant is issued to arrest a person for crime, which will be served unless money is paid to stay the process, is a threat to accuse a person of crime. *Commonwealth v. Murphy*, 94 Mass. (12 Allen) 449, 451.

When threats are charged to have been the means by which a rape was effected, the jury should be instructed that the threats must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative conditions of the parties as to health, strength, and all other circumstances of the case. *Jones v. State*, 10 Tex. App. 552, 559.

In an action to recover damages sustained by a conspiracy between defendants to damage plaintiff and deprive him of his source of business and his customers, no threats are shown in the legal sense where defendants stated that, if other dealers in certain goods continued to sell to plaintiff, the members of defendant association would not buy from them. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom

is most profitable and have acted accordingly; but it was not a threat, constituting unlawful combination. *Cote v. Murphy*, 28 Atl. 190, 194, 159 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686.

A declaration that a person by means of "threats" drove the customers of another from him and succeeded in breaking up his business means a declaration of an intention or determination to injure another by the commission of some unlawful act. If the act intended to be done is not unlawful, the declaration is not a "threat" in law. *Payne v. Western & A. R. Co.*, 81 Tenn. (13 Lea) 507, 514, 49 Am. Rep. 666.

Actions or signs.

"Threat" does not necessarily require that violent language be employed, but a threat may be communicated by signs or actions as fully as by word of mouth. *Armstrong v. Vicksburg, S. & P. R. Co.*, 16 South. 468, 474, 46 La. Ann. 1448.

Persuasion.

"Threats," as used in Code, § 2508, requiring the certificate of a wife's acknowledgment to a deed of her husband's homestead to state that her acknowledgment was not made under threats of her husband, means more than is indicated by the word "persuasion," and such a certificate, in which the word "persuasion" is substituted for the word "threats," is not a substantial compliance with the statute. *Daniels v. Lowery*, 8 South. 352, 353, 92 Ala. 519.

Simple request.

Where striking employes had been enjoined from interfering with other employes by the use of threats or intimidations, a simple request to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct employes in the performance of their duties, is a direct threat and intimidation, and will be punished as such. *Ex parte Richards* (U. S.) 117 Fed. 658, 666 (citing *In re Doolittle* [U. S.] 23 Fed. 545; *United States v. Kane*, Id. 748, 750, 751; *In re Wabash R. Co.* [U. S.] 24 Fed. 217).

Vulgar and abusive epithets.

Mere vulgar and abusive epithets do not constitute "threats," such as to furnish adequate cause to reduce the killing to the grade of manslaughter. *Levy v. State*, 12 S. W. 596, 597, 28 Tex. App. 203, 19 Am. St. Rep. 826.

THREAT TO INJURE PROPERTY.

A threat to injure a person's business by inducing his employes, who are on a strike, to persist in their refusal to work for him,

is not a "threat to do an injury to property" of such person. *People v. Barondessa*, 16 N. Y. Supp. 436, 437, 61 Hun, 571.

THREATEN AND ACCUSE.

In an indictment charging a conspiracy entered into by defendants to maliciously "threaten and accuse" one B. of the crime of adultery, with the intent unjustly and fraudulently to extort money, the words quoted were used in the same sense as the words "charge and accuse" in a prior allegation in the indictment, alleging the conspiracy, and mean an imputation of such offenses against the prosecutor as a means of inducing him to pay money to avoid prosecution. *Commonwealth v. O'Brien*, 66 Mass. (12 Cush.) 84, 90.

THREATENED TO KILL.

The phrase "threatened to kill," as used in an indictment charging that defendant "threatened to kill," etc., is equivalent to "threatening to take life," prohibited by Pasch. Dig. arts. 6585, 6586. *Bule v. State*, 1 Tex. App. 58, 60.

THREATENED TO MURDER.

The phrase "threatened to murder," as used in an indictment charging that defendant "threatened to murder," etc., is equivalent to "threatening to take life," prohibited by Pasch. Dig. arts. 6585, 6586. *Bule v. State*, 1 Tex. App. 58, 60.

THREATENED WITH ATTACK.

"Being threatened with an attack as a defense to a prosecution for carrying concealed weapons implies only that a threat must have been made and stand uncanceled by after-reconciliation or other evidence of abandonment." *Polk v. State*, 62 Ala. 237, 239.

THREATENING.

Threatening supposes some danger in prospect, but more remote than imminent or impending. *Eckhardt v. City of Buffalo*, 46 N. Y. Supp. 204, 211, 19 App. Div. 1.

THREATENING CHARACTER.

"Threatening character," as used in Act Sept. 26, 1888, relating to the depositing of postal cards containing allegations of a "threatening character," do not include a postal card containing an allegation, "You have promised and do not perform," and "I see very plainly you do not intend to pay any attention to my letters or your agreements." *United States v. Simmons* (U. S.) 61 Fed. 640.

THREATENING LETTERS.

"Threatening letters," within the meaning of the statute making it criminal to send threatening letters with a view of extorting money, was intended to embrace only cases where the intent is to obtain that which in justice and equity the writer of the letter is not entitled to receive. It does not extend to cases where the person threatened actually owes the writer of the letter the sum claimed by him. To support an indictment under that statute, the end, as well as the means employed to obtain it, must be wrongful and unlawful. *People v. Griffin*, 2 Barb. 427, 429.

THREE.

Three days.

A statute requiring three days' notice of an act proposed to be done is sufficiently complied with by a performance of the act on the third day. *Ducheneau v. House*, 10 Pac. 427, 428, 4 Utah, 363 (citing *Misch v. Mayhew*, 51 Cal. 514, 515).

Justices' Code, § 12, declaring that a summons must be served at least "three days before the time of appearance," does not mean that three full days shall transpire between the day of service and the day of appearance, but should be construed, according to the ordinary rule for the computation of time, so as to exclude the first day and include the last. *Schultz v. American Clock Co.*, 18 Pac. 221, 222, 39 Kan. 334.

How. St. § 8028, providing that a citation to show cause why an attachment should not be dissolved "shall be served within three days at least before the return day thereof," means three days, exclusive of Sunday, which is not to be included in the computation. *Caupfield v. Cook*, 52 N. W. 1031, 92 Mich. 628.

Three months.

Where a verdict was returned on the 12th of October, and a petition filed for certiorari on the 12th of January following, the petition was not filed within "three months," as required by statute. *Western & A. R. R. v. Carson*, 70 Ga. 388, 389.

Three weeks.

An order of court providing that notice of the time and place of the meeting of certain commissioners should be given "three weeks before the time of the meeting" has no reference to the number of insertions in the paper, but was intended to give all persons interested a definite period to prepare for the meeting, and means that three full weeks' notice should be given, and hence three successive insertions, made within less than three weeks, did not constitute a com-

pliance with the order. In re North Whitehall Tp., 47 Pa. (11 Wright) 156, 160.

Three consecutive weeks.

Where an ordinance is required to be published for three consecutive weeks in some newspaper, the words "three consecutive weeks" should be construed to mean that the publication required is one for 21 days, and not simple insertions, one in each week, in such newspaper. Loughridge v. City of Huntington, 56 Ind. 253, 259.

Three successive weeks.

Where a power of sale in a mortgage required a notice to be published "once each week for three successive weeks," the language did not mean that the first publication should be made three weeks before the time appointed for the sale. Dexter v. Shepard, 117 Mass. 480, 484.

Act June 16, 1836, directing a sheriff to advertise a sale once a week during "three successive weeks," means calendar weeks or specified periods of time, and an advertisement in three successive periods of the kind, although the advertisements may not have been all on the same day of the week, and there may not have been 21 full days between the first and the date of the sale. McKee v. Kerr, 43 Atl. 953, 954, 192 Pa. 164; Hollister v. Vanderlin, 30 Atl. 1002, 1003, 165 Pa. 248, 44 Am. St. Rep. 657.

Three weeks successively.

In construing a statute providing that, in case of an administrator's sale of real estate, notice shall be published in a newspaper for "three weeks successively" next before such sale, as applied to a case where a notice was published in a daily paper one day in each week for three weeks, the court said: "If the publication had been made in a weekly paper on regular publication days, separated by intervals of a week, there can be no question that it would have satisfied the statute. The single publication on the regular publication day would be a publication for a week. It follows that, to constitute a good publication for a given number of weeks, a daily publication is not essential. Publications on regular publication days at the rate of one a week, if separated by intervals of a week, are sufficient. We can perceive no reason why this rule is not as applicable to a publication in a daily as to one in a weekly publication." Dayton v. Mintzer, 22 Minn. 393, 395.

A statutory requirement that a notice of a hearing be published "three weeks successively" before the hearing is satisfied, in the case of a hearing on the 30th day of a month, by a publication in a weekly newspaper, in issues thereof dated the 15th, 22d, and 29th days of said month. It is not necessary that a full week shall intervene be-

tween the last publication and the time of hearing. Swett v. Sprague, 55 Me. 190, 192.

2 Rev. St. 1876, § 467, requiring the publication for three weeks successively of a sheriff's sale of real estate, is complied with by a publication for 21 days, excluding either the date of the first publication or the day of sale. Meredith v. Chancey, 59 Ind. 466, 467.

An order to give notice by publishing in a newspaper "three weeks successively" is complied with by publishing in such paper in three successive weeks, although there be not an interval of a week between either the first and second or the second and third publications. Bachelor v. Bachelor, 1 Mass. 256.

Comp. St. c. 23, § 140, requiring that notice of the probate of a will shall be made by publication "three weeks successively," means a publication once each week for three successive weeks, three weekly publications, and the last publication need not necessarily be 21 days from the date of the first publication. Alexander v. Alexander, 41 N. W. 1065, 1067, 26 Neb. 68.

"Three weeks successively," as used in Code Civ. Proc. § 1547, directing a notice of sale of the property of a decedent to be published in a newspaper for "three weeks successively," and under section 1705, providing that, when any publication is ordered, the judge or court may order a publication for a less number of times than each issue of the paper, embraces a notice published in a daily newspaper once a week for three successive weeks. In re Cunningham's Estate, 15 Pac. 136, 73 Cal. 558.

Three years successively.

"Three years successively," in St. 1793, c. 34, giving a settlement to persons having a freehold of the clear yearly income of £3 and taking the rents and profits thereof three years successively, is to be understood to mean each and every one of the three years, and a statute therefore requires an income with such a value during each of the years. Inhabitants of Western v. Inhabitants of Leicester, 20 Mass. (3 Pick.) 198.

THREE STORY.

The phrase "three story building," as used in a fire policy, was applicable to designate a building with a granite front only and three stories high in the front and rear, although only one story high in the middle. Medina v. Builders' Mut. Fire Ins. Co., 120 Mass. 225, 226.

THRESHING MACHINE.

"Threshing machine," as generally used and understood in the state of Nebraska, includes within its meaning the horse power by means of which the separator is pro-

pelled. *Osborne v. McAllister*, 19 N. W. 510, 511, 15 Neb. 428.

A self-feeder is covered by a policy insuring a "threshing outfit," though not specifically insured, when it constitutes part of the outfit. *Minneapolis Threshing Mach. Co. v. Darnall*, 83 N. W. 266, 269, 13 S. D. 279.

THROAT.

"Throat," as used in an indictment charging a cutting of the "throat," is not to be confined to that part of the neck scientifically called the throat, but means that which is commonly called the throat; and the allegation was proved by showing that the jugular vein was divided, though the carotid artery was not cut. *Rex v. Edwards*, 6 Car. & P. 401.

THROAT DISEASE.

The words "throat disease," in a proposal for life insurance in which the applicant said that he had never had throat disease, mean something more than a temporary inflammation, which at the time the proposal was made was completely cured. *Elsner v. Guardian Mut. Life Ins. Co.*, 3 Cent. Law J. 302.

THROUGH.

The word "through," when used in a deed granting a right of way in, upon, and through lands of U., speaks an intent to concede a mere passage, and not to grant the land itself. *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 341, 51 W. Va. 106.

An indenture granting a right of drainage "in and through" three private ways or avenues named does not entitle the grantee, either expressly or impliedly, to extend the drain to the sea beyond, across lands belonging to a third party, which belonged to the grantor at the date of the indenture. *Fiske v. Wetmore*, 10 Atl. 627, 628, 15 R. I. 354.

As along.

"Through," as used in a grant by a city of authority to a telephone company to run and maintain wires over and through the streets of the city, is equivalent to "along," and does not authorize a laying of the wires under, below, or beneath the streets. *Commonwealth v. Warwick*, 40 Atl. 93, 94, 185 Pa. 623.

The words "through whose land" the highway may pass, in Rev. St. 1894, § 8747, relative to the establishment and vacation of highways, and giving a remedy to any person through whose land the highway may pass, do not require such a highway to separate the land of the owner into two parts, but they apply where his land merely abuts

on the highway. *Brandenburg v. Hittel* (Ind.), 37 N. E. 329, 330.

As into.

Under a city charter providing that the city may take stock in companies constructing roads running to the city, it is held that a road running through the city is a road running to it. *City of Aurora v. West*, 9 Ind. 74, 85.

"Through" does not always mean from end to end or from side to side, but frequently means simply within. As used in an agreement that negotiable bonds issued by a county should be delivered to a railroad company when its road had been so completed through such county that a train of cars shall have passed over the same, the word does not require a road passing entirely through the county from one side to the other, but the condition is satisfied by the construction of a road into the county and within two miles of the opposite side. *Provident Life & Trust Co. of Philadelphia v. Mercer County*, 18 Sup. Ct. 788, 792, 170 U. S. 593, 42 L. Ed. 1156 (reversing *Mercer County v. Provident Life & Trust Co.*, 62 Fed. 623, 19 C. C. A. 44).

"Through," as used in a conveyance of one-half of the grantor's dwelling house and a lot of land on the side of the house, reserving a privilege to pass and repass through the land to the outer cellarway, and through said way and cellar where it may do the least damage, does not mean to or into or out only, and the grantor may go through the cellar to his rooms above without having any occasion to go into the cellar to do any particular business therein. The passage reserved is through, not to, the cellar, as it would have been if the parties intended to limit the right of passage for the purpose of depositing anything in or carrying anything from the cellar. A passage through cannot mean a passage into or out only. *Choate v. Burnham*, 24 Mass. (7 Pick.) 274, 278.

As over.

The word "through," in an act amendatory to the charter of a cemetery association, providing that no road, street, alley, or thoroughfare shall be laid out or opened through said grounds or any part thereof without consent of the directors, was intended to mean the same as the word "over"; the obvious intention being to protect the cemetery lands or any part thereof from being taken for road or street purposes. *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 7 N. E. 627, 629, 119 Ill. 141.

THROUGH CONTRACT.

A "through contract," as used with reference to railroad contracts for the shipment of goods, is a contract made by the carrier

to whom the goods are originally delivered agreeing that the goods shall be transported to their destination; such destination being beyond the terminus of its own road and requiring the service of one or more connecting lines. "Such a contract is more for the convenience of shippers than carriers. It enables property to be transported over long routes, composed of many distinct companies and lines, with great safety and dispatch, and without necessity of employing any intermediate agents other than the carriers themselves. It adds to the public convenience to have such contracts entered into and carried out, and holdings which would have a tendency to discourage and destroy the custom should not be unnecessarily made. For this reason such connecting carriers ought not to be required to ascertain at their peril whether there are any secret agreements affecting the liability of goods received in the ordinary course of business to the ordinary freights. A contract by a railroad company receiving goods at Pittsburgh, Pa., destined for Hudson, Wis., which stipulated against responsibility as a carrier beyond its own line, but guaranteed that the cost of transportation to Hudson would not exceed a certain sum, less than the aggregate of the charges on the several lines between Pittsburgh and Hudson at the usual rates, will not be deemed a "through contract." *Schneider v. Evans*, 25 Wis. 241, 251, 3 Am. Rep. 56.

Plaintiff shipped at Cairo, Ill., by the Illinois Central Railroad, a quantity of cotton assigned to a company in New York. In the bill of lading given by the railroad company its agent was named as consignee at Chicago. The bill of lading exempted that company from damage or loss by fire, and also from all responsibility for the stowage and safe carriage of the packages beyond the line of its road, and stipulated that the other road should pay a specified sum per 100 pounds. The Illinois Central Railroad Company contracted for the transportation from Chicago to New York with the Union Transportation Company, and it was held that the contract with the Illinois Central Railroad Company was not a through contract, and that under it that company had power to contract for the transportation beyond the line of its road, and to provide in such contract for a like exemption of subsequent carriers as that contained in its own contract with plaintiff. *Lamb v. Camden & A. R. & Transp. Co.*, 46 N. Y. 271, 7 Am. Rep. 327.

THROUGH ELEVATORS.

Acts 1872, c. 244, providing that all grain arriving in the city of Baltimore must be reported to the grain weigher's office, except grain carried to the city on wagons, carts, railroad cars, or through elevators, should be construed to apply to grain which arrived

in Baltimore City by water, which was taken out of the vessel by elevator machinery and deposited in an elevator, where it was weighed by an employé of the elevator and came under the immediate superintendence and direction of an assistant weigher of grain stationed there by the weigher general for the purpose of superintending and directing the weighing, though the grain has never been taken from the elevator. When the grain has been removed from the vessels and taken up into the elevators, and thence let down in the harbors and weighed, and after weighing has been put into the bins of purchasers, it has been carried through the elevators in contemplation of the act. *Gill v. Cacy*, 49 Md. 243, 244.

THROUGH FREIGHT.

A "through freight" is a train which does not switch, and neither sets out nor takes in cars at intermediate stations. *Oviatt v. Dakota Cent. Ry. Co.*, 43 Minn. 800, 301, 302, 45 N. W. 436.

THROUGH GRAIN.

"Through grain," in a contract with a railroad company at the terminus of its line requiring the elevator to receive and discharge all through grain at a certain rate, and that the elevator should have the handling of all through grain at such a rate, does not mean shipped through merely to that terminus of said railroad company, but all grain consigned through that terminus to some point beyond by the terms of the shipment. *Richmond v. Dubuque & S. C. R. Co.*, 26 Iowa, 191, 199.

THROUGH THE MOTHER.

"Through the mother," as used in Rev. St. Tex. art. 1657, providing that illegitimate children shall be capable of inheriting from and through the mother, confines the general right of inheritance to the mother and her lineal ascendants; so that it will not go to the mother's brothers and sisters. *Blair v. Adams* (U. S.) 59 Fed. 243, 246.

THROUGH OR UNDER US.

The term "through or under us," in a deed executed by three, covenanting to warrant and defend the premises against the lawful "claims and demands of all persons claiming by or through or under us," is broad enough to embrace all lawful claims derived from the covenantors collectively or severally. The covenant was joint, and it would be too narrow a construction to hold that each might have conveyed separately without a breach; and all three grantors are liable on the covenant if a legal claim under any one of them existed at the time.

Carleton v. Tyler, 16 Me. 392, 393, 33 Am. Dec. 673.

THROUGH TICKET.

A through railway ticket is, in the absence of any agreement to the contrary, an entirety, neither party being entitled to its performance in parts, so that the purchaser of a ticket is entitled to but a continuous passage, and has no right to stop over at an intermediate station and afterwards demand a completion of a contract on a later train. *Louisville & N. R. Co. v. Klyman*, 67 S. W. 472, 474, 108 Tenn. 304, 56 L. R. A. 769, 91 Am. St. Rep. 755.

THROUGH WITHOUT TRANSFER.

A contract by a transportation company to ship certain goods "through without transfer" in cars owned and controlled by the company means that the goods should be shipped through without transfer, and does not permit the company to transfer the goods into a warehouse for the purpose of changing into other cars. *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470, 474.

THROUGHOUT.

"Throughout," as used in St. 1846, c. 167, § 2, authorizing the city to build aqueducts into and through the city and to distribute "the water throughout the city," carries with it a suggestion of continuity in distribution within the city, and does not authorize a construction of the system beyond the city limits. *Inhabitants of Town of Quincy v. City of Boston*, 19 N. E. 519, 521, 148 Mass. 389.

"Throughout the state," as used in the Constitution, declaring that "laws of a general nature shall have uniform operation throughout the state," necessarily implies that, in order that a law partake of the nature of generality, it should by its terms show that it was capable of being applied in any county in the state. It is not necessary that every county in the state at the time of the passage of the law should fall within its operation, but it is necessary that none should be excepted in such a way that it can never fall within its provisions. *Thomas v. Austin*, 30 S. E. 627, 628, 103 Ga. 701.

THROWING PLANT.

A "throwing plant" is a machine which takes raw silk, after it is wound from the cocoon and reeled into hanks, and doubles and twists it into silk threads of varying size and strength, according to the needs of the dyer and weaver. *American Cent. Ins. Co. v. Landau*, 49 Atl. 788, 749, 62 N. J. Eq. 73.

THROWN INTO BANKRUPTCY.

The term "thrown into bankruptcy" implies that the person or corporation spoken of as being thrown into bankruptcy has been adjudicated a bankrupt. *Wilcox v. Toledo & A. A. R. Co.*, 7 N. W. 892, 893, 45 Mich. 280.

THRUSTING.

"Thrusting," as used in Rev. St. § 790, providing that any person guilty of thrusting any person with a dangerous weapon with intent to commit murder, etc., shall be punished, etc., includes thrusting with an iron bolt, rod, or pin, whether the point be sharp or not. The word "thrust," as a transitive verb, means to drive or impel. As an intransitive verb it means to make a push, or to attack with a pointed weapon; as, a fencer thrusts at his antagonist. The statute punishes thrusting a person, not thrusting at a person. *State v. Lowry*, 33 La. Ann. 1224.

THUJA GIGANTEA.

"*Thuja gigantea*" is the botanical name for the tree popularly known as "red cedar" or "canoe cedar." The wood is soft, light, and slightly fragrant. It does not take a polish, and is not of the class of woods known as "cabinet woods." *In re Myers* (U. S.) 69 Fed. 237, 238.

TICKET.

See "Commutation Ticket"; "Foreign Ticket"; "General Ticket"; "Limited Ticket"; "Local Ticket"; "Lottery Ticket"; "Party-Rate Ticket"; "Policy Tickets"; "Pool Ticket"; "Prize Tickets"; "Railroad Ticket"; "Special Ticket"; "Subpoena Ticket"; "Through Ticket."

The word "ticket" has no legal or other fixed and determinate meaning. There are tickets of various description and for various purposes, such as lottery tickets, playhouse tickets, or admission tickets at public exhibitions or private parties, or to a seat in a stage, or for a passage in a steamboat, etc. As used in Act Feb. 16, 1831, prohibiting the circulation or passing of tickets, a man is not prohibited from giving a duebill or other written evidence of a debt or promise to pay a debt to his creditor, or an order on his own store or factor or anybody else for money or goods. *Allaire v. Howell Works Co.*, 14 N. J. Law (2 J. S. Green) 21, 24.

The word "ticket" in the ballot law, providing that "the ticket then declared by a majority of the members of said commit-

tee shall be final, and declare the duly nominated candidates," etc., means the candidates nominated by the respective parties. In re Gerberich's Nomination, 24 Pa. Co. Ct. R. 250, 255.

TICKET AGENT.

See "Acting Ticket Agent."

TICKET BROKER.

See "Scalper."

TICKLER.

A "tickler" or "telltale" is a contrivance to warn railroad brakemen of the proximity of a bridge. It is constructed of an upright on each side of the road and a pole running across the road upon the uprights, from which pole a number of strands of wire are suspended. *Wallace v. Central Vt. Ry. Co.*, 18 N. Y. Supp. 280, 281, 63 Hun, 632.

TIDE.

See "Neap Tide"; "Ordinary Tides."

Three sorts of tides are recognized by Sir Matthew Hale in *De Juris Maris*, c. 6. They are: First. High spring tides, which are the fluxes of the sea and those tides which happen at the two equinoxes; but the line embraced within these tides does not belong to the crown, "for such spring tides overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. Second. The spring tides, which happen twice every month, at full and change of the moon; and the shoar in question is by some opinion not denominated by these tides neither, but the lands overflowed by these fluxes ordinarily belong to the subject *prima facie*, unless the king hath a prescription to the contrary. And the reason seems to be because for the most part the lands covered with these fluxes are dry and maniorable; for at other tides the sea doth not cover them. Third. Ordinary tides, or nepe tides, which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called 'marettum,' sometimes 'warrettum.'" *Baird v. Campbell*, 73 N. Y. Supp. 617, 624, 67 App. Div. 104.

TIDE LANDS.

"The words 'tide lands,' in the legislation of California, applies to land covered and uncovered by the ordinary tide, which the state owns by virtue of its sovereignty." *Rondell v. Fay*, 32 Cal. 354.

"Tide lands," as contained in Act May 14, 1861, entitled "An act to provide for the sale of the marsh and tide lands of this state,"

refers to such tide lands as are subject to periodical overflow, but which are susceptible of reclamation, so as to be valuable for agricultural purposes. *People v. Morrill*, 26 Cal. 336.

The expression "tide lands" is to be understood as referring to those lands only which are covered and uncovered by the daily flux and reflux of the tide. *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 285, 118 Cal. 160.

By the words "tide lands," as used in connection with the reservation of the same by the United States government for the purposes of navigation, commerce, and fishery, is meant that portion of the shore or beach covered and uncovered by the ebb and flow of the tide. *Pacific Steam Whaling Co. v. Alaska Packers' Ass'n*, 72 Pac. 161, 162, 138 Cal. 632.

The words "tide lands" mean land "that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tide. Lands adjacent to navigable waters where the tide flows and reflows, which at high tide are submerged and at low tide are bare, come within such description. It would seem to be correspondent to or be synonymous with 'shore' or 'tract'; and this at common law is that land which lies between ordinary high-water mark and low-water mark." *Andrus v. Knott*, 8 Pac. 763, 12 Or. 501; *Elliott v. Stewart*, 14 Pac. 416, 417, 15 Or. 259; *Walker v. Marks* (U. S.) 29 Fed. Cas. 36, 37.

As public or state lands.

See "Public Land"; "State Lands."

Submerged lands.

The word "tide lands" means such lands only as are covered and uncovered by the tide, and does not include lands permanently submerged, within the meaning of Act May 14, 1861, entitled "An act to provide for the sale of marsh and tide lands." *People v. Davidson*, 30 Cal. 379, 385.

"Tide lands," as used in an act to provide for the sale of the marsh and tide lands of the state, means lands covered and uncovered by the tides, and does not include lands permanently submerged by the waters of the Bay of San Francisco. *Walker v. State Harbor Com'rs*, 84 U. S. (17 Wall.) 648, 650, 21 L. Ed. 744.

"Tide lands," as used in the Constitution and legislation of the state of Washington, includes more than the mere land over which the tide ebbs and flows, and which is bare at low tide. It includes the beds of navigable waters covered by not more than four fathoms of water at ordinary low tide. *State v. Forrest*, 39 Pac. 684, 11 Wash. 227.

TIDE MILL.

A "tide mill" is understood to be a mill placed upon a dam thrown across a creek or inlet from the sea into which the tide naturally ebbs and flows, and wherein the water is raised by the flow of the tide, and at high water and the turn of the tide the water is stopped by the dam and the sluice gates, and kept to that height, until the tide has so far ebbed below the dam as to create a fall, by means of which the mill is worked a few hours, until the return of the flood tide prevents it. *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 114.

TIDE WATER.

"Tide waters" are waters, whether salt or fresh, wherever the ebb and flow of the tide of the sea is felt. *Commonwealth v. Vincent*, 108 Mass. 441, 447.

In England the ebb and flow of the tide became the test of the navigability of a stream. Other "tide waters," with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and hence arose the doctrine of admiralty jurisdiction, which was confined to the ebb and flow of the tide—in other words, to public navigable waters. *Packer v. Bird*, 11 Sup. Ct. 210, 212, 137 U. S. 661, 34 L. Ed. 819.

In reference to rivers and creeks, "tide water" is the place where the water rises and falls, and is not determined by the proportion of salt water to fresh; and a place where the fluctuation is only two feet, which is caused by the river water meeting the sea, is within tide water. *Attorney General v. Woods*, 108 Mass. 436, 439, 11 Am. Rep. 380.

A grant of land bounded on "tide water" extends only to ordinary high-water mark. *Wiswall v. Hall* (N. Y.) 3 Paige, 313, 317; *City of New York v. Hart*, 95 N. Y. 443; *Oblenis v. Creeth* (U. S.) 67 Fed. 303, 304; *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 336, 66 Am. Dec. 369.

A grant of lands "within the limits of tide water," "running to" or "extending unto," conveys only to high-water mark. *Oblenis v. Creeth* (U. S.) 67 Fed. 303, 304 (citing *City of New York v. Hart*, 95 N. Y. 443).

TIE.

The word "tie," as applied to an appointment by election, signifies a state of equality between two or more competitors for the same position. A tie is that which is tied. It is a knot, and where a casting vote is given it is simply to allow him to untie the knot. *Wooster v. Mullins*, 30 Atl. 144, 64 Conn. 340, 25 L. R. A. 694.

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TIGHT.

The term "tight," used in a claim to qualify the construction of the inner chamber or tobacco holder, means sufficiently tight to subserve the purposes of the invention. Slight crevices or openings arising from defective mechanical construction, if not large enough to admit steam in such quantity or volume as to wet the tobacco and defeat the operation of the apparatus, will not violate such rule of construction or relieve such apparatus from the charge of infringement. *Robinson v. Sutter* (U. S.) 8 Fed. 828, 830.

"Tight," as used in a contract to make a certain number of tight joint clamps for natural gas pipes, means a gas-tight joint, or a joint that would reasonably retain natural gas or prevent the leaking of the gas from the joint. *Albree v. Philadelphia Co.*, 50 Atl. 984, 201 Pa. 165.

TILE.

Derivatively the word "tile" means a covering, and is applied to such articles as are used for covering roofs, pavements, walls, and the like. The original meaning of the word refers, therefore, to the use made of the article, and not to the material of which it may be composed. In the *Encyclopædia Britannica*, under the article, "Roofing Tiles," it is said: "In the most important temples of ancient Greece, the roof was covered with tiles of white marble, fitted together in the most perfect way, so as to exclude rain." And in a note to this article it is further stated that "marble tiles are said to have been first made by Byzes of Naxos about 620 B. C." In *Jules Adeline's Art Dictionary* it is stated that "Roman temples were sometimes covered with bronze tiles laid side by side, while the roofs of Chinese temples generally consist of crane porcelain, painted green or yellow. The term is also applied to plaques of marble, stone, or earthenware, sometimes decorated, sometimes with a uniform surface, which are used to cover walls or pavements." Among the definitions of the word in the *Century Dictionary* is that of "also a slab of stone or marble, used with others like it in a pavement or revetment." Pieces of marble less than an inch in length and breadth, and pasted on paper in the form of blocks, or loose in boxes and intended to be imbedded in cement, so as to form a mosaic pavement, are dutiable under 26 Stat. 567, par. 124, relating to marble paving tiles. *United States v. Davis* (U. S.) 54 Fed. 147, 149, 4 C. C. A. 251.

TILL**Till landed.**

Where goods are insured "till landed," without express words, the insurance ex-

tends to the boat the usual method of landing goods out of ship on the shore, and the insurance would cover the goods while they are in a warehouse to which they had been removed temporarily during a stop for the purpose of refitting the vessel. *Pelly v. Royal Exchange Assur. Co.*, 1 Burrows, 341, 348.

Till next term.

An exception was taken to a ruling of the court, and time was given "till the next term of the court" to file a bill of exceptions; but the bill was not filed until the sixth day of the next term. The phrase "till next term" did not include the time during the next term, nor any part of it; and hence the bill was filed too late. *De Haven v. De Haven*, 46 Ind. 296, 298.

Till paid.

A promissory note, payable at a certain time, "with 10 per cent. interest thereon till paid" bore interest between its date and its maturity. *Pittman v. Barret*, 34 Mo. 84, 85.

Where a mortgage was given on a mill to secure certain notes, and made a lien on the mill and machinery "till the payment of said notes," it embraced all machinery placed in the building after the mortgage until the notes were satisfied. *Johnston v. Morrow*, 60 Mo. 339, 341.

TILLAGE.

"Tillage" means husbandry; the cultivation of the land, particularly by the plow. *United States v. Williams* (U. S.) 18 Fed. 475, 478.

TIMBER.

See "Standing Timber."

As personal property, see "Personal Property."

"Timber," as used in a deed of all the pine and spruce timber standing on a township, cannot be construed in the sense of trees suitable to then make timber, but as synonymous with trees or growth. The word "timber" of commerce is squared sticks of wood used in building. The trees from which they were cut became known as "timber trees." The word "timber" may mean wood suitable for building houses or ships, or for use in carpentry, joinery, etc.; trees cut and squared, or capable of being squared and cut into beams, rafters, planks, boards, etc.; growing trees, yielding wood suitable for constructive uses; trees generally; woods. *Donworth v. Sawyer*, 47 Atl. 521, 523, 94 Me. 243 (citing Cent. Dict.).

The term "timber," as used in commerce, refers generally only to large sticks

of wood, squared or capable of being squared, for building houses or vessels; and certain trees only having been formerly used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as "timber trees"; but the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptance of terms in connection therewith, and, as defined by Webster, "timber" is that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like. As used in Rev. St. § 2461, providing penalties for the cutting of timber on land belonging to the United States, includes trees of any size, of a character or sort that may be used in any kind of manufacture, or the construction of any article. *United States v. Stores* (U. S.) 14 Fed. 824, 825.

Buildings.

"Timber," as used in Gen. St. c. 43, § 13, allowing the owner of land taken for a highway, a reasonable time to take off his timber, wood, and trees, includes buildings and parts of buildings. *Commonwealth v. Noxon*, 121 Mass. 42, 43.

Fence rails.

"Timber," as used in Pen. Code, art. 77, punishing cutting and destroying and carrying away timber, does not include fence rails. *McCauley v. State*, 43 Tex. 374.

The word "timber," as used in the article punishing the cutting down or destroying of any tree or timber, or the carrying away thereof, includes rails or other articles manufactured from timber. Pen. Code Tex. 1895, art. 826.

As firewood.

A contract for the right to cut down and haul all timber and bark on certain premises down to as small as 10 inches at the stump of the trees should be construed to mean timber for firewood only, and not material used for shipbuilding. *Nash v. Drisco*, 51 Me. 417, 418.

"Timber," as used in a statute providing a punishment for the offense of carrying away timber, etc., means wood prepared for building or for tools, utensils, furniture, carriages, fences, ships, and the like, usually said of fallen trees, but sometimes of those standing, but does not include wood suitable for fuel. *Wilson v. State*, 17 Tex. App. 393.

Mesquite.

"Timber" includes all kinds of wood used either for building purposes or in the manufacture or construction of useful articles. As used in Rev. St. U. S. § 2461 [U. S. Comp. St. 1901, p. 1527], declaring that any

person who cuts any live oak or red cedar trees or other timber on the lands of the United States, etc., includes mesquite; it being a wood very hard and almost indestructible, and used for beams and underpinnings of adobe houses, or for posts, fencing, fuel, and furniture. *United States v. Soto* (Ariz.) 64 Pac. 419, 420 (overruling *Bustamante v. United States* [Ariz.] 42 Pac. 111).

Pulp wood.

"Timber," as used in Rev. St. c. 42, § 6, providing that the cost of driving timber so intermixed with logs that it cannot be conveniently separated may be recovered from the owner of such timber, comprises all products of the forest conveniently floatable to market. It includes, not only logs, but other wood products, and is intended to have a comprehensive meaning suited to the purpose of the statute, and would include pulp wood. *Bearce v. Dudley*, 84 Atl. 260, 88 Me. 410.

Railroad ties.

"Timber," as used in a contract to enter upon defendant's land and cut all timber, etc., on the land, and remove such timber within a certain time, and the contract also providing that all such timber not removed from such land within the stated time, whether cut or standing, is to be the property of the defendant, means trees standing or felled and lying in their natural state upon the land, and does not include railroad ties made out of the trees. *Hubbard v. Burton*, 75 Mo. 65, 67.

"Timber," as used in Rev. St. § 3330, as amended by Laws 1879, c. 187, § 1, in that part of the section which applies to the county of Marathon and provides for a lien in favor of persons furnishing supplies to men engaged in getting out logs and timber in that county, means the stems or trunks of trees when cut and shaped for use in the erection of buildings or other structures, and not manufactured into lumber within the ordinary meaning of the word "lumber," and it therefore includes railroad ties. *Kollock v. Parcher*, 9 N. W. 67, 69, 52 Wis. 393.

Saw logs.

A contract for the purchase of "merchantable timber" meant merchantable saw logs, and not merchantable lumber. *Bullock v. Consumers' Lumber Co.* (Cal.) 31 Pac. 367, 368

Scrub oaks.

"Timber," as used in the act of Congress forbidding any one to cut and sell timber from government lands, would not include scrub oaks. *O'Hanlon v. Denvir*, 22 Pac. 407, 408, 81 Cal. 60, 15 Am. St. Rep. 19.

Shingles or shingle bolts.

The word "timber," as a generic term, properly signifies only such trees as are used in building either business houses or dwellings. *Castillero v. United States*, 67 U. S. (2 Black) 281, 17 L. Ed. 360; 1 Crabb, Real Prop. § 20; *Burrill*, Law Dict. tit. "Timber." But its signification is not limited to trees. It applies to the wood, or the particular form which the tree assumes when no longer growing or standing in the ground. It does not include shingles and shingle bolts. *United States v. Schuler* (U. S.) 27 Fed. Cas. 978.

Logs and timber, in Rev. St. c. 91, § 34, giving a labor lien on logs and timber for cutting the same, includes cedar shingle rift, cut four feet in length. Cutting up the logs does not defeat the lien. *Sands v. Sands*, 74 Me. 239, 240.

Soil.

"Timber and other trees," as used in a lease of a tenement, save and except all timber and other trees, does not include the soil. *Leigh v. Heald*, 1 Barn. & Adol. 622, 625.

TIMBER BEING WROUGHT IN VESSELS.

The terms "timber in process of being wrought in vessels," in a fire policy on such timber, was construed to include capstans of locusts partly prepared for vessels which the insured was building. *Webb v. National Fire Ins. Co.*, 4 N. Y. Super. Ct. (2 Sandf.) 497, 504.

TIMBER CULTURE ENTRY.

The expression "timber culture entry" has an accepted and well-recognized signification in the acts of Congress, in the decisions of the courts, and in common parlance. It is an entry under the provisions of "An act to encourage the growth of timber on Western prairies," approved March 3, 1873 (17 Stat. 605, c. 277), and the amendments and additions thereto. Rev. St. §§ 2464, 2469 [U. S. Comp. St. 1901, pp. 1534, 1537]. *Hartman v. Warren* (U. S.) 76 Fed. 157, 160, 22 C. C. A. 30.

TIMBER TREES.

A grant of "timber trees" will not pass fruit trees, nor will a grant of "all timber trees, but not the annual fruit thereof," pass apple trees. *Bullen v. Denning*, 5 Barn. & C. 842, 847.

TIME.

See "Actual Time"; "Additional Time"; "Business Time"; "Fixed Time"; "Unreasonable Time."
All times, see "All."

An offer to buy certain stock at any time after January 1st, if "at that time you desire to have me do so," means "at that date," and required an acceptance on January 1st. *Park v. Whitney*, 19 N. E. 161, 148 Mass. 278.

A certificate of publication, stating that notice of a special assessment had been published "five times" in a certain daily newspaper, cannot be construed so as to sufficiently show that the notice was published for five successive days. *Chandler v. People*, 43 N. E. 590, 591, 161 Ill. 41.

Gen. Laws, c. 46, § 4, requires the assessor to assess the taxes at the time ordered by the town, and the town voted that the tax be assessed in the month of September of each year. It was claimed that the assessment did not comply with the statute, because fixing a month is not fixing a time. It was held that the word "time" is of a more general character, and implies a discretion within fixed limits which may be necessary or convenient for assessors, and that there was no intention to fix a particular day on which the assessment must be made, and the assessment made during the month of September was valid. *Warwick & Coventry Water Co. v. Carr*, 52 Atl. 1030, 1031, 24 R. I. 226.

The time given or limited for the performance of an obligation is called its "term." Civ. Code La. 1900, art. 2048.

Computation.

In a computation of time, where the time must be computed from an act done, the day on which the act is done is to be included, especially where the computation must be from and after the doing of the act. *Arnold v. United States*, 13 U. S. (9 Cranch) 104, 106, 3 L. Ed. 671.

In computing the time within which a statute requires a chattel mortgage to be recorded (Rev. St. 1881, § 4913), the day on which it was executed is excluded, and that on which it was recorded is included. *Towell v. Hollweg*, 81 Ind. 154, 158.

The day of an act or statute from which a future time is to be ascertained is to be excluded from the computation. This rule is applicable, not only to contracts, wills, and other instruments, but to statutes and proceedings under them. Thus, where a court of probate on the 14th of December passed an order limiting six months from that time for the exhibition of claims against a decedent's estate, a claim exhibited on the 14th of June following was exhibited in time. *Weeks v. Hull*, 19 Conn. 376, 380, 50 Am. Dec. 249.

Const. art. 3, § 22, declares that, if a bill or joint resolution shall not be returned by the Governor within three days after the same shall have been presented to him, it

shall become a law. Held that, in counting the three days within which the bill is to be returned by the Governor, the day on which the bill was presented to him must be excluded. *Corwin v. Comptroller General*, 6 S. C. (6 Rich.) 390, 395.

St. 1815, c. 137, § 1, providing that a right in equity sold on execution may be redeemed within one year next after the "time of executing the deed" thereof by the officer to the purchaser, means in legal acceptance the day of delivery, which is the same as the date, or the day of the date, and in computing the time the day in which the deed was executed should be excluded. No moment of time can be said to be after a given day until that day has expired. *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 494.

An order made Monday, November 21st, extending for two weeks the time to file a bill of exceptions, extends the time so as to include Monday, December 5th, one day being excluded and the other included. *Cavanaugh v. Corckran*, 11 Ky. Law Rep. 855.

In computing the time allowed for signing a bill of exceptions by an order made in term time permitting it to be done within a stated time after the adjournment of the term, the first day after the adjournment must be excluded under Code 1896, § 11, providing that, in computing the time within which an act required by law must be done, the first day shall be excluded and the last included. *Ragsdale v. Kinney*, 24 South. 443, 447, 119 Ala. 454.

The statutory rule that the "time" within which an act is to be done is to be computed by excluding the first day and including the last applies to the filing of bills of exceptions. *State v. Thorn*, 28 Ind. 306, 308.

Where 60 days' "time" from the 3d of December is allowed within which to file a bill of exceptions, the 2d day of February following is too late. *Schoonover v. Irwin*, 58 Ind. 287, 289.

Where, by agreement of parties, appellant was to have 60 days from March 17th in which to file a bill of exceptions, and it appeared that said bill was filed May 17th, it is too late. *McCoid v. Rafferty*, 84 Iowa, 532, 51 N. W. 24.

The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded. *Clark's Code N. C. 1900, § 596.*

TIME BEING.

See "For the Time Being."

TIME CHECK.

A certificate signed by the master mechanic or other person in charge of laborers,

recting the amount due to the laborer for labor for a specified time. *Burlington Voluntary Relief Department v. White*, 59 N. W. 747, 748, 41 Neb. 547, 43 Am. St. Rep. 701.

TIME FIXED BY AGREEMENT.

The phrase "time fixed by agreement," in Pub. St. c. 188, § 5, providing that the time by which an award shall be made and reported may be varied according to the agreement of the parties, but no award made after the time fixed by the agreement shall have any legal effect or operation, unless made upon a recommitment by the court to which it is reported, has the same meaning as the phrase "time limited in the submission" in section 9, which provides that the award may be returned at any term or session of the court held within the time limited in the submission. *Bent v. Erie Telegraph & Telephone Co.*, 10 N. E. 778, 781, 144 Mass. 165.

TIME GIVEN.

"Time given," as used in Code Civ. Proc. § 1187, requiring a claim for a mechanic's lien to contain a statement of the terms of the "time given" and conditions of the contract, means the time of payment for the work and labor performed and materials furnished as agreed on, as expressed in the contract. If the words "time given" refer to the time agreed on for the completion of the contract, and no period of time for such completion is fixed by the contract, but such time is allowed as the law gives, no time need be stated in the claim. Where there is no express agreement as to time in the contract, it is not necessary to give the time in the claim. *Hills v. Ohlig*, 63 Cal. 104.

TIMEKEEPER.

As laborer, see "Laborer."

TIME OF ABSENCE.

The phrase "time of his absence" in a statute providing that if, after the cause of action shall have accrued, the debtor shall depart from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, has the same meaning as the expression "reside out of the state." *Burroughs v. Bloomer* (N. Y.) 5 Denio, 532, 535.

TIME OF ACCIDENT.

A notice to a city that a person has been injured by a defect in a highway sufficiently describes the "time of the accident," within the requirement of St. 1877, c. 234, § 3, by

naming the day, in the absence of evidence that anything depended upon the nature of the defect or upon the particular hour of the accident. *Donnelly v. City of Fall River*, 130 Mass. 115.

Gen. St. § 2673, requiring notices of the time and place of the occurrence of an injury by means of a defective road or bridge, means the day on which it occurred, together with the month and the year, stated in the common and ordinary manner. *Gardner v. City of New London*, 28 Atl. 42, 43, 63 Conn. 267.

"Time," as used in a statute providing that in an action against a railroad for injuries for killing or injuring live stock, etc., the time when and the place where the killing or the injury occurred must be alleged in the complaint, is complied with by a statement of a specified day of a given month and year on which the accident occurred. *East Tennessee, V. & G. R. Co. v. Carloss*, 77 Ala. 443, 447.

TIME OF ADJUDICATION.

Bankr. Act, § 38, provided that the filing of a petition for adjudication in bankruptcy shall be deemed to be the commencement of proceedings in bankruptcy, and section 14 provided that the assignee should be substituted for the bankrupt in suits pending "at the time of the adjudication in bankruptcy." Held, that the phrase "at the time of the adjudication in bankruptcy" meant the time when proceedings were commenced by the filing of a petition, as provided by section 38. *In re Patterson* (U. S.) 18 Fed. Cas. 1315, 1316.

TIME OF BANKRUPTCY.

"Time of bankruptcy," as used in the bankruptcy act, providing that, where the bankrupt is liable to pay rent, the creditor may prove for a proportionate part thereof up to the "time of the bankruptcy," means the time when the petition was filed, to which time the adjudication relates. *In re May* (U. S.) 16 Fed. Cas. 1205, 1206.

"Time of bankruptcy," as used in the bankruptcy act, with reference to time, shall mean the date when the petition was filed. U. S. Comp. St. 1901, p. 3419.

Under St. 6 Geo. IV, c. 16, § 72, empowering the commissioners in bankruptcy to dispose of goods being in the possession, order, or disposition of the bankrupt, as reputed owner, at the time he becomes bankrupt, held, that the phrase "at the time he becomes bankrupt" means the time of committing the act of bankruptcy, and not the time when the fiat issues. *Fawcett v. Fearne*, 6 Q. B. 20.

TIME OF INJURY.

The "time of injury," within the meaning of the divorce statute, when applied to impotency, applies to any time while the impotency lasts, as it is a continuing injury. *A. B. v. C. B.*, 34 N. J. Eq. (7 Stew.) 43, 44.

TIME OF MEMORY.

At the common law "time of memory" commenced from the beginning of the reign of Richard I. Any custom may be destroyed by evidence of the nonexistence of such custom in any part of the period in the beginning of the reign. *Ackerman v. Shelp*, 8 N. J. Law (3 Halst.) 125, 130.

TIME OF PEACE.

See "Peace."

TIME OF WAR.

See "War."

TIME OPTION.

A "time option" to purchase contains the following elements: An offer to sell, accompanied by an agreement to hold such offer of sale open for a specified time, supported by a sufficient consideration. *Peterson v. Chase* (Wis.) 91 N. W. 687, 688.

TIME POLICY.

A time policy, as the term is used in the law of marine insurance, is a policy on a vessel for any prescribed time, which covers the vessel during such time on any voyage she may undertake. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 339, 27 Am. Rep. 455 (citing 1 Arn. Ins. 333, 409).

A "policy on time," as the term is used in marine insurance, "insures no specific voyage, but covers any voyage within the prescribed time. It is of the nature of a policy on time that it limits the vessel to no geographical track, and deviation is therefore not predicable of it." *Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25, 29 (citing *Bradlie v. Maryland Ins. Co.*, 37 U. S. [12 Pet.] 378, 9 L. Ed. 1123; *Union Ins. Co. v. Tysen* [N. Y.] 3 Hill, 118; *Keeler v. Firemen's Ins. Co.*, Id. 250).

TIME WHEN EXECUTION IS ISSUABLE.

"Time when execution is legally issuable," within the meaning of 2 Comp. Laws, § 5462, which provides that no execution issued on a judgment rendered on appeal to the circuit court against the plaintiff and the surety on his appeal bond shall be levied on

the property of the surety, unless such execution, if issued in the circuit court, is issued within 30 days from the time when the same shall be legally issuable, means the date of the taxation of costs. *Weiss v. Chambers*, 15 N. W. 63, 64, 50 Mich. 158.

TIMIDITY.

Doubt distinguished, see "Doubt."

TIN CANS.

"Tin cans," within the meaning of a fire policy giving permission to keep one barrel of benzine or turpentine in tin cans, is to be construed not to be limited to a number of tin cans, but to include one tin can large enough to hold a barrel of the liquid. *Maryland Fire Ins. Co. v. Whiteford*, 81 Md. 219, 224, 100 Am. Rep. 45.

TIN FOIL.

Where a defendant in a patent suit was enjoined from the application of tin foil or its equivalents during the process of vulcanizing India rubber to preserve the form of material, the words "tin foil or its equivalents" do not include sheets of tin similar to roofing tin. *Poppenhusen v. New York Gutta Percha Comb Co.* (U. S.) 19 Fed. Cas. 1058.

TIPPLE.

"Tipple," as used in the act of 1877, providing that it shall not be lawful for any person to sell or tipple in intoxicating beverages, etc., means to sell and to be drunk at the place of sale. *Harney v. State*, 76 Tenn. (8 Lea) 113, 114.

TIPPLER.

A "tippler" is one who sells liquor by the quart or in larger quantities, which liquor is not drunk or intended to be drunk on the premises of the seller. *State v. Lowenhaupt*, 79 Tenn. (11 Lea) 13, 14.

TIPPLING HOUSE OR SHOP.

See "Common Tippling House."

As disorderly house, see "Disorderly House."

"Tippling houses" are common drinking houses, kept for lucre or gain, where all persons may, if they will, resort and drink ad libitum. *Werner v. Washington* (U. S.) 29 Fed. Cas. 705, 707.

A tippling house is a place where liquor is sold, and formerly represented that class of the liquor traffic now filled by saloons and

barrooms. *Town of Leesburg v. Putman*, 29 S. E. 602, 603, 103 Ga. 110, 68 Am. St. Rep. 80.

A tippling house is "either a house in which tippling and drinking is allowed, or a house kept for the purpose of making a profit by selling spirituous liquors, without furnishing accommodations for travelers, with or without license." *Woods v. Commonwealth*, 40 Ky. (1 B. Mon.) 74, 75.

"Tippling house" has a definite and well-understood meaning in the common law and in common language. Though the fact that spirituous liquors are sold on a single occasion in a quantity less than a quart and permitted to be drunk in the house of the vendor will not constitute the place a tippling house, yet the frequent repetition of such acts will constitute the place a tippling house according to the common law and common language of the country and within the meaning of the term as used in the act of 1793 imposing a penalty for keeping a tippling house. *Morrison v. Commonwealth*, 37 Ky. (7 Dana) 218, 219.

A "tippling house" is a place in which intoxicating liquors are sold in quantities less than a quart without a license. The fact that persons became drunk at a place does not make it a tippling house. *Dunnaway v. State*, 17 Tenn. (9 Yerg.) 350, 352.

To constitute a "tippling house," it is necessary that intoxicating drinks should be sold therein. Hence an instruction that it is a place where spirituous liquors or other drinks are sold is rendered erroneous by the addition of the words "or other drinks." *Patten v. City of Centralia*, 47 Ill. 370, 372.

The term "tippling house," within the meaning of a statute prohibiting the keeping open of a tippling house on the Sabbath day, includes a place where liquor is retailed and tippled on the Sabbath day, with a door to get into it so kept that anybody can push it open and go in and drink. It makes no difference in law whether the place be called a barroom, or a glee club resort, or a parlor, or a restaurant, if it be a place where liquor is retailed and tippled on the Sabbath day. It makes no difference if the drinking be done standing or sitting at a bar or round the table. It is tippling, and the place where it is done is a tippling house; and if anybody wishing to drink can have access therein, if ingress and egress be free to all comers, it is a tippling house kept open on Sunday. *Hussey v. State*, 69 Ga. 54, 58.

A tippling house is defined to be a public drinking house, and it is not necessary that the liquors or intoxicating drink be drunk on the premises. *Harris v. People*, 39 Pac. 1084, 1085, 21 Colo. 95.

A tippling shop is a place in which liquors are sold in drams or small quantities,

and where men are accustomed to tipple, and necessarily includes the element of drinking on the premises; and hence a city, under authority to regulate tippling places, has no authority to regulate places for the sale of intoxicating liquors, unless such liquors are drunk on the premises. *City of Yankton v. Douglass*, 66 N. W. 923, 924, 8 S. D. 441.

"Tippling houses," within the meaning of a statute prohibiting the keeping open of tippling houses on the Sabbath, was held in *Hall v. State*, 3 Ga. (3 Kelly) 18, to include one tippling house, and that the keeping open of such a house was criminal within the meaning of the statute. *Bethune v. State*, 48 Ga. 505, 510.

Proof that accused, upon three different Sundays within the same year, at least, sold whisky in her dwelling house to different persons at retail, permitting the same or a portion thereof to be drunk on the premises, held to prove the offense of keeping open a tippling house on the Sabbath. *Williams v. State*, 100 Ga. 511, 526, 28 S. E. 624, 629, 39 L. R. A. 269.

Club rooms.

A tippling house is a place where intoxicating drinks are sold in drams of small quantities to be drunk on the premises; a place of public resort, where spirituous, fermented, or other intoxicating liquors are sold or drunk in small quantities without a license therefor; a public drinking house, where intoxicating liquor is either sold by drams to the public, or else given away, and imbibed; and a social club, maintaining club rooms, which were open only to members, wherein a bar was kept and drinks dispensed to the members, is guilty of keeping open a "tippling house" on Sunday, where such place was open on Sunday. *Mohrman v. State*, 32 S. E. 143, 145, 105 Ga. 709, 43 L. R. A. 398, 70 Am. St. Rep. 74.

Place for sale of beer.

"Tippling house," as used in a statute prohibiting the keeping open of a tippling house on Sunday, means a public drinking house, and includes a house wherein beer alone is sold. *Koop v. People*, 47 Ill. 327, 329.

Place where liquors are given away.

"Tippling house," as used in Code, § 4535, prohibiting the keeping open of tippling houses on the Sabbath day, is not limited to places kept for the purpose of selling liquors by drams or small quantities to the public, and where men are accustomed to tipple, but includes a place where liquors are given away by the drink, not merely one or two, but where it was a usual and common thing on Sunday, notwithstanding there was no money given or received for the drinks. *Minor v. State*, 63 Ga. 318, 321.

As place without a license.

A "tippling house," within the meaning of the statute, is a place where spirituous liquors are sold without license in less quantities than a quart to be drank at the place. *Harney v. State*, 76 Tenn. (8 Lea) 113, 114.

"Tippling shop," as used in an ordinance providing that no tippling shop shall be kept within corporate limits of the city without a license, is not identical with "disorderly house." *Bouvier* defines a tippling house as a place where spirituous liquors are sold and drank in violation of law. To like effect are the definitions in *Webster's* and *Worcester's* Dictionaries. An instruction that a tippling house is a place of public resort, where spirituous, fermented, or other intoxicating liquors are sold and drank in small quantities without having a license therefor, was incorrect. *City of Emporia v. Volmer*, 12 Kan. 622, 629.

An indictment charging the defendant with "keeping a tippling house" for three consecutive months imports an unlawful selling of spirituous liquors by retail without license. *Commonwealth v. Campbell*, 68 Ky. (5 Bush) 311, 312.

TIPLING PURPOSES.

"Tippling purposes," as used in *Laws* 1877, c. 251, § 22, prohibiting the sale of cider for "tippling purposes," implies that the place of drinking and the place of sale is the same. *State v. McNamara*, 69 Me. 133, 135.

TISSUE.

The word "tissue," in the trade-name of an article as "French Tissue," is descriptive of its texture, and cannot be appropriated as part of the trade-mark. *Draper v. Skerrett* (U. S.) 116 Fed. 206, 208.

TISSUE PAPER

"Tissue paper," as used in *Tariff Act* Oct. 1, 1890, par. 419, includes merchandise imported and invoiced as crepe, or crepe tissue, which, according to the finding of the board of general appraisers, is made in a tissue paper mill, and invoiced, advertised, and sold as "tissue." *Dennison Mfg. Co. v. United States* (U. S.) 66 Fed. 728.

TITLE.**Of action.**

Code Proc. § 274, provides that in an appeal the papers must be entitled as in the action, but that the title of the action shall not be changed in consequence of the appeal, but that the parties shall be known

as "appellant" and "respondent." Held, that the phrase "but the title of the action shall not be changed," etc., had reference only to the names of the parties to the cause and their order, and not to the name of the court; and hence the motion papers on appeal must be entitled "In the Appellate Court," notwithstanding the requirement that the title shall not be changed. *Clickman v. Clickman*, 1 N. Y. (1 Comst.) 611.

Of affidavit.

The "title of an affidavit" embraces its entire heading; that is, the name or style of the court, as well as the names of the parties. *Bowman v. Sheldon*, 10 N. Y. Leg. Obs. 339, 340.

Of legislative act.

The title of an act is part of the act and a guide to its right construction. *Commonwealth v. Lloyd*, 35 Atl. 816, 818, 178 Pa. 308.

The term "title," when used in speaking of the title of an act, means that part of the act by which it is known and distinguished from other acts. It does not include the divisions, subdivisions, arrangement, and classification of the provisions of an act. *Robinson v. State*, 15 Tex. 311, 312.

Originally in the English courts the title was held to be no part of the act. "No more," says Lord Holt, "than the title of a book is part of the book." It was generally framed by a clerk of the House of Parliament, where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part. It cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these are doubtful that resort may be had to the title, and even then it has little weight. *Hadden v. Collector*, 72 U. S. (5 Wall.) 107, 110, 18 L. Ed. 518.

"In England the title is no part of a statute. Lord Mansfield gives as a reason for this that it does not pass with the same solemnity. One reading is often sufficient. *Rex v. Williams*, 1 W. Bl. 93. With us, however, it is always read three times. There may be good reason for holding that the title, as well as the preamble, may be resorted to for the purpose of assisting the construction, whenever the enacting clause is doubtful, but it certainly is not to overrule or control it." *Yeager v. Weaver*, 64 Pa. (14 P. F. Smith) 425, 428.

"The title of an act is a label, and not an index. In the interpretation of the constitutional provision that every law shall embrace but one object, which shall be embraced in the title, the object of a law must not be confused with its product. The ob-

ject of every law must be singular and be expressed in the title. The product may be as diverse as the object requires, and finds its expression in the terms of the enactment only." *Moore v. Burdett*, 40 Atl. 631, 62 N. J. Law, 163.

The "title of an act" is a limitation upon the extent to which effect can be given to it. An act entitled "An act to establish an excise department in cities of this state" (P. L. 1884, p. 133), cannot be applied to a town, though in its enacting clause it is provided that it shall apply to any town or city. *Jones v. Town of Morristown*, 49 Atl. 440, 441, 66 N. J. Law, 488.

Of political party.

"Title" is not synonymous with the word "name" in the new election law, providing that the nominees of each party shall be printed on separate tickets, underneath the name or title of the party making the nomination. *State v. Black*, 24 Atl. 489, 493, 54 N. J. Law, 446, 16 L. R. A. 769.

TITLE (To property).

See "Absolute Title"; "Bad Title"; "Clear Title"; "Complete Title"; "Defective Title"; "Doubtful Title"; "Equitable Title"; "First-Class Title"; "Good and Clear Title"; "Good and Marketable Title"; "Good and Perfect Title"; "Good Title"; "Imperfect Title"; "Incomplete Title"; "Indian Title"; "Indisputable Title"; "Junior Title"; "Just Title"; "Lawful Title"; "Legal Title"; "Lucrative Title"; "Marketable Title"; "Mining Title"; "Onerous Title"; "Outstanding Title"; "Perfect Title"; "Pretended Right or Title"; "Proper Title"; "Record Title"; "Right or Title"; "Right, Title, and Interest"; "Satisfactory Title"; "Tax Title"; "True Title"; "Undisputable Title"; "Unofficial Title."

See "Abstract of Title"; "Bond for Title"; "Chain of Title"; "Claim of Title"; "Color of Title"; "Covenant of Title."

All my title, see "All."

"Title" is defined as the means whereby the owner of lands hath the just possession of his property. 2 Bl. Comm. 195; Co. Litt. 345; *Woodruff v. Wallace*, 41 Pac. 357, 360, 3 Okl. 355; *Donovan v. Pitcher*, 53 Ala. 411, 417, 25 Am. Rep. 634; *Houston v. Farris*, 71 Ala. 570, 571; *Kamphouse v. Gaffner*, 73 Ill. 453, 458; *Pannill v. Coles*, 81 Va. 380, 383; *Arrington v. Liscom*, 34 Cal. 365, 385, 94 Am. Dec. 722; *Fitzgerald v. Miller*, 63 N. W. 221, 223, 7 S. D. 61; *Parker v. Metzger*, 7 Pac. 518, 521, 12 Or. 407; *Botsford v. Morehouse*, 4 Conn. 550, 551; *Jacob Tome Institute v. Davis*, 41 Atl. 168, 168, 87 Md. 591.

"Title" arises when a man has lawful cause of entry into lands whereof another is seised; and it signifies also the means whereby a man comes to lands or tenements, as by feoffment, last will, and testament, etc. *Joy v. Stump*, 12 Pac. 929, 930, 14 Or. 361.

"Title" may be defined to be that which constitutes a just cause of exclusive possession, or which is the foundation of ownership of property. *Webst. Dict.*; *Houston v. Farris*, 71 Ala. 570, 571; *Pratt v. Fountain*, 73 Ga. 261, 262.

In legal acceptance "title" has respect to that which is the subject of ownership, and is that which is the foundation of ownership, and with a change of title the right of property and ownership passes. *Allen, J., in Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711. As applied to real estate, it is defined to be "the means whereby the owner of land or other real property has the trust and legal possession and enjoyment of it; the lawful cause or ground of possessing that which is ours. 2 Bouv. Law Dict.; *Loy v. Home Ins. Co.*, 24 Minn. 315, 318, 31 Am. Rep. 346.

"Title" is defined as the lawful cause or ground of possessing that which is ours. It is that which is the foundation of ownership of property, real or personal. The title to a debt consists in the facts which, taken together, created the contract relations of the parties thereto. *Hunt v. Eaton*, 21 N. W. 429, 431, 55 Mich. 362.

"Title" has respect to that which is the subject of ownership, and is that which is the foundation of ownership, and with a change of title the right of property in the owner passes. *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 395, 3 Am. Rep. 711.

"Title" is the means whereby a person's right to property is established. *Civ. Code Ga.* 1895, § 3208.

As adjudicated title.

"Title" within the meaning of Rev. St. Ohio, § 5955, providing that, when summons has been served or publication made, the action is pending, so as to charge third persons with notice of its pendency, and that, while pending, no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title, does not mean the title claimed in the pleading, but the title as finally determined by the adjudication of the court. *McClaskey v. Barr* (U. S.) 43 Fed. 130, 132.

As chain of transfer.

By the term "title," as used in a provision requiring suit to recover real estate,

as against persons in peaceable and adverse possession thereof under title, to be commenced within three years next after the cause of action shall have accrued, is meant a regular chain of transfer from or under the sovereignty of the soil. *Rev. St. Tex.* 1895, art. 3341; *Buford v. Bostick*, 58 Tex. 63, 70; *Horton v. Crawford*, 10 Tex. 382, 386; *Rice v. P. J. Willis & Bro.*, 87 Fed. 626, 628, 31 C. C. A. 154; *Miller v. Texas & P. R. Co.*, 10 Sup. Ct. 206, 216, 132 U. S. 662, 33 L. Ed. 487.

As estate in fee.

The word "title," when used in reference to title to real estate, implies an estate in fee. Nothing short thereof is a complete title. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 381.

Where plaintiff contracted to give a sufficient deed to vest in the defendant the "title of the said farm," a deed which plaintiff's wife had not executed with the solemnities required by law to bar her dower was not such a deed as required or as defendant was obliged to accept. The "title" meant the legal estate in fee, free and clear of all valid claims, liens, and incumbrances whatsoever. It is the ownership of the land dominium directum et absolutum, without any rightful participation by any other person in any part of it. If the plaintiff's wife had a contingent life estate in one-third part of the farm, the defendant had not a clear and absolute title. *Jones v. Gardner* (N. Y.) 10 Johns. 266, 269.

Sometimes the word "title" is used in a general sense, so as to include any title or interest; but "title" in common acceptance means the full and absolute title. When we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee, and not that he is a mere lessee. *United States v. Hunter* (U. S.) 21 Fed. 615, 617.

The word "title," as defined by the Century Dictionary, means "ownership; absolute ownership; the unincumbered fee." Thus allegations that the land was conveyed to third persons, who thereby acquired the title, and that his tenant entered upon and holds possession under him, fairly imports that the conveyance was by deed legally executed, and that the possession by the tenant was lawfully held. *Langmede v. Weaver*, 60 N. E. 992, 997, 65 Ohio St. 17.

Same—Leasehold.

The word "title," as used in *Rev. St. U. S.* § 2116, prohibiting contracts for the title or purchase of any Indian lands, does not include a leasehold interest for grazing purposes merely. *United States v. Hunter* (U. S.) 21 Fed. 615, 617.

The phrase "title to real estate," as used in *Rev. St.* § 230, subd. 1, declaring that the jurisdiction of justices shall not extend to any action wherein the title to lands, tenements, etc., may in any wise come in question, and as used in *Rev. St. p.* 241, § 40, providing that when the defendant shall, as a justification of an act for trespass quare clausum fregit, plead title to any real estate in himself or in another, the plaintiff may thereupon commence his action in the Supreme Court, embraces both freehold and leasehold estates and any right to enter and have possession of the property. *Campfield v. Johnson*, 21 N. J. Law (1 Zab.) 83, 85.

Interest distinguished.

As used in an insurance policy the terms "interest" and "title" are not synonymous. A mortgagor in possession and a purchaser holding under a deed defectively executed have both of them absolute as well as insurable interests in the property, though neither of them has the legal title. "Absolute" is here synonymous with "vested," and is used in contradistinction to "contingent" or "conditional." *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 116, 20 South. 419, 83 L. R. A. 258, 57 Am. St. Rep. 17.

As legal title.

In ordinary acceptance "title to land" is considered to mean the legal title, and will be held to be so used in a submission of certain matters in controversy in relation to the title to certain land; and hence "title," as used in *Code Civ. Proc.* 1884, § 1135, providing that all controversies which might be the subject of civil action, except the question of title to real property in fee or for life, may be submitted for arbitration, means the legal title. *Thygerson v. Whitbeck*, 16 Pac. 403, 404, 5 Utah, 406.

Act Cong. March 3, 1881, providing that if, in any action brought in pursuance of *Rev. St. U. S.* § 2326 [*U. S. Comp. St.* 1901, p. 1430], "title to the grounds in controversy" shall not be established by either party, the jury shall so find, and a judgment shall be entered according to the verdict, means that in such actions recovery cannot be sustained merely by proof of occupancy of the premises in dispute; but either party, before he can secure judgment, must show compliance with the statutes, state and federal, and also miners' rules and regulations enforced, relating to the location of mining claims on the public domain. *Becker v. Pugh*, 13 Pac. 906, 907, 9 Colo. 589.

The word "title," in *Code*, p. 475, c. 74, § 10, declaring that "a purchaser shall not be affected by the record of a deed or contract made by a person under whom his title is not derived," necessarily means a complete

or legal title, being without qualification. *Hoult v. Donahue*, 21 W. Va. 294, 299.

Same—Imperfect title.

"Title," as used in Act 1835, requiring that the person who would avail himself of these provisions should have a connected title in law or equity, deducible of record from the state or the United States, or from any public officer or other person authorized by the laws of the state to sell such land for the nonpayment of taxes, means nothing more than such a title as is evidenced by a deed in proper form and duly executed by one of the officers or persons named in the act as the source with which the person relying upon it is required to connect himself by a regular chain of conveyances. It should not be construed to mean a perfect title, nor is the word in its ordinary acceptance understood in such a restricted sense. There are perfect titles and apparent or imperfect titles. Even a naked possession constitutes a species of title, though it may be the lowest degree. The meaning of the word is to be ascertained from the connection in which it is used. *Irving v. Brownell*, 11 Ill. (1 Peck) 402, 414.

The expression "title," in the general proposition that, when equities are equal, he that has the legal title will be preferred, includes, in its broadest sense, all rights capable of being enjoyed and secured under the law. One holding a legal title to lands is certainly included, but rights amounting to less than the full legal title are equally included with it; and it is not necessary that one should acquire the full legal title to lands to entitle him to the protection of the defense of purchase for valuable consideration without notice of a prior lien. *Haynsworth v. Bischoff*, 6 S. C. (6 Rich.) 159, 167.

As ownership.

Where a policy provided that, if the interest of the assured should be other than the sole ownership, the policy should be void, the word "ownership" was synonymous with "title." *Woodward v. Republic Fire Ins. Co.* (N. Y.) 82 Hun, 365, 369.

The "title" to goods and chattels "means the right to the property and the right to the possession thereof; in short, the ownership thereof." *Frank v. Forgotston*, 61 N. Y. Supp. 1118, 1119, 30 Misc. Rep. 816.

"Title," as used in an assignment by a judgment creditor of his right, title, and interest in the judgment, "relates to the assignor's ownership of the judgment; that is, by the use of the word, they indicate the intention to transfer whatever property they may hold in it." *Scofield v. Moore*, 31 Iowa, 241, 245.

When it is alleged that plaintiff has title to certain premises, in an action to re-

cover possession of land, the meaning ordinarily attached to such statement is that plaintiff is the owner of the premises or is seised of the same. *Livingston v. Ruff*, 43 S. E. 678, 679, 65 S. C. 284.

A party may have a title to property, though he is not the absolute owner. If he has the actual or constructive possession of property, or the right of possession, he has a title thereto, though another person may be the owner. An instruction, in an action of trespass for taking and carrying away goods, that, in order to entitle plaintiff to a verdict, he must show a title to the property or some part of it, is, therefore, not erroneous. *Roberts v. Wentworth*, 59 Mass. (5 Cush.) 192, 193.

As right of possession.

"Title" means right of possession. *Dunster v. Kelly*, 18 N. E. 361, 362, 110 N. Y. 558.

"Title" is generally applied to signify the right to land and real estate. It is a right of possession or of property in lands, and distinct from actual possession. *Campfield v. Johnson*, 21 N. J. Law (1 Zab.) 83, 85.

"Title," as used in the statute in relation to summary process, providing that, if the lessee obtain a title after the date of the lease against the lessor, he may show it, means a right to the possession paramount to that of the complainant. *Rodgers v. Palmer*, 33 Conn. 155, 156.

The question of actual possession of lands is not one of title, within the meaning of the statute providing that a justice of the peace shall have no jurisdiction of cases involving the title of land. *Ehle v. Quackenboss* (N. Y.) 6 Hill, 537, 539.

"Title," as used in Code Civ. Proc. § 2951, requiring a justice of the peace to discontinue an action for trespass where it is shown that title to real property will come in question, means right of possession. *Manfredi v. Wiederman*, 35 N. Y. Supp. 680, 14 Misc. Rep. 342.

The word "title," as used in Comp. Laws, § 642, declaring that a justice of the peace shall have no jurisdiction of an action for an injury to real property, where the title to such property comes in question, does not embrace the different degrees or stages of right; but it is limited to the right of possession, for where that is in question before a justice he has no jurisdiction of the case. The word "title," as used in the statute, means precisely what it means in reference to the common-law action of ejectment. It is synonymous with the right of possession. Therefore, where plaintiff in his complaint alleged that he was entitled to the possession of certain premises, which allegation defendant denied, a question of title was

raised, ousting the justice of his jurisdiction. *Grosso v. City of Lead*, 68 N. W. 310, 9 S. D. 165.

The word "title," in 2 Rev. St. p. 226, § 4, providing that a justice of the peace shall have no cognizance of any action "where the title to land shall in any wise come in question as hereinafter provided," is synonymous with the right of possession, and a question of "actual possession" is not one of title within the statute. *Ehle v. Quackenboss* (N. Y.) 6 Hill, 537, 539.

In Pub. St. c. 196, § 30, providing that whenever an action of trespass shall be brought before any justice court, and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question, the word "title" signifies, not the fact of plaintiff's possession, but his right of possession. *Carroll v. Rigney*, 23 Atl. 46, 47, 15 R. I. 81.

"Title," as used in a statute declaring that the jurisdiction given to justices of the peace shall not extend to any action wherein the title of any lands, tenements, hereditaments, or other real estate shall or may in any wise come in question, is to be understood in a strict technical sense. "An action wherein the title comes in question is, in the meaning of the statute, one in which something more is brought into controversy than the actual occupation, or mere pedis possessio. It is one which involves *justa causa possidendi*." *Gregory v. Kanouse*, 11 N. J. Law (6 Halst.) 62, 63.

As right to property.

"It is insisted that the complainant has not acquired a title to the land by the issuing and levying of an execution thereon before the filing of the bill. Much learning has been expended in this case as to the meaning of this word 'title.' We take it to mean no more than this: that the party has acquired a right to the property in dispute, a right to question the title of the fraudulent grantee, who holds by conveyances giving him a perfect title as against the grantor, but which may be avoided by a creditor." *McKibben v. Barton*, 1 Mich. (Manning) 213, 214.

"Title," as defined by Jacob, in his Law Dictionary, includes a right, but is the more general word. Abbott defines "title" to be such a claim to the exclusive control and enjoyment of a thing as the law will recognize and the courts, and, as applied to lands or goods, signifies either a party's right to the enjoyment thereof or the means whereby such right is approved or by which it is evidenced. Webster defines it as a right, as a good title, or an imperfect title; the instrument which is evidence of a right; that by which a beneficiary holds a benefice by the

canon law. Worcester defines it as that which gives a right or claim to ownership; that by which the owner of lands or personal property has the just possession of his property; the instrument or document by which a title to something is approved. *Pratt v. Fountain*, 73 Ga. 261, 262.

Same—Evidence of right.

The word "title," as used in reference to bona fide purchasers, has reference to the evidence of rights held by the vendor, which by a conveyance becomes the purchaser's evidence of right, and not to what may be the real beneficial interest of that person, as may be shown outside of such evidence by extrinsic proof. *Patty v. Middleton*, 82 Tex. 586, 591, 17 S. W. 909, 911.

"Title" may be defined generally "to be the evidence of right which a person has to the possession of property." 2 Abb. Law Dict. 566; *Chapman v. Dougherty*, 87 Mo. 617, 620, 56 Am. Rep. 469.

The word "title," when used in connection with real estate, is generally defined to be the evidence of right by which a person has possession of property. *Guler v. Bridges* (Ky.) 70 S. W. 288, 289.

One's title to land is the evidence of his right or of the extent of his interest; the means whereby the owner is enabled to assert or maintain his possession; the right of the owner, considered with reference either to the manner in which it has been acquired or its capacity of being effectually transferred. *Robertson v. Vancleave*, 29 N. E. 781, 129 Ind. 217, 15 L. R. A. 68.

TITLE BOND.

Though a title bond has become a common mode of making an equitable conveyance, it is in fact but an executory contract in writing for the sale of real estate, to be afterwards consummated by further action when the conditions are complied with. It has been assimilated to a conveyance from the vendor, followed by a reconveyance to him from the vendee by way of mortgage to secure the purchase money. It does resemble that, and in effect has substantially the same consequences in most respects; yet, where the real justice of the case requires a distinction, the general analogy should not be suffered to mislead. In every respect a title bond is but an agreement to convey, from which a court of equity creates an equitable estate in the vendee, holding the vendor as his trustee for the land and the purchaser as the vendor's trustee for the money. *Atkinson v. Hudson*, 44 Ark. 192, 196.

A title bond has always been considered a lien merely. *Light v. Greenwich Ins. Co.* (Tenn.) 58 S. W. 851, 853.

"Title bonds" are said to be mortgages at common law, and the relations of the parties are those of mortgagor and mortgagee. *Wells v. Francis*, 4 Pac. 49, 50, 7 Colo. 396 (citing *Merritt v. Judd*, 14 Cal. 59; *Lewis v. Hawkins*, 90 U. S. [23 Wall.] 123, 23 L. Ed. 113).

Deed distinguished.

There is a wide difference between a deed for land and a title bond. The one is the evidence of an executive contract; the other is the evidence of an unexecuted contract. The former is evidence that a sale has been made; the latter that a sale is to be made. The one is a sale; and the other a contract for a sale. *Peterson v. Richman*, 23 S. W. 53, 54, 93 Tenn. 71 (citing *Moseby v. Partee*, 52 Tenn. [5 Helsk.] 30).

TITLE BY ADVERSE POSSESSION.

"Title by adverse possession" is not merely an equitable, but a complete legal, title. The law creates and confers the title arising from adverse possession. It does not flow from a contract between the parties which could be reduced to writing and put of record. There is no privity between the possessor and him who is dispossessed, and the right of the former does not result from any act of the latter, but is the effect given by the law to his possession. *MacGregor v. Thompson*, 26 S. W. 649, 7 Tex. Civ. App. 82.

TITLE BY ALLUVION.

See "Alluvion."

TITLE BY DESCENT.

"Title by descent" is a title by which one person upon the death of another acquires real estate of the latter as his heir at law. Property acquired by descent is property which the law, upon the death of the ancestor, casts on the heir. *Orr v. White*, 6 N. E. 909, 910, 106 Ind. 341.

TITLE BY LIMITATION.

"Title by limitation" and title by prescription to real estate are practically synonymous. *Dalton v. Rentaria*, 15 Pac. 37, 41, 2 Ariz. 275.

TITLE BY PRESCRIPTION.

Title by limitation and "title by prescription" to real estate are practically synonymous. *Dalton v. Rentaria*, 15 Pac. 37, 41, 2 Ariz. 275.

A title by prescription is defined as one acquired by possession had during the time and in the manner fixed by law, and as applied to highways it is an easement over land acquired by user during the period and

in the manner fixed by law. *Gross v. McNutt*, 38 Pac. 935, 937, 4 Idaho, 286, 300.

"Title by prescription" is a right which a possessor of land acquires by reason of his adverse possession during a period of time fixed by law, and where it does not originate in part under a claim of right. *Burdell v. Blain*, 66 Ga. 169, 170.

TITLE BY PURCHASE.

"Title by purchase," as defined by Blackstone (2 Bl. Comm. c. 15), includes every mode of acquiring an estate except that of inheritance. It includes the mode of acquiring an estate by devise or will, as well as by other modes of purchase. *Delaney v. City of Salina*, 9 Pac. 271, 276, 34 Kan. 532.

TITLE DEDUCIBLE FROM STATE.

An auditor's tax deed is a title "deducible of record from the state, * * * or from any public officer or other person authorized * * * to sell such lands for nonpayment of taxes," within the meaning of Rev. St. Ill. c. 66, § 2, providing that possession under such title for seven years is sufficient to protect the holder thereof. *Mattison v. Walker* (U. S.) 16 Fed. Cas. 1146.

TITLE DEFECTIVE IN FORM.

The phrase "title defective in form," as used in the proposition that a title defective in form cannot form the basis of a prescriptive right, does not mean a title which, though apparently good, has some latent defect, nor does it mean a title which, though apparently clothed with all the formalities required by law, may be proved defective by extensive evidence; but it means a title on the face of which the defect is stamped, so that the holder of such a title cannot pretend that he possesses in good faith, for he is supposed to know the defect of form which his title shows, and cannot plead ignorance of law. *Texas & P. Ry. Co. v. Smith*, 15 Sup. Ct. 994, 995, 159 U. S. 66, 40 L. Ed. 77.

TITLE IN FEE.

See "Fee."

TITLE OF RECORD.

Const. § 251, provides that no action shall be maintained for possession of any lands lying within this state, where it is necessary for the claimant to rely for his recovery on a grant or petition issued by the commonwealth of Virginia prior to the year 1820 against any person claiming by possession under a title of record, unless such action be commenced within a stipulated time. Held, that the words "title of record" meant

a title from the commonwealth. *Shaw v. Robinson*, 64 S. W. 620, 622, 111 Ky. 715.

TITLED.

"Titled," as used in Act Feb. 5, 1850 (Pasch. Dig. art. 809), providing that no certificate of land, land warrant, or evidence of land claim, of any kind whatever, shall hereafter be located upon any land heretofore titled within certain limits, means land granted by the government. *Truehart v. Babcock*, 51 Tex. 169, 177.

"Titled," as used in Const. art. 14, § 2, providing that all genuine land certificates shall be located, surveyed, or patented only on vacant and unappropriated public domain, and not upon any lands titled from the sovereignty of the state, means land for which a patent is issued, which on its face is evidence that the state has parted with its right and conferred it on the grantee, for reasons not appearing on the face of the patent. The grant may be void, or voidable, but the land embraced in it is nevertheless land titled. *Winsor v. O'Connor*, 8 S. W. 519, 520, 69 Tex. 571.

"Titled lands," as used in Const. art. 14, § 2, providing that land certificates shall not be located on any "land titled or equitably owned under color of title from the state," includes lands conveyed by a commissioner with power to issue title, and locations of grants made on such lands do not constitute titled land, nor color of title. *Texas-Mexican Ry. Co. v. Locke*, 12 S. W. 80, 89, 74 Tex. 370.

TITULO.

The Spanish word "título" means, according to Spanish authority, the cause in virtue of which anything is possessed, and the instrument by which the right is accredited; and in Spain and Mexico they are a class of title (títulos), not translatable of property. But it is to be applied as well to title papers, which convey "title," in the usual acceptance of the term, as to those which confer a mere right of occupancy. *De Haro v. United States*, 72 U. S. (5 Wall.) 599, 626, 18 L. Ed. 681.

TO.

See "From and To."

The preposition "to" indicates direction, so that an agreement to convey title to the government would be plain, but where it is used in an agreement stating that the title to certain lands is in the government means ownership of the land or property. *Balch v. Arnold*, 59 Pac. 434, 437, 9 Wyo. 17.

"To," as commonly used, conveys the idea of movement towards, and actually

reaching, a specified point or object, and the meaning is not satisfied until the point or object be actually attained. An agreement to pay a certain sum of money when a railroad should be extended to a certain section did not become obligatory upon the extension of the road within 500 feet of the section. *Stevens v. Ambler*, 23 South. 10, 12, 39 Fla. 575.

A charge of a court that plaintiff, in support of his allegations, "brings evidence to show" certain facts, is not an affirmation that the evidence does show facts stated, and is quite distinct from and opposite to an assertion that he brings facts that show such and such things. The one form of expression merely designates the purpose for which the evidence is introduced; the other is a positive declaration that it establishes those facts. *Central R. R. v. Freeman*, 75 Ga. 331, 338.

The use of the words "to or from" in the reservation in a deed to lay railroad tracks to or from limekilns reserved by the grantor means to or from the locality where they are situated, in such a manner and to such an extent as to enable the grantor to enjoy their use and possession for the purpose named in the reservation. *Janes v. Fonda*, 8 Atl. 195, 58 Vt. 453.

As exclusive or inclusive.

In designating boundaries the word "to" without the word "inclusive" excludes the object to which the line runs. *Thompson v. Blackwell*, 5 La. 465, 466; *Municipality No. 2 v. Municipality No. 1*, 17 La. 573, 576.

The words "from," "to," and "at" are taken inclusively, according to the subject-matter. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 346, 23 L. Ed. 428.

The word "to" is a word of exclusion, when used in describing premises—to an object named, excluding the terminus mentioned. *Bradley v. Rice*, 13 Me. (1 Shep.) 198, 201, 29 Am. Dec. 501; *Bonney v. Morrill*, 52 Me. 252, 256; *Montgomery v. Reed*, 69 Me. 510, 514.

The words "to," "from," and "by," when used to express boundaries, ordinarily mean terms of exclusion, and are always to be understood in that way, unless there is something in the connection which makes it manifest that they were used in a different sense. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491, 537.

Where a municipal charter provided that the damages incurred in extending a street shall be paid by the real estate fronting on either side of the extension and of the original street to a point to be fixed by the common council, and also by the real estate fronting on cross streets, or streets forming a junction with such street improvement, and within a hundred feet of the same, and an assessment was made for the extension

of L. street from A. street, southerly "to R. street," the words "to R. street" should not be construed to include R. street for the purposes of taxation. *Schumacker v. Toberman*, 56 Cal. 508, 510.

"To" is a word of exclusion, unless it appears by necessary implication to have been used in a different sense. *Bradley v. Rice*, 13 Me. (1 Shep.) 198, 29 Am. Dec. 501. As used in Acts Vt. 1898, No. 265, prescribing the proceedings for the appointment of commissioners to determine the damages sustained by the owners of land taken, and providing that they shall be the same as those provided for in V. S. 8815 "to" 3821, which sections shall govern all proceedings to the final determination of the matter, it is inclusive. *Littleton Bridge Co. v. Pike*, 47 Atl. 108, 72 Vt. 7.

In an order granting parties to the 28th of January in which to file a certain statement of facts, the word "to" will be held to include the day mentioned, so that service on the 28th day was sufficient. Ordinarily whether the words "to," "till," or "until" will be held to be words of inclusion or exclusion is usually determined by the context of the statute or instrument in which they are used, and will be held to include or exclude the day named, as the evident intention requires. *State v. Benson*, 58 Pac. 217, 219, 21 Wash. 365.

An order issued under Pub. Loc. Laws of the City of Baltimore, art. 4, § 170, providing that a bill of exceptions may be signed within 30 days, but not thereafter, unless the time for signing such bill shall have been previously extended by order of court, extending the time for the signing of such a bill "to" a certain day, must be regarded as intending to include the day named, so that an order issued on such a day for a still further extension is valid. *Gottlieb v. Fred W. Wolf Co.*, 23 Atl. 198, 199, 75 Md. 126.

Same—Computation of time.

"To" has no settled legal meaning, but is defined to be a word of exclusion, unless, by necessary implication, it must be held to be used in an inclusive sense; and as used in an order extending the time to make and serve a case to a certain date is used in the sense of "till" or "until," and does not include such date. *City of Garden City v. Merchants' & Farmers' Nat. Bank*, 60 Pac. 823, 824, 8 Kan. App. 785.

As used in an indorsement on a promissory note as follows: "Interest paid on the within note to July 26th, '71"—"to" is construed to mean that the interest is paid up to the 26th, and not including the 26th. *Stearns v. Sweet*, 78 Ill. 446, 448.

Where an order extends the time for filing a statement on motion for a new trial or

for doing any act in practice to a specified day, the day specified is part of the time within which the act may be done. *Penn Placer Min. Co. v. Schreiner*, 35 Pac. 878, 14 Mont. 121.

The word "to," in common parlance and sometimes in legal phraseology, is applied to time. It has also various significations indicating toward, to, and into. In regard to time, it often indicates a coming or passing into a day; and hence where a seller was to deliver oil, "buyer's option, at any time from this date to December 31, 1870," the seller had the whole of December 31st to perform. *Conawingo Petroleum Refining Co. v. Cunningham*, 75 Pa. (25 P. F. Smith) 138, 140.

Gen. Laws, c. 112, § 4, making it an offense for any person to have in his possession any ruffed grouse "from" the 1st day of January "to" the 1st day of October, will be construed as reading between the 1st day of January and the 1st day of October. *State v. Stone*, 38 Atl. 654, 20 R. I. 269.

As by.

In considering a complaint for an unlawful sale of intoxicating liquors by the defendant "to a person whose name is not known by the complainant," the courts said: "The allegation that a person is not known 'by' the complainant has the same signification as the allegation that he is not known 'to' him." *Commonwealth v. Griffin*, 115 Mass. 175, 176.

As from.

A railroad ticket with the words "Portland to Boston" on it does not entitle the holder to a ride from Boston to Portland. *Keeley v. Boston & M. R. Co.*, 67 Me. 163, 165, 24 Am. Rep. 19.

As in.

"To," as used in a deed describing the property as lot 14, in block No. 19, "to" a certain village, should be construed as meaning "in," though it is not so accurate and proper as the word "in." *Delorme v. Ferk*, 24 Wis. 201, 203.

"To the house," as used in a benefit certificate, providing that the beneficiary should receive sick benefits if he were sick so as to be totally disabled, and absolutely, necessarily, and continuously confined "to the house," does not mean the same as in the house. "To" signifies direction, connection with, appurtenant, while "in" signifies the quality of being interior. Strictly speaking, confinement to a house differs from confinement in a house. According to the strictly literal meaning of the words, the person may be absolutely, necessarily, and continuously confined to the house notwithstanding he spent a portion of his time in the dooryard. It would be generally understood that a sick

person was confined to the house although he went into the dooryard to take sun baths or get fresh air. *Scales v. Masonic Protective Ass'n*, 48 Atl. 1084, 1085, 70 N. H. 490.

As in furtherance of.

"To a common purpose," as used in *Laws* 1893, p. 120, § 2, giving as the four requisites to constitute co-employees fellow servants, as: "They must be engaged in the common service, in the same grade of employment, working together at the same time and place, and to a common purpose"—means that the acts required of each in the performance of his duties at the time of the accident must be in furtherance of the common service. *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 366, 89 Tex. 475.

As into.

"To," as used in a charter authorizing a railroad company to construct its line "to" a city, empowers it to construct the line "into" the city. *Waycross Air-Line R. Co. v. Offerman & W. R. Co.*, 35 S. E. 275, 276, 109 Ga. 827; *Hazlehurst v. Freeman*, 52 Ga. 244, 246.

When used in a charter of a turnpike company authorizing them to build a road from Troy "to" Hudson, the word "to" does not mean that the road was to terminate on arriving at the bounds of the city of Hudson, but entitled the company to construct the road within the corporate limits to the compact part of the city. *President, etc., of Farmers' Turnpike Road v. Coventry* (N. Y.) 10 Johns. 389, 392.

"To," when used in a charter authorizing a turnpike company to construct a railroad to a certain city, means to a point within the city to which the corporation was authorized to construct its road. *Mohawk Bridge Co. v. Utica & S. R. Co.* (N. Y.) 6 Paige, 554, 562.

"To," as used in an indictment charging an illegal transportation of intoxicating liquors from a place in one county to a town in another county, does not mean into or within such town. Going "to" a line is not going beyond it. It is not crossing the line. "To" is a term of exclusion, unless, by necessary implication, it is manifestly used in a different sense. "To" an object excludes the terminus referred to. *State v. Bushey*, 24 Atl. 940, 84 Me. 459.

As through.

Under a city charter providing that the city may take stock in companies constructing roads running to the city, it is held that a road running through the city is a road running to it. *City of Aurora v. West*, 9 Ind. 74, 85.

The words "to said city," in an authority to a city to take stock in a chartered com-

pany for making a road or roads to said city, does not limit the city to subscriptions to roads terminating in the city, but it may subscribe to stock in a road to other cities and towns, from the nearest of which to the city subscribing there is a direct road; the road in which the stock is taken being in fact a road in extension and prolongation of one leading into the city. *Von Hostrup v. Madison City*, 68 U. S. (1 Wall.) 291, 296, 17 L. Ed. 538.

As towards.

As used in a marine policy providing that the ship should not sail from any port on the east coast of Great Britain to any port in the belts between certain dates, "to" means "towards" or "on the voyage to," and is not limited to going to the place of destination so as to arrive at a belt port within the prohibited time, and is not synonymous with "at," and consequently prohibits voyages toward the places named within the period mentioned; and hence if the vessel was on the voyage to a belt port within the prohibited period, but would not arrive there until after the expiration of such period, the insurance company would not be liable for a loss sustained. *Colledge v. Harty*, 6 Exch. 205, 211.

As which.

Where a statute giving a right of action for stock injured on its right of way, and excepting any railroad company whose road is inclosed with a good and lawful fence "to prevent" such animals from being on the track, the use of the words "which prevent" in an instruction in an action for damages, instead of the language of the statute "to prevent," should not be construed as misleading, the two phrases being practically synonymous. *Missouri Pac. Ry. Co. v. Eckel*, 31 Pac. 693, 694, 49 Kan. 794.

TO ALL INTENTS AND PURPOSES.

Under 9 Ann. c. 14, § 1, providing that notes given for money lent for gaming purposes shall be void, "to all intents and purposes," such notes are void even in the hands of an innocent purchaser for value without notice, since it would be making the notes of some value to the lender if he could pay his own debts with it. *Bowyer v. Bampton*, 2 Strange, 1155.

Under St. 23 Geo. III, c. 56, certain trustees on behalf of the parish of St. Luke purchased premises in the parish of St. Leonards, and there erected a workhouse. Section 11 exempted the premises from any greater parochial or parliamentary tax than to such amount as they were before assessed at. 40 Geo. III, c. 97, § 1, repealed this act, and constituted a new governing body in the parish, transferring to them all the property vested in them and possessed by them "as

fully, effectually, and beneficially, and in as large and ample manner, and to all intents and purposes whatsoever, as the same were vested in and possessed by the former trustees." Held, that while the word "beneficially" alone might not have the effect of reserving the exemption concerning taxation contained in the repeal act, being coupled with the words, "to all intents and purposes whatsoever," they were to be considered as having that effect, and such words were not merely words of conveyance only. *Reg. v. Inhabitants of St. Leonard's, Shoreditch*, 13 Q. B. 964, 975.

Though a statute providing that gaming notes were void to "all intents and purposes whatever," it should not be construed so as to avoid the note in the hands of a bona fide indorsee. *Haight v. Joyce*, 2 Cal. 64, 66, 56 Am. Dec. 311.

TO AND ALONG.

"To and along," as used in the description of a deed carrying the property to and along a road, would, by well-settled construction, carry the boundary to the center, if not controlled by the starting point. *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 293, 41 Am. Rep. 361.

TO AND AMONGST.

Where those words were used in a will relating to the division of property "to and amongst" children, each child must have some share assigned to him. *Doe v. Alchin*, 2 Barn. & Ald. 122, 125.

TO THE AMOUNT OF.

Where a policy of insurance for \$6,000 was assigned to B. as "collateral security to the amount of \$3,000," the sum or aggregate amount to be received by the assignee was thereby limited and fixed at \$3,000. It would have been no stronger had the words used been "to an amount not exceeding \$3,000." To say "to the amount of" means "no more than that amount." *Swartley v. McCracken* (Pa.) 7 Montg. Co. Law Rep'r, 49, 50.

Const. 1868, art. 13, §§ 2, 3, providing that stockholders shall be liable for all debts of the corporation due at the time of its dissolution to the amount of their stock, means that the stockholders shall not only be liable to the amount remaining undue on their stock, but in an additional sum equal to the amount of their stock. *McDonald v. Alabama Gold Life Ins. Co.*, 5 South. 120, 121, 85 Ala. 401.

TO AND FOR HER BENEFIT.

A bequest to a wife, stipulating that the property shall be held by her "to and for

her use, benefit, and right, without let, hindrance, molestation," has the effect of excluding her husband from any rights in the property. *Newman v. James*, 12 Ala. 29, 31.

TO ARRIVE.

"To arrive" is a neuter verb, and when applied to an object moving from place to place designates the fact of coming to or reaching one place from another, or reaching a place by traveling or moving towards it. *Thompson v. United States* (U. S.) 23 Fed. Cas. 1107, 1109.

As rendering sale conditional.

The use of the phrase "to arrive," in a contract of sale of goods to arrive by a certain vessel, operates to preclude title to the goods from passing till the vessel arrives. *Benedict v. Field*, 16 N. Y. 595, 597.

The use of the words "to arrive" in a contract to sell and deliver goods "to arrive" on a certain vessel operates to render the contract conditional, and if the ship be lost, or the subject-matter of the sale does not arrive in the ship, the contract is at an end. *Shields v. Pettee*, 4 N. Y. Super. Ct. (2 Sandf.) 262, 268.

As a warranty.

Defendant agreed to sell plaintiffs one hundred tons of soda, "to arrive" ex Daniel Grant, etc. Held, that the contract did not amount to a warranty on the part of the seller that the soda would arrive if the vessel arrived, but was a contract for the sale of goods at a future period, subject to a double condition of the arrival of the vessel with the specified cargo on board. *Johnson v. MacDonald*, 9 Mees. & W. 600.

Where a seller agreed to sell goods expected to arrive by a particular ship, and goods of the description contracted to be sold do arrive on that ship, but are consigned to a third party, the vendor is not liable for failure to deliver the goods, since there was an implied condition that the goods were not only to arrive, but that they were to be consigned to the vendor so as to be within his power. *Gorriessen v. Perrin*, 2 C. B. (N. S.) 681, 702.

Defendant contracted to sell plaintiffs 50 tons of palm oil, "to arrive" per the Mansfield, etc., and in case of nonarrival of the vessels, or of the arrival of vessels not having so much on board after the delivery of former contracts, the contract to be void. The Mansfield on arrival had on board 235 tons of oil, but the contracts made previously to that above mentioned amounted to 228 tons, leaving only seven tons applicable to the contract. Held, that the contract was for 50 tons, and was entire, and, such an amount not having arrived on

the Mansfield after delivery of oil to prior contracts, the plaintiffs were not even entitled to the seven tons over that required to satisfy such former contracts, the words "to arrive," etc., being a condition precedent to defendant's liability to deliver. *Lovatt v. Hamilton*, 5 Mees. & W. 639.

"To arrive by vessel or vessels," as used in a contract to sell goods to arrive by vessel or vessels within 60 days from date, is to be construed as not limited to goods arriving in the seller's vessels, but by all vessels coming to the port where the sale was made. *Fraser v. Harbeck*, 27 N. Y. Super. Ct. (4 Rob.) 179, 181.

In considering an instrument worded "Sold D. H. Rogers 1,000 sacks coarse Liverpool and 2,000 sacks fine Liverpool salt at \$2.10 per sack, to arrive by the 15th of November," the court said: "Effect is, of course, to be given to the words of the contract to arrive by the 15th of November; but the question is, what effect? They are, we think, words of condition and description only, and cannot be considered as warranty that the salt shall arrive. They serve to distinguish the salt which was the subject of the contract from the mass of salt of the same variety found in the market. The salt plaintiffs contracted to sell and defendants contracted to buy was not salt which plaintiffs may have had on hand or salt which may have previously arrived. It was salt which was to arrive between the date of the contract and the 15th of November. Whether it would arrive or not depended upon contingencies not absolutely within the control of either party. If it arrived within the time limited, plaintiffs were impliedly bound to deliver it under the contract. If it failed to arrive within that time, no such obligation arose. There was in that case no salt which under the terms of the contract the plaintiffs were bound to deliver or the defendant bound to accept. *Rogers v. Woodruff*, 23 Ohio St. 632, 635, 636, 13 Am. Rep. 276.

TO BE.

"To be" is sometimes used as synonymous with "to become," "to be made to be." *Bolsdere v. Citizens' Bank*, 9 La. 506, 511, 29 Am. Dec. 453.

TO BE ADVANCED.

"To be advanced," as used in a bond by which the undersigned agreed to indemnify the national bank to the extent of £1,000 "advanced or to be advanced" a certain person, but said indemnity to cease when he shall have paid in the said sum of £1,000 to the credit of his account, the words "advanced or to be advanced," though fairly admitting of the construction that future as

well as past advances were meant, would not be so considered, in view of the fact that at the time the guaranty was given the person to whom advances were secured already owed a debt of £1,400, due to the bank. *Bell v. Welch*, 9 C. B. 154, 168.

TO BE CHARGED.

A city ordinance providing that the rates of fare "to be charged" on any street railway within the city limits shall be a certain fixed sum applies not only to companies existing at the time the ordinance was enacted, but to those coming into existence thereafter; the words refer to the future, to what is to be charged hereafter, and are certainly prospective in their meaning. *Chicago Union Traction Co. v. City of Chicago*, 65 N. E. 451, 470, 199 Ill. 484, 50 L. R. A. 631.

TO BE COMMENCED.

Where in one section of an act it is provided that in suits "commenced" the plaintiff will not be allowed more costs than damages if he recover less than \$6, and in another section the provisions were made applicable only to suits "to be commenced," the ambiguity of the phraseology was such as to forbid a construction rendering the act applicable to actions commenced prior to its passage. *White v. Hunt*, 6 N. J. Law (1 Halst. Ch.) 415, 418.

TO BE DEFINED.

When an already fixed and defined boundary line is proposed "to be defined," the expression is tantamount to saying that the line already defined will be redefined, changed, altered, and differently fixed. *State v. Hocker*, 18 South. 767, 769, 36 Fla. 358.

TO BE DESIGNATED.

"To be designated from time to time," as used in Laws 1870, c. 383, § 1, providing for the publication of city advertising in a specified number of newspapers, "to be designated from time to time" by the mayor and comptroller of said city, does not abrogate all previous designations, but until the officers named made new designations under that act the designations made under previous acts remained in force. It does not imperatively require subsequent action on the part of those officers in order to make any publication lawful. "The Legislature intended to confer the power on the mayor and comptroller to change the selection of newspapers after the passage of the act from time to time in their discretion, and the words 'to be' may have been deemed necessary to accomplish that intent. Without them the act might have been construed

as referring only to prior designations, and the expression 'from time to time' may be held to limit and qualify the force which might otherwise be given to the words 'to be.' In *re Folsom*, 56 N. Y. 60, 65.

TO BE PAID.

The words "to be paid," in a note to be paid in solvent notes and accounts of other men, are equivalent to the word "payable." *Williams v. Sims*, 22 Ala. 512, 516.

"To be paid," as used in the insurance law providing that all money "to be paid" on a policy by a mutual benefit insurance company shall be exempt, seems to have been chosen to exclude the possibility of a construction which would exempt such moneys from the payment of debts or liabilities of members or other beneficiaries after they had been paid over. The exemption refers, not to moneys paid or when paid, but to be paid. This view accords not only with the ordinary and appropriate use of the language employed, but with the obvious purpose of the Legislature to protect membership insurance companies as well as their members and beneficiaries from the annoyances which would result if a beneficiary fund could be the subject of attack by the importunate creditors of such members and beneficiaries. *Bull v. Case*, 59 N. E. 301, 302, 165 N. Y. 578.

TO BE PASSED.

"To be passed," as used in the bond of a tax officer given to secure the collection of taxes, which provides that it is to secure the collection of taxes which may be authorized by any act to be passed in the present session of parliament, and which is executed during the session, is to be construed as including any act passed during such session, though passed before the execution of the bond. *Nares v. Rowles*, 14 East, 510, 518.

TO BE SELECTED.

"To be selected," as used in a conveyance by the owner of a township of a certain number of acres "to be selected" in the east half of the township by the grantor in one or two lots, implies that title passed to be held in common until selected. The right of selection was not a condition precedent, but a right subordinate, to be exercised or not, at the will of the grantee upon partition. *Donworth v. Sawyer*, 47 Atl. 521, 523, 94 Me. 243.

TO BE TAKEN.

"To be taken," as used in a contract for the sale and purchase of glassware "to be

made after September first, and to be taken by January first, 1883," by a custom in such business gives the buyer a right of ordering the goods to be shipped as he wishes between the dates, and the seller must ship as ordered, and may not deliver the goods without such order. *Atkinson v. Truesdell*, 6 N. Y. Supp. 509, 57 N. Y. Super. Ct. (25 Jones & S.) 228.

TO BE USED.

The words, "to be used by a certain date," in a limited railroad passenger ticket, do not operate to require the passenger to complete his journey by the date mentioned, but he is only required to commence the journey by such time. *Gulf, O. & S. F. Ry. Co. v. Looney*, 19 S. W. 1039, 1042, 85 Tex. 158, 16 L. R. A. 471, 34 Am. St. Rep. 796.

"To be used as cabinet warerooms," as used in a lease of a building "to be used as cabinet warerooms," does not amount to a direct covenant to use the building as such and for no other purposes whatever. *Brugman v. Noyes*, 6 Wis. 1, 10.

Where plaintiff furnished a large quantity of brick under a general contract to a contractor engaged in the erection of several distinct buildings, and had no knowledge that any particular supply was going to any particular building, he cannot enforce a lien for a balance due against one of the buildings in which a portion of the bricks were used on the ground that such bricks were materials furnished "to be used," within the meaning of a Washington statute giving a lien for such materials. *Eisenbeis v. Wakeman*, 28 Pac. 923, 924, 3 Wash. 534.

TO BECOME.

See "Become."

TO THE COLLECTOR.

"To the collector," as used in U. S. Embargo Act, 2 Story's Laws, p. 1071 (2 Stat. 451), providing that no registered or sea letter vessel shall be allowed to depart from one port of the United States to any other within the same, unless the owner, master, consignee, or factor of such vessel shall first "give bonds," with one or more sureties, to the collector of the districts from which she is bound to depart, etc., does not mean that the bond is to be made payable to the collector, but that it is to be made payable to the United States and delivered to the collector. *Dixon v. United States* (U. S.) 7 Fed. Cas. 761, 763.

TO EFFECT.

See "Prosecute to or with Effect."

TO THE FULL AMOUNT.

The phrase "to the full amount," in *Sess. Laws 1896, c. 185, § 80*, providing that no corporation shall make dividends except from the surplus or net profits from the business, or pay to the stockholders any part of the capital stock, except in accordance therewith, and providing that the directors violating such provision shall be jointly and severally liable to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend made, "seems to indicate that the liability may, under supposable circumstances, be less than the whole amount of the dividends paid. The provision in the act is intended as an indemnity against injury, such as is capable of computation in dollars and cents, and giving it that construction will avoid enforcing a pure penalty." *Siegman v. Maloney*, 51 Atl. 1008, 1010, 63 N. J. Eq. 422.

TO HAVE AND TO HOLD.

The words "to have and to hold" in a deed is but a habendum clause, the purpose of which is merely to define the estate which the grantee is to take in the property conveyed. *Wheeler v. Wayne County*, 24 N. E. 625, 626, 132 Ill. 599.

TO HER SOLE AND SEPARATE USE.

See "Sole Use."

TO HER USE AND BEHOOF FOREVER.

A devise to testator's wife, "to her use and behoof forever," giving her power to expend the property for her support and maintenance during her lifetime, and providing that so much of the estate as remains unexpended at her death shall be disposed of in a specified manner, implies that the wife should have the power of expending the property only for her support and maintenance during her lifetime, with the power of expending it only so far as it was necessary for her reasonable support and maintenance. *Chase v. Ladd*, 153 Mass. 126, 26 N. E. 429, 25 Am. St. Rep. 614.

TO LOW WATER MARK.

"To the low water mark," as used in *Me. Colonial Ord. 1641*, which provides that in all creeks, coves, and other places above and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the "low water mark," etc., means to the low water mark in the nearest direction, without any regard to the course of the side lines of the upland to which the flats are adjoining and appurtenant. *Emerson v. Taylor*, 9 Me. (9 Greenl.) 42, 43, 23 Am. Dec. 531.

TO A MOUNTAIN OR RIDGE.

To a mountain or ridge means summit point, or summit line, unless otherwise expressed. *Pol. Code Cal. 1903, § 3905*; *Pol. Code Mont. 1895, § 4105*; *Rev. St. Ariz. 1901, par. 929*.

TO MY KNOWLEDGE.

"To my knowledge," as used in an application for a life insurance policy in which the applicant stated that there is no hereditary taint of any kind in the family on either side of the house "to my knowledge," restricts and narrows down the affirmation to what the applicant himself personally knew touching the subject. The affirmation has this extent, no more. *Northwestern Mut. Life Ins. Co. v. Gridley*, 100 U. S. 614, 616, 25 L. Ed. 748.

TO MY USE.

An indorsement on a bill of exchange to "pay the money to my use" has been held to be a restrictive indorsement, which operates to put an end to the negotiability of the paper. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

TO THE OCEAN SHORE.

To the ocean shore means a point three miles from shore. *Pol. Code Cal. 1903, § 3907*.

TO THE ORDER OF.

A bill payable "to the order of A." is the same as if payable "to A. or order." *Huling v. Hugg* (Pa.) 1 Watts & S. 418, 420.

TO PLAINTIFF'S DAMAGE.

"To plaintiff's damage," as used in a complaint declaring upon a book account of \$929.59, which, after stating the cause of action, concluded with the words, "to plaintiff's damage" \$500, which allegation was followed by a prayer for judgment for the amount of the debt, interest, and costs, means nothing. It is a mere flourish of the pleader, and is not intended to limit, nor does it limit, the entire amount of the recovery to \$500. Where interest is allowable not eo nomine, but by way of damages, such an allegation may be proper. *Buer v. Prescott*, 14 S. W. 138, 77 Tex. 438.

TO THE ROAD.

A conveyance describing one call as being "to a road," and then running along the road, should be construed to mean to the center of the road. *Sizer v. Devereux* (N. Y.) 16 Barb. 160, 166.

"To the road," as used in a deed of land reciting that the line runs "to the road, and

thence by the road," means to the center of the road, though the measurement of distances would extend only to the side of the road. *Oxton v. Groves*, 68 Me. 371, 372, 28 Am. Rep. 75 (citing *Hunt v. Rich*, 38 Me. 195; *Cottle v. Young*, 59 Me. 105; *In re Reed*, 13 N. H. 381, 384).

The words "to a highway" in a deed describing lands as running to a highway will be construed, in the absence of anything showing a contrary intention, as fixing the boundary of the land at the center of the highway. *Buck v. Squiers*, 22 Vt. 484, 489.

"To the road," as used in a deed of land describing a line as extending westerly "to the road," means to the center of the road. *Goodeno v. Hutchinson*, 54 N. H. 159, 163.

A deed describing the boundaries of the land as "to, upon, or along a highway or railroad" does not convey the land to the center of the highway or railroad, unless the grantor owns the fee of the highway or railroad. *Church v. Stiles*, 10 Atl. 674, 675, 59 Vt. 642.

TO THE SATISFACTION OF THE COURT.

See "Satisfaction of the Court."

TO THE STREAM.

A boundary in a deed "to a stream," "on a stream," or "by a stream" includes the flats at least to low water mark, and in many cases to the middle thread of the river. *Thomas v. Hatch* (U. S.) 23 Fed. Cas. 948, 949.

To a creek, river, slough, strait, or bay means the middle of the main channel thereof, unless otherwise expressed. *Pol. Code Mont.* 1895, § 4106; *Pol. Code Cal.* 1903, § 3908.

A deed describing land as extending "to a tree on the bank of the river" should be construed to locate the line at the thread of the stream, notwithstanding the description contains other words giving the length of lines and quantity of land conveyed. *Kent v. Taylor*, 13 Atl. 419, 64 N. H. 489.

TO THAT EFFECT.

See "Effect."

TO THAT END.

Where a testator directed his executors to pay certain legacies, and gave to trustees all property remaining after such payments and after the payment of debts, and after directing the trustees to pay certain bequests he declared that "to that end" he gave them all property remaining after payment of debts and of such legacies and other pay-

ments as are to be paid by the executors, the words "to that end" should not be construed to cut down the amount of property given to the trustees, but to only explain why he did not leave in the hands of the executors enough to pay all of the legacies, and that the property given the trustees was not restricted to what was necessary to pay certain legacies to be paid through them. *Weber v. Bryant*, 37 N. E. 203, 161 Mass. 400.

TO THE USE OF A THIRD PERSON.

An indorsement on a bill of exchange to "pay the contents to the use of a third person" has been held to be a restrictive indorsement, which operates to put an end to the negotiability of the paper. *Lee v. Chillicothe Branch State Bank* (U. S.) 15 Fed. Cas. 151, 153.

TO THE WATER.

Calls in a deed which describe land on the sea shore as running "to the water, and thence by the water," carry the grant to low water mark. The words "to the water" have the same significance to carry boundary to low water mark that other words have been decided to have, such as "by the sea," "tide water," "salt water," "a harbor," "bay," "cove," "creek," "river." *Babson v. Tainter*, 10 Atl. 63, 64, 79 Me. 368 (citing *Gould, Waters*, § 195).

TO WHOM IT MAY CONCERN.

See, also, "Whom It May Concern."

A guaranty of a negotiable instrument addressed "to whom it may concern" is in the nature of an open letter of credit, and is evidently intended to give the instrument currency, and any person who advances money on the faith of it may enforce payment of the guarantor. *Sawyer v. Hopgood*, 13 N. Y. St. Rep. 711.

TO WIT.

The office of "to wit" is to particularize what is too general in a preceding sentence, and render clear, and of certain application, that which might seem otherwise doubtful or obscure. *Buck v. Lewis*, 9 Minn. 314, 317 (Gil. 298, 300).

"To wit" are words used to call attention to a more particular specification of what has preceded; and a record which stated that the jury retired to consult of "their verdict as follows, to wit," and the result of their deliberation is then given, and the verdict arrived at is spread at large upon the record, sufficiently identifies the verdict recorded as the one rendered by the

Jury. Gilligan v. Commonwealth, 37 S. E. 962, 964, 99 Va. 816.

The words "to wit" and "that is to say," as used in a pleading, are termed a "videlicet." "The natural and proper use of a videlicet is to particularize that which is general before, and to explain that which is indefinite, doubtful, or obscure; but it must neither be contrary to the premises, nor increase or diminish the precedent matter; and therefore if a man selsed in fee of black acre, white acre, and green acre in D. should grant all his lands in D., viz., black acre and white acre, yet green acre shall also pass by the grant." *Stukeley v. Butler*, Hob. 168.

The use of the videlicet is to avoid a variance, and to avoid a positive averment, which must be strictly proved. *Brown v. Berry*, 47 Ill. 175, 177.

The office of a videlicet is to explain what goes before, and when it is repugnant to or inconsistent with the preceding matter it is inoperative and void. *Cotton v. Ward*, 19 Ky. (3 T. B. Mon.) 304, 310.

The precise and legal use of a videlicet in every species of pleading is to enable the pleader to distinguish and fix with certainty that which was before general, and which without such explanation might with equal propriety have been applied to different objects. *Commonwealth v. Hart*, 76 Mass. (10 Gray) 465, 468.

The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged, and in such cases, i. e., when the circumstances are not essential in their nature, he is ordinarily not held to prove them. *State v. Heck*, 23 Minn. 549, 550.

"The office of a videlicet is to explain what went before, and where it is repugnant or contradictory it is material and traversable, and as such an averment coming after a videlicet is traversable so it must be proved when material, if averred without a videlicet. The general rule in relation to allegations under a videlicet or a scilicet seems to be that if they be impossible or contrary or repugnant to the preceding matter they shall be rejected as surplusage, but where they are used to explain what goes before them, and are consistent with the preceding matter, they are material and traversable." *Gleason v. McVickar* (N. Y.) 7 Cow. 42, 43.

The common office of a videlicet is to state time, place, or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made; but it may be and is frequently used as particularizing the more general antecedent matter. *Sullivan v. State*, 67 Miss. 346, 354, 7 South 275, 277.

The proper office of a videlicet is to particularize or explain what goes before it. It may restrain the generality of preceding words, but cannot enlarge or diminish the preceding subject-matter. In the former case it is merely explanatory of the thing which precedes it, while in the latter it is repugnant to it. When a material videlicet is preceded by words of direct averment, the videlicet is regarded as a direct allegation, and therefore is traversable, and, being regarded as traversable, it follows that if traversed it must be proved. *Gould*, Pl. c. 3, §§ 35-41. The pleader cannot relieve himself from the necessity of proving unnecessary allegations or irrelevant matter by putting them under a videlicet. Where, in an action on an accident policy, the complaint, after alleging the accidental death of the insured, alleged, under a videlicet clause, the cause and manner of the accident in such a manner as to make one complete and consistent allegation, the general issue traverses not only the general allegation, but also the allegations under the videlicet. *Clark v. Employers' Liability Assur. Co.*, 48 Atl. 639, 642, 72 Vt. 458.

The precise and legal use of a videlicet in every species of pleading is defined to be to enable the pleader to isolate, to distinguish, and to fix with certainty that which was before general, and without which explanation might with equal propriety be applied to different objects. *Commonwealth v. Quinlan*, 153 Mass. 483, 484, 27 N. E. 8.

TOBACCO.

See "Leaf Tobacco."
As medicine, see "Medicine."

TOGETHER.

See "Acting Together"; "Taken Together."

"Together" means "in company"; "into or in union with each other as wholes or parts, so as to be combined or joined with each other; conjointly; in the same place or at the same spot with each other locally, as in company; at the same moment of time; simultaneously; contemporaneously; mutually; reciprocally." Parties contracted, in settlement of litigation over an estate, that complainant should have in fee an undivided one-third of a certain tract of land, together with the mansion house and all improvements thereon. The improvements were scattered over more than one-third of the land, and so situated that it would be impracticable to partition the tract so as to award all improvements to her. Held, that the contract should be construed as giving to complainant one-third of the tract as improved, and not one-third of the land and

all the improvements in addition thereto. *Clack v. Hadley* (Tenn.) 64 S. W. 408, 407.

"Together," as used in Rev. St. § 1343, providing that to be fellow servants the servants must be working together at the same time and place, will not admit of the construction that they may be associated together in the prosecution of various enterprises and when residing far apart. *Dryburg v. Mercur Gold Min. & Mill. Co.*, 55 Pac. 367, 371, 18 Utah, 410.

Where a declaration against the owner of a stagecoach asserted that the owner undertook to carry the plaintiff, her children and servants, "together" in and by a certain stage, evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants, supported the averments. *Long v. Horne*. 1 Car. & P. 610.

"Together," as used in a contract relating to patents, and providing that they should be "sold, leased, or disposed of together," should be construed to mean that one or more of the patents might be sold or disposed of after reasonable exertions had been made, during a reasonable length of time, under all the circumstances that might be found to exist, to sell or dispose of them together. *Fowler v. Mallory*, 3 Atl. 560, 563, 53 Conn. 420.

TOGETHER WITH IMPROVEMENTS.

The clause, "together with all improvements which I may make," in an assignment of a patent for a large consideration, was construed to authorize the assignee to make and sell the original invention as improved by the inventor after the assignment. *Aspinwall Mfg. Co. v. Gill* (U. S.) 32 Fed. 697, 700.

TOILET SOAP.

"Toilet soap," as used in Tariff Act Oct. 1, 1890, par. 79, will not include a medical soap, containing 20 per cent. of carbolic acid, and used for curative purposes. *Park v. United States* (U. S.) 66 Fed. 731.

TOKEN.

See "False Token."

Bank Note as Public Token, see "Bank Note."

A "token" is defined to be a sign or mark. *State v. Green*, 18 N. J. Law (3 Har.) 179, 181.

"Token," as used with reference to the offense of cheating, means anything which has the semblance of public authority, as false weights, measures, seals, marks of

produce and manufacture, false dice, marked cards, and things of a similar kind, false and deceptive, used in unlawful games. *State v. Middleton* (S. C.) Dud. 275, 285.

"Token," as used in 2 Gav. & H. Rev. St. p. 445, § 27, providing for the punishment of any person who, with intent to defraud another designedly, by color of any false "token," obtains the signature of any person to a written instrument or obtains anything of value, means, as defined by Bouvier, a document or sign of the existence of a fact. Tokens are either public and general or privy tokens. They are either true or false. When a token is false, and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating; but if it is a mere privy token, as counterfeiting a letter in any man's name in order to cheat the one individual, it would not be indictable. *Jones v. State*, 50 Ind. 473, 476.

TOLERABLY SAFE.

"Tolerably safe" and 'actually dangerous' are not necessarily conflicting terms; indeed, the former frequently, perhaps usually, implies the latter. To illustrate, it is a dangerous thing to stand on the brink of Table Rock, and gaze into the turbulent waters of the Niagara; yet because hundred of thousands of people have done so safely, and very few have been precipitated into the abyss beneath, the act is tolerably safe." A railroad which was in a tolerably safe condition was not in a reasonably safe condition, as required by law. *Stetler v. Chicago & N. W. R. Co.*, 6 N. W. 303, 307, 49 Wis. 609.

TOLERATE.

"The word 'tolerate' is defined thus: To allow, so as not to hinder; to permit, as something not wholly approved; to suffer; to endure; to admit." It implies knowledge of the thing tolerated. *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1198.

TOLL.

See "Intermediate Toll."

Toll is a settled, certain and defined sum exacted for the use of a common passage. *Wadsworth v. Smith*, 11 Me. 278, 283, 26 Am. Dec. 525.

A toll is a demand of proprietorship. *St. Louis Brewing Ass'n v. City of St. Louis*, 37 S. W. 525, 528, 140 Mo. 419 (citing *Philadelphia & R. R. Co. v. State of Pennsylvania*, 82 U. S. [15 Wall.] 232, 21 L. Ed. 146).

"Toll" is defined to be a compensation in markets and fairs for goods, cattle, etc., bought and sold. *Jac. Law Dict. 'Toll.'* A

tribute or custom paid for passage or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; a reasonable sum due to the lord of a fair for things sold and which are tollable. Burr. Law Dict. "Toll"; Crabb, Real Prop. § 683. It is defined by Webster: (1) A tax paid for some liberty or privilege; particularly for the privilege of passing on a bridge or a highway, or for that of vending goods in a fair, market, or the like. (2) A liberty to buy and sell within the bounds of a manor. (3) A portion of grain taken by a miller as a compensation for grinding." The word, as used in a contract to pay for the passage of boats of one party on the canal of the other party during a specified period, does not necessarily import that payment is to be made at the times of a passage. *Pennsylvania Coal Co. v. Delaware & H. Canal Co.*, 8 Abb. Dec. 470, 477.

In order that a demand may constitute a toll, there must be some relation between the payment to be made and the engines or wagons or quantity of coal to be conveyed over the line; some measure upon which the rate or charge or payment is to be made; and that the word "tolls" could not be construed to mean such terms of payment as the parties may agree upon. *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 22 Eng. Law & Eq. 531, 535.

"Toll is the price of the privilege to travel over that particular highway, and it is a quid pro quo. It rests on the principle that he who receives the toll does or has done something as an equivalent to him who pays it. Every traveler has the right to use the turnpike as any other highway, but he must pay the toll." *City of St. Louis v. Green*, 7 Mo. App. 468, 476.

"Toll," as used in Comp. Laws, c. 77, § 20, relating to the establishment of the "rates, toll, or fare to be charged" by a street railway company, means a class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally, if not universally, connected with some franchise which involves duties as well as privileges of a public or general nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges, and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public, in turn, are protected from extortion by an obligation to pay only regular dues. *McKee v. Grand Rapids & R. L. St. Ry. Co.*, 1 N. W. 873, 876, 41 Mich. 274.

The word "toll" in Code, § 671, providing that where a judgment is entered against a corporation authorized to receive fare or toll the franchise of such corporation may be taken on execution, etc., means a tax paid

for some use or privilege or other reasonable consideration. This is the definition given in the Century Dictionary, and the definitions in all other books are substantially the same. *McNeal Pipe & Foundry Co. v. Howland*, 16 S. E. 857, 860, 111 N. C. 615, 20 L. R. A. 743.

If a toll gatherer on a turnpike road exacts and receives from a traveler a sum greater than he is permitted by law to collect, it is not a collection of toll, but an extortion, so that an action to recover a penalty for it does not involve the legality of a toll, within the meaning of a constitutional provision allowing suits involving the legality of a toll to be brought in the district court. *Brown v. Rice*, 52 Cal. 489, 491.

Stallage.

"Toll," as applicable to fairs and markets, is defined by Lord Coke to be a reasonable sum of money due to the owner of the fair or market on sale of things tollable within the fair or market, or for stallage, picage, or the like. In *Brook, Abridgment*, it is said that by common law a man shall pay "toll" for nothing brought into a fair, but for things sold, but by custom he may pay for everything brought into the fair, and he shall pay for his place and his stand though he sell nothing. It may be said that in this case toll and stallage are different things, and unless the owner of the fair or market has the soil, either as a freehold or in possession, he cannot claim stallage. But where the crown grants to a person and his heirs that they may hold a market in a certain town, with all tolls or profits, and such grantee afterwards acquires the soil, he may claim stallage by virtue of the grant. *Lockwood v. Wood*, 6 Q. B. 31, 43.

Tax distinguished.

A "toll" is a demand of proprietorship, while a "tax" is a demand of sovereignty. *City of St. Louis v. Western Union Telegraph Co.*, 13 Sup. Ct. 485, 487, 148 U. S. 92, 37 L. Ed. 390.

Tolls exacted under a statute for the use of an improved waterway are merely compensation for benefits conferred by which the floating of logs down a stream is facilitated. Tolls are the compensation for the use of another's property or of improvements made by him, and their amount is determined by the cost of the property or of the improvement and considerations of the return which such values or expenditures should yield. Taxes are levied for the support of the government, and their amount is regulated by its necessity, and there is no analogy between the imposition of taxes and the levying of tolls for the improvement of highways. *Sands v. Manistee River Imp. Co.*, 8 Sup. Ct. 113, 123 U. S. 288, 31 L. Ed. 149.

Tonnage duty.

"Tolls," as exacted for passage through locks, are a compensation for the use of artificial facilities constructed, not an impost upon the navigation of the stream; and the ordinance of the government of the Northwest Territory, July 13, 1787, providing that the navigable waters leading into the Mississippi shall be forever free, does not prevent the state of Illinois from levying tonnage duties for a canal and dam used in improving the navigation of the Illinois river. *Huse v. Glover*, 7 Sup. Ct. 313, 315, 119 U. S. 543, 30 L. Ed. 487.

Trackage charges.

The term "tolls" in P. L. 112, imposing a certain tax on the gross receipts of a railroad company for the tolls and transportation, includes a sum which one railroad company receives from another as compensation for the use of its tracks by the latter company. *Commonwealth v. New York, P. & O. R. Co.*, 22 Atl. 212, 213, 145 Pa. 200.

Transportation charges.

A "toll" is the tribute or custom paid for passage, not for carriage. It is always something taken for a liberty or privilege, not for a service. *Boyle v. Philadelphia & R. R. Co.*, 54 Pa. (4 P. F. Smith) 310, 314; *Pennsylvania R. Co. v. Sly*, 85 Pa. (15 P. F. Smith) 205, 210; *New York, L. E. & W. R. Co. v. Commonwealth of Pennsylvania*, 15 Sup. Ct. 896, 898, 158 U. S. 431, 39 L. Ed. 1043; *Geiger v. Perkiomen & R. Turnpike Road*, 31 Atl. 918, 919, 167 Pa. 582, 28 L. R. A. 458.

"Toll" is a word applied to charges made for the use of a highway, but in railroad legislation it is very often used to express a charge for transportation. *Lake Superior & M. Ry. Co. v. United States*, 93 U. S. 442, 454, 23 L. Ed. 965.

Where the charter of a bridge company makes the bridge and approaches thereto a public thoroughfare or turnpike or highway, for use of which by vehicles and foot passengers it was authorized to charge reasonable toll, for the erection of which gates were established, the word "toll" was strictly applicable to the use of the highway, rather than compensation for transportation services which the bridge company might perform or be permitted to receive. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (U. S.) 37 Fed. 567, 616, 2 L. R. A. 289.

Congress in the legislative acts by which it has made donations of the public lands to the states in which they lie for the purpose of aiding in the construction of railroads has stipulated that the railroads so aided shall be public highways for the use of the government, free from all tolls or other charges of transportation of its property or

troops. This reservation secures to the government only a free use of the railroad concerned, and does not entitle the government to have troops or property transported by the companies over their respective roads free of charge for transporting the same. "In coming to this conclusion we do not place any great stress upon the use of the word 'toll' as being a word peculiarly applicable to charges for the use of a highway, as contradistinguished from the charge for transportation which is more properly denominated as 'freight.' Whilst this is undoubtedly true, it must be conceded that, in the actual language of railroad legislation, the word 'toll' is very often used to express the charge for transportation also. Our opinion is based rather upon that marked distinction which the mind naturally makes, and which is so generally made in railroad legislation, between the road as a thoroughfare and the transaction of the carrier business thereon, whether by the railroad company itself or by other persons, and the manifest intent of Congress in the legislation under review to reserve only the free use of the road, and not the active service of the company in transportation." *Lake Superior & M. R. Co. v. United States* (U. S.) 12 Ct. Cl. 35, 54.

TOLL BRIDGE.

As real estate, see "Real Property."

TOLL COLLECTING COMPANY.

The term "toll collecting company," within the meaning of statutes taxing such companies, does not include a railroad company furnishing its own conveyances, carrying nothing but passengers, and charging a certain price as fares. "It cannot be fairly said to collect tolls at all. Tolls are collected from persons who pass or travel by their own conveyances over the roads or bridges of another." *Jersey City & B. R. Co. v. Haight*, 30 N. J. Law (1 Vroom) 447.

TOLLGATE.

"Tollgate," as used in Code, § 4918 (New Code, § 5751), requiring any person or body corporate privileged by act of Assembly to open and keep any tollbridge or tollgate, to keep the same in repair, means the road on which the gate is allowed to be erected, as the use of the word in such sense is a not uncommon figure of speech. *Fayetteville & C. Turnpike Co. v. State*, 83 Tenn. (15 Lea) 578, 580.

The words "turnpikes," "tollgates," and "tollbars," in the act relating to the taking of tolls, are used synonymously. *Company of Proprietors of Northam Bridge & Roads v. London & S. Ry. Co.*, 6 Mees. & W. 423, 439.

"Tollgate" is synonymous with "turnpike gate," as used in a statute punishing the running of tolls. *Barnes v. White*, 1 C. B. 192, 214.

TOLL ROAD.

As street, see "Street."

A "toll road" is a public highway, differing from ordinary public highways chiefly in the fact that the cost of its construction in the first instance is borne by individuals or by a corporation having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. *Virginia Canon Toll Road Co. v. People*, 45 Pac. 398, 399, 22 Colo. 429, 37 L. R. A. 711.

"Toll roads are in a limited sense public roads, and are highways for travel, but we do not regard them as public roads in the largest sense, since there is in them a private proprietary right. The private right which turnpike companies possess in their roads deprives these ways, in many essential parts, of the character of public roads. It seems to us that, strictly speaking, toll roads owned by a private corporation, constructed and controlled for the purpose of private gain, are not public roads, though the people have the right to freely travel them on the payment of the toll prescribed by law. They are, of course, public in a limited sense, but not in such a sense as are the public ways under full control for the state; for public ways, in the strict sense, are completely under legislative control. *Elliott, Roads & S.*, p. 5." *Board of Shelby County Com'rs v. Castetter*, 33 N. E. 986, 987, 7 Ind. App. 309.

TOLL SERVICE.

The term "toll service," as used in relation to telephones, refers to that service which is rendered by placing at the disposal of the patron at the transmitting station and the one at the receiving station instruments connected by electric wires, by means of which the two are enabled to carry on a conversation, as distinguished from that telephone service accomplished by means of instruments placed in the residences or places of business of the patrons for their private and personal enjoyment and benefit, and which needs no agent or messenger to carry such service into execution, except the operator of the central office. *Central Union Telephone Co. v. Swoveland*, 42 N. E. 1035, 1039, 14 Ind. App. 341.

TOLL-THOROUGH.

"Toll-thorough" is a toll which is taken for passing over a highway in consideration of repair or other benefit done by the owner

of the toll, but without any interest or claim in the toll. *King v. Nicholson*, 12 East, 330, 340.

A "toll-thorough" is a toll which is demanded by an express grant, by custom or prescription, on a public highway in a public port, or for the use of public property. It is termed "toll-thorough" because the party claiming it is presumed to have had no original right to the place where he demanded toll. The claimant must show not only his right to toll by custom, prescription, or grant, but must show some consideration for it, some burden on himself, some benefit to the public, and that he or those under whom he claims had once a right to the locus in quo which had been commuted for the toll, and this consideration must be applied to the precise spot where toll is claimed. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 582, 9 L. Ed. 773, 938.

TOLL-TRAVERSE.

A "toll-traverse" is a charge originating in the liberty given to pass over the owner's soil. *King v. Nicholson*, 12 East, 330, 340.

"Toll-traverse" is a toll demanded for passing on or over the private property of the claimant, or using it in any other way, and is founded on the right which every man has to the exclusive enjoyment of what is exclusively his private property, its use by others being a sufficient consideration for the exaction of toll. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 582, 9 L. Ed. 773, 938.

TOMB.

The word "tomb" signifies, among other meanings, a monument or tombstone erected in memory of the dead, so that a provision in a will that an executor should expend a certain amount for a tomb for testatrix does not lapse because the body of deceased could not be recovered and deposited in it, but such provision should be used for the erection of a suitable monument. *Succession of Langles*, 29 South. 739, 750, 105 La. 89.

TON.

See "Gross Ton."

A "ton" is a certain weight in pounds or a certain weight or space by which the burden of a ship is estimated. *Reck v. Phoenix Ins. Co.*, 7 N. Y. Supp. 492, 54 Hun. 637.

A "ton" in weight and a ton in measurement are not the same thing. The expressions are not simply different terms to indicate the same idea. A ton in measurement is 40 cubic feet (*McCulloch Commercial Dic*

tionary; Webster's Dictionary). A ton in weight is 2,240 pounds. *Roberts v. Opdyke*, 40 N. Y. 259, 262.

The word "ton," as applied to the measurement of vessels, has a certain definite meaning, well settled by custom and by the navigation laws of the United States, and it means 100 cubic feet of interior space. *The Thomas Melville* (U. S.) 62 Fed. 749, 751, 10 C. C. A. 619.

A "ton" is understood in commerce to mean twenty hundredweight, each hundred consisting of 112 pounds. *Helm v. Bryant*, 50 Ky. (11 B. Mon.) 64, 65.

The word "ton," as used in chapter 6 of title 34, relating to the collection of duties upon imports, being the chapter on appraisal, when used in reference to weight, shall be construed as meaning twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. U. S. Comp. St. 1901, p. 1941.

In Pennsylvania 2,000 pounds avoirdupois weight constitute a ton. *Weaver v. Fegely*, 29 Pa. (5 Casey) 27, 70 Am. Dec. 151.

Twenty hundredweight, consisting of 100 pounds each, constitute a ton. Pol. Code Idaho, 1901, § 611.

Twenty hundredweight constitute a "ton." Pol. Code, § 3215; *Higgins v. California Petroleum & Asphalt Co.*, 120 Cal. 629, 631, 52 Pac. 1080, 1081.

By Sess. Acts 1841, p. 86 (Rev. Code 1845, p. 1077), a "ton" of hemp is 2,000 pounds avoirdupois, and cannot be shown to consist of a larger amount by evidence of custom. *Green v. Moffett*, 22 Mo. 529, 536.

As used in a contract for the purchase and sale of a certain number of tons of iron, the word "tons" should be construed in a suit at law to mean statute ton—2,000 pounds avoirdupois. *Many v. Beekman Iron Co.* (N. Y.) 9 Paige, 188, 195.

When parties contract for any material by weight, using terms that have come to us from the past with a different meaning, such as "ton," which had commonly been regarded as meaning 2,240 pounds, the mere fact that a state has undertaken to regulate weights and measures, and in discharge of such office has fixed the ton at 2,000 pounds, will not dispense with an obligation to furnish the old measure. When the ton is used to represent, for convenience or calculation, 2,000 pounds, the contract should, and usually does, so state it as per ton of 2,000 pounds, or per ton neat; but as coal and other cheap and heavy articles have never been sold by the pound as a unit for calculating its price, but by the ton, convenience of calculation has never required, nor has custom sanctioned, any reform, so called, or any change in the

amount so represented by this unit. *The Miantinomi* (U. S.) 17 Fed. Cas. 254, 256.

In an action of trover by a mortgagee to recover certain wire, described in the mortgage as "one ton of wire," it may be shown that the parties did not mean a precise ton by weight, but the mass of wire stored in a certain place, which they denominated a ton. *Barry v. Bennett*, 48 Mass. (7 Metc.) 354, 361.

TONIC.

A "tonic" is defined to be any remedy which improves the tone or vigor or the muscular fibers generally. Among the drugs or preparations which are classed as tonics are weak alcoholic beverages in very moderate quantities. A preparation labeled as a tonic containing alcohol and the bitter principle of the hop in proportions that made it a mild tonic instead of an intoxicating beverage is a tonic as that term is defined by standard authorities. It is common knowledge that physicians frequently prescribe some kinds of beer as a tonic. The word "tonic" in itself signifies to the common understanding a preparation having medicinal qualities; and where the proprietor of such a preparation labeled his product "Rochester Tonic," and put it on the market as such, it is liable, under the War Revenue Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], as a medicinal preparation or composition, to the tax named under that section. *United States v. J. D. Iler Brewing Co.* (U. S.) 121 Fed. 41, 42, 43, 57 C. C. A. 381.

TONNAGE.

See "Gross Tonnage"; "Net Tonnage"; "Registered Tonnage"; "Tax on Tonnage."

"Tonnage" is defined to be the cubical contents or burden of a ship in tons, or the amount of weight which one or several ships will carry. *Reck v. Phoenix Ins. Co.*, 7 N. Y. Supp. 492.

The modern meaning of the word "tonnage" is given correctly in *Wheaton's Law Dictionary* (see *Bouvier's Dictionary of Maritime Law*): "The capacity of a ship or vessel; the duties paid on the tonnage of a ship or vessel, which are also called tonnage." *Mayor of Washington v. Barnes* (U. S.) 6 D. C. 230, 232.

A marine insurance policy, warranting that the insured vessel should not load more than the "registered tonnage," refers to the vessel's carrying capacity as stated in the ship's papers under which she was sailing at the date of the policy, and not to the registered tonnage as fixed by United States law, the vessel being a foreign one. *Reck v. Phoenix Ins. Co.*, 29 N. E. 137, 130 N. Y.

160 (reversing *Beck v. Phoenix Ins. Co.*, 16 Hun, 344, 345).

Tonnage is the capacity of a vessel to carry cargo, and a charter of a ship's "whole tonnage" transfers to the charterer only the space necessary for that purpose. The registered tonnage of a vessel, as regulated by the act of Congress, is intended as a safe standard of her capacity to carry cargo, and is usually less than her actual tonnage. *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 405, 4 Am. Rep. 567 (citing *Hoe v. Groverman*, 5 U. S. [1 Cranch] 214, 236, 237, 2 L. Ed. 86; *Ashburner v. Balchen*, 7 N. Y. [3 Seld.] 262; *Cuthbert v. Cumming*, 10 Exch. 809, 814).

"Tonnage," as used in Const. U. S. art. 1, § 10, declaring that no state shall, without the consent of Congress, lay any duty on tonnage, means the duties paid on the tonnage of a ship or vessel, or on the capacity of a ship or vessel. *Alexander v. Wilmington & R. R. Co.* (S. C.) 3 Strob. 594, 595 (citing *Bouvier*).

"Tonnage" has long been an official term, intended originally to express the burden that a ship would carry in order that the various dues and customs which are levied on shipping might be levied according to the size of the vessel, or rather in proportion to her capacity of carrying burden; and hence the term, as applied to a ship, has become almost synonymous with that of size, and the word means the number of tons burden a ship or vessel will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authorities. *State Tonnage Tax Cases*, 79 U. S. (12 Wall.) 204, 225, 20 L. Ed. 370; *Homan's Com. & Nav. Dict.*; *Wheeling, P. & C. Transp. Co. v. City of Wheeling*, 99 U. S. 273, 284, 25 L. Ed. 412.

"Tonnage," as used in *Laws N. Y. 1877*, c. 315, regulating the rate of wharfage in New York and Brooklyn by the "tonnage" of the vessel, means the registered, and not the gross, tonnage of the ship. *The Craigendoran* (U. S.) 31 Fed. 87, 88.

TONNAGE DUTY.

A "duty on tonnage" is a duty or tax or burden imposed under the authority of the state, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence contribution claimed for the privilege of arriving and departing from a port of the United States. *Cannon v. City of New Orleans*, 87 U. S. (20 Wall.) 577, 581, 22 L. Ed. 417.

A "duty on tonnage" is a duty proportionate to the tonnage of vessels; a certain rate on each ton. As used in the federal Constitution it has a wider meaning, and in-

cludes any duty on the ship, whether a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. *Southern S. S. Co. v. Port of New Orleans*, 73 U. S. (6 Wall.) 81, 34, 18 L. Ed. 749.

A "duty of tonnage," within the strict definition of the term, is a tax graduated according to the capacity of the ship or vessel. Act March 31, 1869, authorizing the harbor masters to receive a percentage per ton on all vessels permitted to enter the waters of the bay of New York, or in the North river, within the limits of Jersey City and Hoboken, and load or unload or make fast to any wharf, was a duty on tonnage. *Hackley v. Geraghty*, 34 N. J. Law (5 Vroom) 332, 336.

A tonnage duty, as used in the federal Constitution prohibiting a state, without the consent of Congress, from levying "any duty of tonnage," is a duty on a vessel without any reference to the place where her owner resides, without regard to the jurisdiction within which the capital invested is owned. It is manifestly a tax on the boat as an instrument of navigation, and not a tax on the property of the citizens of the state. A state law, including steamboats as a portion of the property subject to taxation, is therefore not unconstitutional as imposing a tonnage duty. *Perry v. Torrence*, 8 Ohio, 521, 524, 32 Am. Dec. 725.

The term "duty of tonnage" was intended to mean that tax which all European and diverse free cities and ports were in the habit of levying on all vessels entering their ports in proportion to their tonnage, and this was what was known in the maritime and commercial world at the time of the adoption of the Constitution as a tonnage tax, or a duty on tonnage. A tonnage tax is also defined to be "a duty levied on a vessel according to the tonnage or capacity, without reference to where her owner resides. It is a tax on the boat as an instrument of navigation, and not a tax on the property of a citizen of the state, and the duty of tonnage which the Constitution prohibits the states from levying is any duty or tax on a ship, as such, without regard to the residence of her owner, whether it be a fixed sum on its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty when a ship, as an instrument of commerce, is required to pay a duty as a condition to her being allowed to enter or depart from a port or load or unload a cargo. *The North Cape* (U. S.) 18 Fed. Cas. 342, 344.

A tax upon vessels engaged wholly in the navigation of waters within the state, levied on such vessels, at the rate of a specific sum per ton of the registered tonnage, is a tax on the property of such vessels, and

not a duty of tonnage, within the meaning of Const. U. S. art. 1, § 10, providing that no state shall, without the consent of Congress, lay any duty of tonnage. *Lott v. Mobile Trade Co.*, 43 Ala. 578, 584.

Freight tax.

Tonnage duties are duties laid on the carrying capacity of vessels, the only means or instruments of distant commerce known at the time of the adoption of the federal Constitution, though doubtless the principle is applicable to railroad tonnage as a means of external commerce. The early act of Congress of July 20, 1790, regulating tonnage duties, provides that upon all ships or vessels which shall be entered in the United States from any foreign port or place there shall be paid the several and respective duties following, etc. The act of March 21, 1799, provides the rule for the measurement of the tonnage of vessels. The nature of the subject, the legislation, and practice of the government, and the well-known meaning of the terms used, render it clear that the act of 1864, imposing a tax on corporations for freight carried over their roads, is a tax on the business, and not a tonnage tax. *Commonwealth v. Philadelphia & B. R. Co.*, 62 Pa. (12 P. F. Smith) 286, 297.

License tax.

The duty of tonnage which the Constitution prohibits the states from levying is a duty or tax on a ship as such, which she is required to pay as a condition of her being allowed to enter or depart from a port or load or unload cargo, either upon her tonnage, her property, or as a license to her officers or crew. Act March 24, 1899, § 10, authorizing the state oyster commission to fix the license tax imposed on boats entitled to engage in oyster planting in certain tidal water in the state according to the tonnage measurement of the boats, does not constitute a duty on tonnage, within the meaning of the federal Constitution. *State v. Corson*, 50 Atl. 780, 783, 67 N. J. Law, 178.

Lock tolls.

Tolls imposed according to tonnage for the use of locks and canals is not a "duty of tonnage," within the prohibition of the Constitution. *Huse v. Glover*, 7 Sup. Ct. 813, 315, 119 U. S. 543, 30 L. Ed. 487.

Wharfage fees.

A duty on tonnage is a duty on a vessel for the privilege of entering a port, and does not prohibit wharfage. *Sweeney v. Otis*, 37 La. Ann. 520, 521.

A "duty of tonnage," within the constitutional provision that no state shall, without the consent of Congress, lay any "duty of tonnage," is a charge, tax, or duty on a vessel for the privilege of entering a port;

and though usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It does not include a charge for wharfage. *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 2 Sup. Ct. 732, 738, 107 U. S. 691, 27 L. Ed. 584 (quoted in *City of St. Louis v. Consolidated Coal Co.*, 59 S. W. 103, 105, 158 Mo. 342).

A "duty on tonnage" is a tax or charge imposed on vessels engaged in importing merchandise into the ports of the United States. It is a commercial regulation exclusively, being a duty on the vessel levied for the privilege of entering our ports as carriers. An act authorizing the establishment of rates of "wharfage" and their collection through the agency of a harbor master is not in conflict with the Constitution. *O'Conley v. City of Natchez*, 9 Miss. (1 Smedes & M.) 31, 47, 40 Am. Dec. 87.

Wharfage fees, regulated by the tonnage of vessels, when imposed by municipal authorities, are not a "tonnage tax," within the meaning of Const. U. S. art. 1, § 10, par. 3, prohibiting any state from laying any duty of tonnage without the consent of Congress. *Leathers v. Aiken* (U. S.) 9 Fed. 679, 681.

TOOK.

The word "took" in a charge that another took certain property is slanderous, as importing a felony, if spoken and understood as a charge of larceny. *Bornman v. Boyer* (Pa.) 3 Bin. 515, 519, 5 Am. Dec. 380.

The word "took" in a charge that another took money which had been stolen does not per se constitute a charge of larceny. *Justice v. Kirilin*, 17 Ind. 588, 589.

A charge that another "took corn" is not itself actionable, as importing a felony, as such words may be used equally well to import a mere trespass; but when the words are used in connection with other language charging the taking of corn out of a crib, and that the person taking the corn looked around to see if any person saw him, the words are actionable as importing a larceny. *Jones v. McDowell*, 7 Ky. (4 Bibb) 188.

The words, "I believe you took it," when spoken of and to another, are not actionable per se as imputing larceny, but they may be slanderous as having such meaning when considered in connection with extrinsic circumstances. *Alcorn v. Bass*, 46 N. H. 1024, 1025, 17 Ind. App. 500.

The words, "took my pocketbook from my pocket," do not import a charge of larceny, and therefore, when standing alone, they are not per se slanderous. *Bartow v.*

Brands, 15 N. J. Law (3 J. S. Green) 248, 250.

TOOK A RECESS.

"Took a recess," as used in reference to a board of county supervisors, which, not having finished the business pending before it, took a recess from time to time, is equivalent to "adjourn." The object of an adjournment to a given time and of a record thereof is to give to persons having business before the board notice of the time when they may have a hearing, as well as to retain the power of the board to act during the remainder of the term by showing that jurisdiction so to do is still claimed. These objects are as well attained by the announcement that the board takes a recess until a specified hour or day as by the use of the term "adjourn." *Ex parte Mirande*, 14 Pac. 888, 890, 73 Cal. 365.

The words "took, stole and carried away," in an instruction that defendant is guilty of grand larceny if she stole, took, and carried away the property, is bad in failing to state the nature of the taking, as the words are not as particular as the words used in a statute which requires that a taking must be wrongful and with a felonious intent in order to constitute a sufficient indictment. *State v. Campbell*, 18 S. W. 1109, 108 Mo. 611.

TOOLS—TOOLS OF TRADE.

See "Common Tools of Trade"; "Farming Tools and Utensils"; "Mechanical Tools"; "Necessary Tools"; "Track Tools"; "Working Tools." As fixtures, see "Fixture."

Barbers' chairs.

Within an act exempting from attachment and levy of execution such suitable tools as are necessary for upholding life, the chair in which a barber placed his customers, operated by direct application of manual force, is as much a tool as the blacksmith's anvil or vice, the shingle maker's shaving horse, the wood sawyer's sawhorse, or the photographer's head rests. *Allen v. Thompson*, 45 Vt. 472, 474.

A barber's chair and mirror, when used by him in his business, are exempt as being tools of a mechanic used in his occupation. *Terry v. McDaniel*, 53 S. W. 732, 733, 103 Tenn. 415, 46 L. R. A. 559; *Fare v. Cooper*, (Tex.) 34 S. W. 341.

Bicycle.

"Tools," as used in Rev. St. 1895, art. 2397, providing that tools, apparatus, and books belonging to any trade or profession of a debtor shall be exempt from execution,

does not include a bicycle used by an architect and building superintendent, though useful and convenient in the prosecution of his business. As there used, the word only includes such tools as properly belong to and are essential to the conducting of the business. For instance, the printing press, type, cases, etc., are tools belonging to, and are exempt to, a printer; the awl, last, etc., to a shoemaker; the forge, anvil, tong, hammers, etc., to the blacksmith; but the word does not include every convenience that might be beneficial in carrying on a particular business. *Smith v. Horton*, 46 S. W. 401, 402, 19 Tex. Civ. App. 28.

Boat and fishnet.

A boat and net are exempt as tools of the trade of a fisherman. *Sammis v. Smith* (N. Y.) 1 Thomp. & C. 444, 446.

Buggy and harness.

A single man, who is a land, loan, and insurance agent, cannot claim a buggy and harness which he uses in his business as exempt from execution as "tools and apparatus" belonging to his trade and profession. *Cates v. McClure*, 66 S. W. 224, 27 Tex. Civ. App. 459.

"Tools and team," within the meaning of a statute exempting from execution the tools and team of a debtor, includes a buggy wagon used by a physician in visiting his patients. *Van Buren v. Loper* (N. Y.) 29 Barb. 388, 389.

"Tools of his occupation," within the meaning of Gen. Laws, c. 224, § 2, exempting the tools of a debtor's occupation from attachment, includes a physician's wagon and harness used by him in riding to visit his patients, and reasonably necessary for his practice, though they do not come within the strict definition of the term "tools." *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

Building.

The "tools and instruments" exempt from execution by Code 1873, § 3072, means the tools or instruments used or handled by the mechanic, and does not include the building or place where the trade is pursued. Thus, the building in which a photographer carries on his business is not exempt, even though it is personal property. *Holden v. Stranahan*, 48 Iowa, 70, 71.

Camera.

The term "tools of his occupation," within the meaning of a statute exempting to a debtor the tools of his occupation, to a certain value, does not include a daguerreotype apparatus which the owner has ceased to use for the taking of likenesses, and is using only to teach the art to another with a view

to the sale of the chattel. *Norris v. Hoitt*, 18 N. H. 198, 198.

Cheesemaking articles.

Articles of property used by the owner, a woman, and by her sister, in making cheese, such as cheese vats, cheese presses, curd knives and the like, are "tools and implements or instruments," within the meaning of the exemption laws. *Fish v. Street*, 27 Kan. 270, 272.

Commercial books and office fixtures.

"Tools and instruments," within the meaning of the statute exempting from execution the tools and instruments necessary for the exercise of a trade or profession by which the debtor gains a living, includes the commercial books and counting house and furniture of the merchant, and an iron chest therein in which his books and papers are kept. *Farmers' & Merchants' Bank v. Franklin*, 1 La. Ann. 393, 394.

Cornet.

Under Gen. St. c. 133, § 32, cl. 5, exempting from attachment a debtor's tools and implements of trade necessary for carrying on his trade or business, where a debtor earned his living partly by working as a tinner and partly as a musician, playing on his cornet at balls and parties, his cornet was a tool of his trade, and exempt. *Baker v. Willis*, 123 Mass. 194, 195, 25 Am. Rep. 61.

Crucible.

"Tools," as used in Vermont statutes making it a misdemeanor to have in one's possession any tool for the purpose of counterfeiting coins, etc., does not include a crucible used as a pot for melting lead. *State v. Bowman*, 6 Vt. 594, 596.

Dray wagon.

Rev. St. § 2335, exempting from execution all implements of husbandry and "all tools, apparatus, and books belonging to any trade or profession," includes a wagon owned by a drayman and used by him in his business. *Cone v. Lewis*, 64 Tex. 331, 333, 53 Am. Rep. 767.

Farm implements.

Implements of husbandry used in tilling the land are not within St. 1805, c. 100, exempting the tools of a debtor from attachment and execution. *Dailey v. May*, 5 Mass. 313, 314.

"Tools," as used in Pamph. Laws, c. 2804, § 1, providing that tools of the occupation of a debtor to the amount of \$30 shall be exempt from attachment, means, "such implements of husbandry or of manual labor as are usually employed in and are appropriate to the business of the several trades or

classes of the laboring community and according to the wants of their respective employment or profession, whether farmer, mechanic, manufacturer, or, in fact, any artisan or laborer who may require the use of such helps to obtain his living. In the country, farming or gardening is, or ought to be, a part of a man's business, and the soundest policy, as well as the language of the statute, forbids the taking of any of the tools so necessary to all good husbandry." Hence the plow, wheels, axletree, etc., harrow, and drag used by a farmer are "tools of his occupation," within the meaning of the statute. *Wilkinson v. Alley*, 45 N. H. 551, 552.

"Tools," as used in a statute exempting from attachment such suitable apparel, bedding, tools, etc., as may be necessary for upholding life, should be construed to include such farm tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, and other tools of that character; but it does not include machinery or implements used by oxen and horses, as carts, plows, harness, mowers, and reapers. *Garrett v. Patchin*, 29 Vt. (3 Williams) 248, 249, 70 Am. Dec. 414.

"Tools of his occupation," within the meaning of a statute exempting to a debtor the tools of his occupation, includes his team, wagon, sled, and harness, if he is engaged in the business of farming. They are included within the term as much as the plow, cartwheels, and chains of a farmer. *Rice v. Wadsworth*, 59 N. H. 100.

Furniture.

"Tools, implements, and fixtures," within the meaning of a statute exempting from execution tools, implements, and fixtures necessary for carrying on the trade or business of a debtor, includes a clock, stove, screen, pitcher, and table cover belonging to a milliner, if the jury find them necessary for carrying on the business. *Woods v. Keyes*, 96 Mass. (14 Allen) 236, 237, 92 Am. Dec. 766.

A mirror is a necessary tool to a milliner. *Wilkinson v. Alley*, 45 N. H. 551, 552.

Harness.

In Black's Law Dictionary it is said that "the usual meaning of the word 'tool' is an instrument of manual operation; that is, an instrument to be used and managed by the hand instead of being moved and controlled by machinery." In English's Law Dictionary we find the following definition of the word "tool"; "An implement used by the hand in working. A hand instrument necessary to one's trade. According to Bouvier, this word, as used in exemption laws, 'includes any instrument necessary for the prosecution of trade'; and a set of

harness does not fall within the words "common tools of trade," as used in the Georgia statute exempting such tools of trade from execution. *Kirksey v. Rowe*, 40 S. E. 990, 114 Ga. 893, 88 Am. St. Rep. 65.

Horse.

"Tools and instruments," within the meaning of the statute exempting from execution the tools and instruments necessary for the exercise of the trade or profession by which the debtor gains his living, does not include the horse of a physician. His surgical instruments, those for the preparation of medicines usually employed by country practitioners, and possibly, under the dictum in *Milton's Case*, 2 Rob. (La.) 81, his medical library, are protected by the Code; but we cannot go further, and treat as tools and instruments of his profession all other things that contribute to its convenient exercise. *Hanna v. Bry*, 5 La. Ann. 651, 655, 52 Am. Dec. 606.

Lamp, etc., of jeweler.

Under Gen. St. pp. 473, 474, § 3, providing that the necessary tools and implements of any person, used and kept for the purpose of carrying on his trade or business, shall be exempt from execution, etc., a lamp and other articles kept by a watchmaker and jeweler are exempt, provided such articles are necessary for his use in carrying on the business of making and repairing watches and jewelry. *Bequillard v. Bartlett*, 19 Kan. 382, 386, 27 Am. Rep. 120.

Joists.

A joist which workmen are placing in a building does not come within the term "tools." *Griffiths v. New Jersey & N. Y. R. Co.*, 25 N. Y. Supp. 812, 5 Misc. Rep. 320.

Lathe.

"Tools or implements," within the meaning of Code Civ. Proc. § 690, subd. 4, exempting from execution the tools or implements of a mechanic necessary to carry on his trade, includes a turning lathe, which is easily turned by one man, and such as is ordinarily used by mechanics. *In re Robb*, 33 Pac. 890, 99 Cal. 202, 37 Am. St. Rep. 48.

Law books.

Law books are common tools of trade. *Lenoir v. Weeks*, 20 Ga. 596, 597.

Tools and instruments, within the meaning of Code Prac. art. 641, exempting the tools and instruments necessary for the exercise of the trade or profession of the debtor from seizure, being intended to encourage such trade or profession by enabling the debtor to sustain himself and family by his own industry, includes the books of professional men. The lawbooks of a lawyer are perhaps not any less necessary to the proper ex-

ercise of his profession than the tools of a mechanic are to the latter, and enable him to carry on his trade. *Lambeth v. Milton* (La.) 2 Rob. 81.

Logging tools.

"Tools and implements," within the meaning of exemption statutes exempting tools and implements when necessary to carry on the debtor's business, includes a logging capstan and cable and tools used in logging by one engaged as a farmer, if necessary to be used in clearing and improving his farm. *State v. Creech*, 51 Pac. 363, 18 Wash. 186.

Machines.

"Tools or implements," within the meaning of the statute exempting from execution the tools and implements of a debtor, include various machines for making boots, owned by the debtor and used in his shop, although he employs four or five men to help him. *Daniels v. Hayward*, 87 Mass. (5 Allen) 43, 44, 81 Am. Dec. 731.

Comp. St. p. 208, § 1, exempting from execution tools necessary for upholding life, does not include a portable machine called a "billy and jenny," used for spinning and manufacturing cloth. *Kilburn v. Demming*, 2 Vt. 404, 405, 21 Am. Dec. 543.

The statute exempting tools for the exercise of a trade or profession from execution cannot be made to apply to the multifarious machinery and implements constituting an extensive factory, and requiring the attendance and skill of a large number of operatives. *Boston Belting Co. v. Ivens*, 28 La. Ann. 695, 696.

"Tools," as used in Rev. St. c. 114, § 88, exempting the tools of any debtor from execution, etc., does not comprehend what in popular language are known as "machines." *Knox v. Chadbourne*, 28 Me. (15 Shep.) 180, 178, 48 Am. Dec. 487.

A machine for shaving and splitting leather, operated either by hand, steam, or water, costing \$250, and weighing from 600 to 900 pounds, operated by turning a crank, and, when worked by hand, requiring two men to work it, and which had been fastened to the floor by cleats when in operation, is not a "tool necessary for upholding life," within the Vermont statute exempting such tools from attachment and execution, such apparatus being a machine. *Henry v. Sheldon*, 35 Vt. 427, 429, 82 Am. Dec. 644.

"Tools of trade," in Tariff Act Oct. 1, 1890, par. 686, includes machines used in the manufacture of gloves and imported by a glove manufacturer, which he himself, his father, and his two brothers had worked in Germany, intended to transplant his business in the United States, and to manufacture

gloves in the same way. In *re Lindner* (U. S.) 66 Fed. 723.

St. 1855, c. 264, which exempts from levy on execution the tools and implements, materials, stock, and fixtures of the debtor necessary for carrying on his trade or business, does not include machinery, materials, stock, and fixtures of a paper mill. The statute above cited is not applicable to persons engaged in and conducting large and extended manufacturing operations, requiring the co-operation of many persons in various parts of the work to be done, and a heavy outlay and expenditure for the procurement of machinery indispensable to its accomplishment. *Smith v. Gibbs*, 72 Mass. (6 Gray) 298, 300.

Mechanic's tools.

Mechanic's tools used by a farmer in repairing his farming implements are exempt as tools of trade. *Garrett v. Patchin*, 29 Vt. (3 Williams) 248, 249, 70 Am. Dec. 414.

Mill saw.

St. 1821, c. 95, exempting the tools necessary for a mechanic, etc., does not include a mill saw which is not worked by hand or muscular power, but is part of a mill propelled by water. *Batchelder v. Shapleigh*, 10 Me. (1 Fairf.) 135, 136, 25 Am. Dec. 213.

Patterns.

A tool is any instrument, such as a hammer, saw, plane, file, and the like, used in the manual arts to facilitate mechanical operation; any instrument used by the craftsman or laborer at his work; any instrument used for service; and, as used in an insurance policy designating the risk as on "tools used in the manufacture of boots and shoes," includes patterns used for making boots and shoes. *Adams v. New York Bowery Fire Ins. Co.*, 51 N. W. 1149, 1151, 85 Iowa, 6.

"Tools," as used in a policy of fire insurance issued by defendants on plaintiff's fixed and movable machinery, engine, lathes, and tools, means instruments of manual operation—that is, instruments to be used and managed by the hand, instead of being moved and controlled by machinery—and includes all patterns used in moulding castings, which from their size and shape admit of being applied and managed by the hands of man; and they are none the less tools for the reason that sand is pressed and compacted around the pattern, for it is still an instrument managed directly by the hand for the purpose of performing one of the processes of manufacture. *Lovewell v. Westchester Fire Ins. Co.*, 124 Mass. 418, 419, 26 Am. Rep. 671.

Piano.

A piano is a tool necessary to a music teacher. *Amend v. Murphy*, 69 Ill. 337, 339.

Pool table.

In construing the word "tools" in exemption laws, "a pool table in a saloon is held not to be a tool, upon this ground; that the saloon could run without a pool table, and a pool table could be run without a saloon, but not very successfully. *Goozen v. Phillips*, 12 N. W. 889, 890, 49 Mich. 7.

Printing press.

A printing press and types and other instruments used in printing are not tools, and entitled as such to exemption from sale on execution under Vermont Statutes. *Spooner v. Fletcher*, 3 Vt. 133, 136, 21 Am. Dec. 579.

A printing press owned by a practical printer, editor, and publisher of a newspaper, and necessary to carry on his trade or business as a printer, is not a "tool," within the meaning of Code, § 468, exempting from taxation tools of any mechanic necessary to carrying on his trade. *Frantz v. Dobson*, 2 South. 75, 76, 64 Miss. 631, 60 Am. Rep. 68.

St. 1805, c. 10, providing that the tools of any debtor necessary for his trade or occupation should be exempted from attachment and execution, cannot be construed to include printing types and forms of a printer. The word "tool" is not understood, either in its strict meaning or popular use, as designating complicated machinery, which in order to produce any useful effect must be worked by combining several distinct parts or separate pieces, the aid of more than one hand being necessary to perform the operation, all which is required in the use of a printing apparatus. Nor can the several parts be denominated "tools," as they cannot be used separately, but, like the ax and its handle, must be united to accomplish any work. The press and forms may with as much propriety be denominated "tools" as the types. All are necessary component parts of the machinery for printing. *Danforth v. Woodward*, 27 Mass. (10 Pick.) 423, 427, 20 Am. Dec. 531; *Buckingham v. Billings*, 18 Mass. 82, 85.

Exemption Act (Comp. Laws 1879, c. 38), § 3, subd. 8, provides that necessary tools and implements of any mechanic or other person used and kept for the purpose of carrying on his trade or business, to the extent of \$400, shall be exempt, etc. Held that, though the word "tools" alone did not include printing press and printing materials, such presses and materials were clearly within the meaning of "implements," as the term was used to extend the term "tools" in the statute referred to. *Bliss v. Vedder*, 7 Pac. 599, 601, 34 Kan. 57, 55 Am. Rep. 237.

"Tools," within the meaning of Connecticut statutes exempting tools of a person from taxation, means such tools as are nec-

essary for upholding life, and may include a printing press, cases, types, etc., and such apparatus necessary to uphold life. *Patten v. Smith*, 4 Conn. 450, 454, 10 Am. Dec. 166; *Davidson v. Hannon*, 67 Conn. 312, 314, 34 Atl. 1050, 34 L. R. A. 718, 52 Am. St. Rep. 282.

"Tools," as used in Const. art. 2, § 32, providing for exemption of household furniture, beds and bedding, family library, arms, carts, and wagons, farming implements, tools, neat cattle, work animals, swine, goats, and sheep, not to exceed in value in the aggregate the sum of \$500, means instruments of manual operation, particularly such as are used by farmers and mechanics, and is not to be understood, either in strict meaning or popular use, as designating complicated machinery, which in order to produce any useful effect must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation, all which is required in a printing apparatus. Nor can the several parts be designated "tools," as they cannot be used separately, but, like the ax and its handle, must be united to accomplish any work. The press and forms with as much propriety could be designated "tools" as the types. All are the necessary component parts of the machinery for printing; besides, types cannot be used as tools of trade by a printer if he is stripped of the other parts of his printing apparatus; so that the exemption from attachment of the types alone would not enable him to pursue his trade, and thereby earn his subsistence, which was the object of the statute. *Oliver v. White*, 18 S. C. 235, 241.

"Tools," as used in Code, § 797, exempting from taxation the tools of any mechanic, not exceeding \$300 in value, should be construed to include the press, types, composing stones, and other implements necessary for a printer to carry on his business. It does not include the costly machinery in use in large printing establishments, such as power presses operated by steam, but the ordinary hand press of a printer should be included. *Smith v. Osburn*, 5 N. W. 681, 682, 53 Iowa, 474.

2 Pasch. Dig. art. 5487, providing that all tools and apparatus belonging to any trade or profession shall be exempt from execution, is to be construed as including the printing press, types, cases, etc., of the publisher of a newspaper, which are essential to the conduct of the business. *Green v. Raymond*, 58 Tex. 80, 83, 44 Am. Rep. 601.

"Tools or implements of trade," within the meaning of a statute exempting all tools or implements of trade from execution, includes the press and type of a practical printer, which are necessarily used by him and

his journeymen in the publication of a weekly newspaper. *Sallee v. Waters*, 17 Ala. 482, 486.

"Tools or apparatus" within the meaning of a statute exempting the tools and apparatus of a debtor from forced sale, includes a press and paper cutter owned by a job printer, and necessary for his business. *St. Louis Type Foundry v. Taylor* (Tex.) 35 S. W. 691, 692.

Rifle.

A rifle gun is not excepted from the sale under execution under St. 1839, as a tool, unless perhaps it appears that the owner is a hunter or forester. *Choate v. Redding*, 18 Tex. 579, 581.

Safe.

Sayles' Civ. St. art. 2337, exempting from execution a tool or apparatus, belonging to any trade or profession, includes an iron safe used by an insurance agent to store his policies, etc. *Betz v. Maier*, 33 S. W. 710, 712, 12 Tex. Civ. App. 219.

Code Civ. Proc. § 690, subd. 4, exempting from execution the tools or implements of a mechanic or artisan necessary to carry on his trade, includes a safe used by a jeweler and watchmaker, where evidence showed that a safe was necessary to the profitable conduct of his business, and that customers would not leave their watches to be repaired unless one were used. In re *McManus' Estate*, 25 Pac. 413, 87 Cal. 292, 10 L. R. A. 567, 22 Am. St. Rep. 250.

Sewing machine.

The terms "tools, implements, and fixtures," in Gen. St. c. 133, § 32, exempting tools, implements, and fixtures from execution, includes a sewing machine. *Rayner v. Whicher*, 88 Mass. (6 Allen) 292, 294.

"Tools and instruments," in a statute which exempts the tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade, includes two sewing machines kept by a tailor and personally used in his trade, if reasonably necessary therefor. *Cronfeldt v. Arrol*, 52 N. W. 857, 50 Minn. 327, 36 Am. St. Rep. 648.

Sign.

The phrase "tool or implement of trade," in the statute of March 7, 1797, authorizing the levy of execution on the goods or chattels of a debtor, excepting tools, does not include a wooden boot hung up at the door of a boot and shoe maker's shop; the same not being a tool of his trade, but merely a symbol thereof. *Wallace v. Barker*, 8 Vt. 440, 441.

Sled.

A sled used by the debtor in drawing wood and timber cut from his land, to market for sale, is exempt from attachment as a "tool of his occupation." *Parshley v. Green*, 58 N. H. 271, 272.

"Tools of plaintiff's occupation," within the meaning of a statute exempting such tools from execution, includes a sled used by the debtor in drawing wood and timber cut from his land, to market for sale, but does not include a wagon used only for convenience or pleasure. *Parshley v. Green*, 58 N. H. 271, 272.

Storekeeper's equipment.

Articles necessary in carrying on a mercantile business are not "tools and implements," within St. c. 171, § 34, cl. 5, so as to be exempt from taxation under such statute. *Desmond v. Young*, 53 N. E. 151, 173 Mass. 90.

The use of the words "tools and implements," as used in Rev. St. 1898, § 2982, exempting the tools, implements, and stock in trade of any mechanic, merchant trader, or other person used to carry on his trade or business, not exceeding \$200, should be construed to cover such articles as are usually used in, and are reasonably necessary to carry on, the trade or business of a merchant, not exceeding the value of \$200, actually kept for that purpose. Therefore a merchant may select a safe, showcases, and like articles as tools and implements to the amount allowed, in lieu of stock in trade. *Cunningham v. Britson*, 77 N. W. 740, 742, 101 Wis. 378.

In construing a statute exempting from execution or attachment "the tools and implements of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business," the court said "it would be a very strained construction to say that tools and implements were necessary to a merchant in the transaction of his business, and specially to include within the meaning of this act, under that head, such articles as desks and counters, jars, paper, boxes, barrels, and scales, and I think cannot be so held." *Grimes v. Bryne*, 2 Minn. 89, 105 (Gil. 72, 88).

The tools or implements, materials, stock, and fixtures of a debtor necessary for carrying on his trade or occupation, which are exempted from execution by St. 1855, c. 264, do not include the stock of goods, scales and measures, horse, wagon, and harness of a shopkeeper in the country. The clause in this section which exempts from attachment the tools and implements of the debtor has never been so construed as to embrace that class of persons who are engaged merely in the business of buying and selling articles

of merchandise. On the contrary, it has always been considered as having been intended specially for the benefit of those to whom, on account of their peculiar pursuits and avocations, tools and implements are essential to make their labor available, and to enable them to complete the work which they undertaken to perform. *Willson v. Elliot*, 73 Mass. (7 Gray) 69, 70.

Surgical instruments.

"Tools," as used in a statute exempting tools from execution, includes the surgical instruments of a physician. *Robinson's Case* (N. Y.) 3 Abb. Prac. 466, 467.

Typewriter.

A typewriter is not exempt from execution as a tool or apparatus belonging to the profession of a physician, though he uses it in correspondence and advertising his business. *Massie v. Atchley*, 60 S. W. 582, 583, 28 Tex. Civ. App. 114.

Wagon.

Acts 1842, exempting from execution the tools and implements of any mechanic necessary to the carrying on of his trade, does not include a wagon. *Morse v. Keyes* (N. Y.) 6 How. Prac. 18, 21.

The term "tools, implements, materials, stock, or fixtures," necessary for carrying on a debtor's business, which are exempted from execution in the statute, does not include a wagon with patent couplings attached, used by the owner in carrying on his business of selling patent couplings. *Gibson v. Gibbs*, 75 Mass. (9 Gray) 62.

Watch and chain.

Gen. St. c. 66, § 279, exempting from execution the "tools or instruments" of any mechanic or other person used and kept for the purpose of carrying on his trade, cannot be construed to include a watch and chain of a cigarmaker, for they are not instruments of such person for carrying on his trade, for the trade is one which necessarily involves the employment of no one besides himself. *Rothschild v. Boelter*, 18 Minn. 361, 362 (Gil. 331, 332).

TOON.

"Toon," as used by a testator in devising all his interest in real estate described to be "60 acres, Sc. 25, toon 7," etc., means "town." *Chambers v. Watson*, 14 N. W. 839, 60 Iowa, 336, 46 Am. Rep. 70.

TOP.

"Top," as the term is used in the mining law, refers to that part of a lode which

comes nearest to the surface. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44, 46.

"Top of a vein," as used in an act of Congress providing that when a title or patent and the side and end lines of a mining claim cover the "top" or apex "of a vein" of mineral matter the party pursuing the vein in a downward direction may follow the vein as long as he can find it, and so long as it is the same vein, means the highest end or termination of the vein, and this is so even if at any intermediate point or points where the vein is continuous it rises higher than such highest end, it being essential to such top or apex that there be no vein continuing beyond it. It must be the end of the vein which approaches nearest the surface. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 40, 43.

"Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver v. Louisville*, defines 'top' or 'apex' as the highest or terminal point of a vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. Chief Justice Beatty, of Nevada, who is mentioned in the report of the public lands commission of 1879-80 as one of the ablest jurists who has administered mining law, in his letter to that commission says, after defining dip or force of strike, the top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure. According to this definition, the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes at right angles to the strike, the top or apex of each section is the highest part of a vein between the planes that bound the section; but if the dividing planes are not vertical, or not at right angles, to a vein which departs at all from a perpendicular in its downward course, then the highest part of a vein between such planes will not be the top or apex of the section which they include. Report Public Lands Commission, 399. The word 'top,' while including apex, may also include a succession of points; that is, a line so that by the top of a vein would be meant a line connecting a succession of such highest points or apices, thus forming an edge." *Duggan v. Davey*, 26 N. W. 887, 901, 4 Dak. 110.

TOP AND BOTTOM DICE.

The words "top and bottom dice," applied to a game, signifies no class of acts which can be known by the public or the courts. The words do not inform one as to what class of acts they are which constitute top and bottom dice, and are not sufficiently

definitive to create a crime; being words which do not convey a fixed or ascertainable meaning in law or in English. A law is a rule of action prescribed. A word which has no fixed meaning cannot constitute a rule of action, for the connotation is not definite, nor does it prescribe either to the public or the courts what acts are or are not criminal." *Harland v. Territory*, 13 Pac. 453, 457, 3 Wash. T. 131.

TOP BUGGIES WITH POLES.

The words "top buggies with poles," in a contract for the purchase of top buggies with poles, have a meaning understood by the trade, which must be adopted in enforcing the contract, and therefore evidence that the words mean a common grade of buggies is admissible. *Louis Cook Mfg. Co. v. Randall*, 17 N. W. 507, 510, 62 Iowa, 244.

TOPPED.

A herd of cattle is said to be "topped" when the best cattle are picked out, leaving only the inferior ones. *Griffith v. Bergeson*, 88 N. W. 451, 115 Iowa, 279.

TORMENT.

In laws relating to cruelty to animals the word "torment" includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted. Code N. O. 1883, § 2490; Rev. St. Me. 1883, p. 911, c. 124, § 49; Ann. St. Ind. T. 1899, § 1298. Every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue when there is a reasonable remedy or relief. Rev. St. Wyo. 1899, § 2287; Bates' Ann. St. Ohio 1904, § 3721; Mills' Ann. St. Colo. 1891, § 117.

The term "torment" does not per se include the mere fact of driving a sick, sore, lame, or disabled horse, and the driving of such a horse directly to its stable is not an offense, or driving it for exercise, or driving it carefully, in a manner proportioned to its condition, where it has become disabled, lame, or sick on the road. *Stage Horse Cases* (N. Y.) 15 Abb. Prac. (N. S.) 51, 64.

TORNADO.

The words "tornado" and "hurricane" are synonymous, and mean a violent storm, distinguished by the vehemence of the wind and its sudden changes. A hurricane is a very high wind. So that an allegation in an answer denying that the loss was caused by a tornado or hurricane, but stating that it was caused by a very high wind, admits that it was caused by a tornado or hurricane.

Queen Ins. Co. v. Hudnut Co., 35 N. E. 397, 398, 8 Ind. App. 22 (citing Webster's Dict.).

"A 'tornado' is defined by Webster as a violent gust of wind, or a tempest distinguished by a whirling, progressive motion, usually accompanied by thunder, lightning, and torrents of rain, and commonly of short duration and small breadth; a hurricane. Other dictionaries give substantially the same definition, and that it is generally accompanied by thunder and lightning and rain or hail, and appears to have an electric origin, so that whether a loss was caused by a tornado or the lightning accompanying it is a matter for the jury. Spensley v. Lancashire Ins. Co., 11 N. W. 894, 897, 54 Wis. 433.

TORT.

See "Maritime Tort"; "Personal Tort."

Action and judgment for tort as property, see "Property."

Action for as civil action, see "Civil Action—Case—Suit—etc."

Generally speaking, a "tort" is a wrong, and obviously a tortious act is not more than a wrongful act; but, in the language of the books, a tortious act consists of the commission or omission of an act by one without right, whereby another receives some injury, directly or indirectly, in person, property, or reputation. *Hayes v. Massachusetts Mut. Life Ins. Co.*, 18 N. E. 322, 325, 125 Ill. 626, 1 L. R. A. 303.

"Tort" may be defined to be an injury or a wrong committed with or without force to the person or property of another, and such injury may arise by either the nonfeasance, malfeasance, or misfeasance of the wrongdoer. *Gindele v. Corrigan*, 22 N. E. 516, 517, 129 Ill. 582, 16 Am. St. Rep. 292.

While a tort, perhaps, has never been accurately defined, and, from its nature, may be incapable of an exact definition, the nearest approach to it, it is believed, has been made by Sir Frederick Pollock in summing up his normal idea of it, which is as follows: "Tort is an act or omission (not being merely the breach of duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways: (a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of. (b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting. (c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and pre-

vented. (d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely, or within limits, to avoid or prevent." *Galveston, H. & S. A. Ry. Co. v. Hennigan (Tex.)* 76 S. W. 452, 453.

The term "tort" has a signification somewhat similar to wrong, and is an unlawful act injurious to another, independent of contract. Torts may be committed with force, as a trespass, which may be an injury to the person, such as assault, battery, and imprisonment; or they may be committed without force. Torts of this latter kind are to the absolute or relative rights of persons, or to personal property in possession or reversion. These injuries may be either by nonfeasance, malfeasance, or misfeasance. *Philadelphia & Havre de Grace Steam Towboat Co. v. Philadelphia, W. & B. R. Co. (U. S.)* 19 Fed. Cas. 474, 475.

A person commits a tort who does some act forbidden by law, if that act causes another substantial loss beyond that suffered by the rest of the public. *City Trust, Safe Deposit & Surety Co. of Philadelphia v. American Brewing Co.*, 67 N. E. 62, 63, 174 N. Y. 486.

A tort may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. *Civ. Code Ga.* 1895, § 3807; *Reid v. Humber*, 49 Ga. 207, 208.

"Torts" may be divided into two general classes: The first, designated as "property torts," embracing all injuries and damages to the property, real or personal; the second, known as "personal torts," including all injuries to the person, whether to reputation, feelings, or the body. *Mumford v. Wright*, 55 Pac. 744, 748, 12 Colo. App. 214.

As chose in action.

See "Chose in Action."

Damage necessary.

In view of the law, a wrong without resulting damages is not a tort; and this is true of a fraud, whether inhering in a contract or not. *Carpenter Paper Co. v. News Pub. Co.*, 87 N. W. 1050, 1051, 63 Neb. 59.

To constitute a tort, two things must concur—a wrongful act committed by the defendant, and proximate legal damage to the plaintiff. *Trow v. Thomas*, 41 Atl. 652, 654, 70 Vt. 580.

To constitute a tort two things must concur—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant. *Wright v. Chicago & N. W. R.*

Co., 7 Ill. App. (7 Bradw.) 483, 445; *Sprague v. Heaps*, Id. 447, 448.

As private wrong.

A private wrong is a tort, and a tort is defined as a private or civil wrong or injury. *Tomlin v. Hildreth*, 47 Atl. 649, 651, 65 N. J. Law, 438.

A tort is a private wrong sustained by some person or body of persons. *Gorman v. Budlong*, 49 Atl. 704, 706, 23 R. I. 169, 55 L. R. A. 118, 91 Am. St. Rep. 629.

A tort is defined to be a civil or private wrong or injury. It consists of injuries of omission or commission, done to individuals. Every illegal obstruction in a highway is a nuisance, and a nuisance is a tort. This is the rule when one owns property which involves injury to the property or other right or interest of his neighborhood. *Merrill v. City of St. Louis*, 83 Mo. 244, 255, 53 Am. Rep. 576 (citing 1 Hilliard, Torts, 577).

As wrong independent of contract.

A tort, in its legal sense, is a wrong independent of contract. *Bouv. Dict. Mobile Life Ins. Co. v. Randall*, 74 Ala. 170, 176; *International Ocean Telegraph Co. v. Saunders*, 14 South. 148, 151, 32 Fla. 434, 21 L. R. A. 810; *Clark v. Gates*, 87 N. W. 941, 942, 84 Minn. 381; *Civ. Code Ga.* 1895, § 3807. This broad definition, when correctly understood, is entirely consistent with the well-settled general proposition that in certain relations duties are imposed, the breach of which is regarded as a tort, though the relations themselves are formed by contract, and the contract may cover the same ground. *Haohle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21, 24.

"Tort" denotes an injury inflicted otherwise than by a mere breach of contract. *Barkley v. Williams*, 64 N. Y. Supp. 318, 319, 30 Misc. Rep. 687; *Jones v. Hunt*, 12 S. W. 832, 833, 74 Tex. 657.

A tort is defined to be any wrong not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer. *Denning v. State*, 55 Pac. 1000, 1002, 123 Cal. 316 (citing *Cooley*, Torts, p. 2).

The word "tort" means nearly the same as the expression "civil wrong." It denotes an injury inflicted otherwise than by a mere breach of contract, or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties. *Louisville & N. R. Co. v. Spinks*, 30 S. E. 968, 969, 104 Ga. 692.

The essence of a tort consists in the violation of some duty to an individual, which

duty is a thing different from the mere contract obligation. *Shirk v. Mitchell*, 36 N. E. 850, 853, 137 Ind. 185 (citing *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382).

A tort is a breach of a duty which the law, in distinction from mere contract, has imposed, yet the imposing of it may have been the cause of the contract, or because of it and something else combining, when otherwise it would not have created the duty. In such a case commonly the party injured by nonfulfillment of the duty may proceed against the other for its breach, or for the breach of the contract, at his election. *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

Ordinarily the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal, or the lawyer to his client, the ground of duty is apparent. But where no such relation flows from the contract, and still a breach of its obligation is made the principal means of inflicting on another an injury, the question whether such invasion is actionable as a breach of the contract only or as a tort leads to a difficult search for a distinguishing test. A breach of a contract may be so planned and intended and interwoven with fraud as to become a tortious act. *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382, 390.

We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a "borderland," where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult. *Moak, Underh. Torts*, 23. The text writers either avoid a definition entirely, or frame one plainly imperfect, or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal, or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable

as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test. *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 882, 390.

A tort is a private personal wrong, as distinguished from a wrong to the public or crime. A tort is further distinguished from a contract (1) in that the party may be arrested on process and imprisoned on the judgment; (2) in that there is no right of contribution between the several defendants for a joint wrong; (3) joint tort feorsors or wrongdoers are severally liable; (4) at common law the action does not survive, but abates on the death of the party. A tort may grow out of or be coincident with the contract, and in such case it must clearly have all the necessary elements of a tort to be followed by such serious consequences. *Van Oss v. Synon*, 56 N. W. 190, 191, 85 Wis. 661.

A breach by a railroad company of an executory contract, into which it was under no legal duty of entering, to furnish the other contracting party with transportation from one point to another, is not a tort, and does not give rise to an action *ex delicto*. *Louisville & N. R. Co. v. Spinks*, 30 S. E. 968, 969, 104 Ga. 692.

Breach of marriage promise.

A breach of a marriage promise is not a tort. *Malone v. Ryan*, 14 R. I. 614, 618.

Diversion of water course.

The overflow of land by a millpond is a tort. Running out a dam into a waterway of a navigable river, giving a new direction to the current, washing a neighbor's land away, is also a tort. Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 507], which gives federal courts jurisdiction of actions against the government for claims upon contracts or for damages in cases not sounding in tort, does not give them jurisdiction of an action against the government for an alleged wrongful diversion of a water course, since that is an action sounding in tort. *Mills v. United States*, (U. S.) 46 Fed. 738, 747, 12 L. R. A. 673.

Libel and slander.

O. & W. Dig. art. 1100, gives justices jurisdiction of all suits and actions for "torts, trespasses, and other injuries," where the amount claimed exceeds, etc. Held, that such phrase does not include actions for libel and slander. *Engelking v. Von Wamel*, 26 Tex. 469, 471.

Negligence or malfeasance.

The term "tort" includes wrongs suffered in consequence of the negligence or malfeasance of others, when the remedy at common law was by an action on the case. *Holmes v. Oregon & C. R. Co.* (U. S.) 5 Fed.

75, 77; *Mills v. United States* (U. S.) 46 Fed. 738, 747, 12 L. R. A. 673.

The term "tort," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy in common law is by an action on the case. *Jervey v. The Carolina* (U. S.) 66 Fed. 1013, 1016; *Smith v. Burnett*, 10 App. D. C. 469, 482; *John Spry Lumber Co. v. The C. H. Green*, 43 N. W. 576, 578, 76 Mich. 320, 327; *Leathers v. Blessing*, 105 U. S. 626, 630, 26 L. Ed. 1192; *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.*, 64 U. S. (23 How.) 209, 215, 16 L. Ed. 433.

Causing harm by negligence is a tort. One of the definitions of a tort is an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented. *Bigby v. United States*, 23 Sup. Ct. 468, 472, 188 U. S. 400, 47 L. Ed. 519 (citing *Pollock, Torts*, 1, 19).

TORT SOUNDING IN EXEMPLARY DAMAGES.

A tort that sounds in exemplary damages is where some right of person or of property is injured maliciously, violently, wantonly, or with a reckless disregard of social or civil obligations. *Samuels v. Richmond & D. R. Co.*, 14 S. E. 943, 944, 35 S. C. 493, 28 Am. St. Rep. 883.

TORTIOUS.

The word "tortious" is a synonym of the word "unlawful." *Milligan v. Brooklyn Warehouse & Storage Co.*, 68 N. Y. Supp. 744, 745, 34 Misc. Rep. 55.

TORTURE.

"Torture" is defined to be torment judicially inflicted; pain by which guilt is punished or confession is extorted; anguish; extreme pain; anguish of body or mind. *State v. Pugh*, 15 Mo. 509, 511.

An indictment charging a defendant with killing by feloniously, unlawfully, willfully, and with express malice aforethought, casting the deceased into a certain fire then and there burning, and by means of the flames thereof the said deceased instantly died, charges a killing by torture, within the meaning of Laws 1891, p. 150, making killing by means of torture murder in the first degree. *Territory v. Vialpando*, 42 Pac. 64, 65, 8 N. M. 211.

In the laws relating to cruelty to animals, the word "torture" includes every act.

omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted. Code N. C. 1883, § 2490; Pen. Code N. Y. 1903, § 669; Ann. St. Ind. T. 1899, § 1298; Rev. St. Me. 1883, p. 911, c. 124, § 48; Gen. St. Minn. 1894, § 6542. Every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief. Bates' Ann. St. Ohio 1904, § 3721; Mills' Ann. St. Colo. 1891, § 117; Rev. St. Wyo. 1899, § 2287.

The torture alluded to in the statute forbidding the torturing of any animal must consist of some violent, wanton, and cruel act, necessarily producing pain and suffering to the animal. Tying brush or boards to a horse's tail is not necessarily a torture inflicted on the horse. *State v. Pugh*, 15 Mo. 509, 511.

The term "torture" does not per se include the mere fact of driving a sick, sore, lame, or disabled horse, and the driving of such a horse directly to its stable is not an offense, or driving it for exercise, or driving it carefully, in a manner proportioned to its condition, where it has become disabled, lame, or sick on the road. *Stage Horse Cases* (N. Y.) 15 Abb. Prac. (N. S.) 51, 64.

TOTAL.

The word "total" means all; the whole. *East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572, 576, 76 Tex. 653.

TOTAL DESTRUCTION.

"Total destruction of a building," within the meaning of a fire insurance policy, must mean the complete destruction of the injured property by fire, so that nothing of value remains of it, as distinguished from a "partial loss," where the property is damaged, but not entirely destroyed. This does not mean that the materials of which the building was composed were all utterly destroyed or obliterated, but that the building, though some part of it may be left standing, has lost its character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot properly and longer be designated as a building. *Corbett v. Spring Garden Ins. Co.*, 155 N. Y. 389, 390, 50 N. E. 282, 41 L. R. A. 318. Where the cost of repairing a building exceeds one-half of the value of the destroyed building, the question whether it was a total destruction is for the jury. *Corbett v. Spring Garden Ins. Co.*, 58 N. Y. Supp. 148, 149, 40 App. Div. 628.

"Total destruction," within the meaning of a fire policy, providing that a total destruction shall terminate the lease, does not include a mere destruction of a partition in

an insured building, and the burning out of the windows of the building. *Einstein v. Levi*, 49 N. Y. Supp. 674, 676, 25 App. Div. 565.

TOTAL DISABILITY.

See, also, "Wholly Disabled."

Total disability must of the necessity of the case be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged. One can readily understand how a person who labors with his hands would be totally disabled only when he cannot labor at all, but the same rule would not apply to the case of a professional man, whose duties require the activity of the brain, and which is not necessarily impaired by serious physical injury. If a person engaged in the general practice of medicine and surgery is unable to go to his business, enter his office, and make calls upon any of his patients, but is confined to the bed, and is only enabled to exercise his mind on occasional application to him for advice, he may be said to be "totally disabled." *Wolcott v. United Life & Accident Ins. Ass'n*, 8 N. Y. Supp. 263, 264, 55 Hun, 98.

The meaning of the phrase "total disability" in an accident policy is not that the insured must have been disabled so as to prevent him from doing anything whatsoever pertaining to his occupation, but that he must have been disabled only to that extent that he could not do any and every kind of business pertaining to such occupation. He might be able to do a part, and not be able to do all, and, because he was not able to do all, be deemed to be wholly disabled from doing any and every kind, provided, of course, that he was so disabled as to be prevented from doing substantially all the necessary and material things in such occupation requiring his own exertions in substantially his customary and usual manner of so doing. He might be able to do, personally, minor and trivial things not requiring much time or physical labor, and through others, under his direction, do the heavier things requiring physical exertion, which in the ordinary performance of his duties he had heretofore done personally, and yet, because of inability to do the heavier and more material things personally, be said to be wholly disabled. *Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 977, 23 Ind. App. 657.

A total disability is one which prevents insured from following an occupation whereby he can obtain a living; and, in determining whether such a disability exists, both his mental and physical capabilities must be considered. *McMahon v. Supreme Council, Order of Chosen Friends*, 54 Mo. App. 463, 472.

The words "totally disabled," as used in an accident policy, do not mean a state of absolute helplessness. The insured might be able to walk, might be able to ride on the cars to his physician's office, and still have been entirely incapacitated for work or business. If he is so incapacitated, we think he is totally disabled, within the meaning of the policy. *Mutual Ben. Ass'n v. Nancarrow*, 71 Pac. 423, 424, 18 Colo. App. 274.

The words "totally disabled from the prosecution of his usual employment," in an accident insurance policy, mean wholly disabled from doing substantially all kinds of his accustomed labor to some extent. A disability that prevents his doing as much in a day's work as before is not total, but one that entirely prevents his doing certain portions of his accustomed work is total, though there are other portions that he is able to do. *Sawyer v. United States Casualty Co. (Mass.)* 8 Am. Law Reg. (N. S.) 233, 235.

An accident policy insured against death or total disability from bodily injuries effected through external, violent, and accidental means. The total disability was defined as follows: "If said member shall sustain bodily injuries by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership." Plaintiff stated his occupation in the contract to be that of "retired," the term "gentleman" or equivalent being evidently omitted by clerical error, and in an action on the policy testified that he had no occupation except to amuse himself; that his income was derived from investments; that he had a shop at his house where he sometimes amused himself, and was a director in a wagon company, and at times used some of its machinery in connection with his amusement. While operating a buzzsaw at the wagon shops, he received a severe and painful wound on the back of the hand, which deprived him of the use of it for some time. Held, that the injury was not covered by the policy, as plaintiff was not totally disabled. *Knapp v. Preferred Mut. Acc. Ass'n*, 53 Hun. 84, 6 N. Y. Supp. 57.

The words "total disability," as used in a contract of insurance, do not mean that the insured will indemnify on account of loss sustained by the assured being partially disabled from some kinds of business. *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631, 634.

Where an accident policy provides for compensation for the period of total disability only, the insured cannot recover for a disability which did not prevent him from the prosecution of any and every kind of business pertaining to his occupation. *Saveland*

v. Fidelity & Casualty Co., 30 N. W. 237, 239, 67 Wis. 174, 58 Am. Rep. 863.

Where an accident policy provided for indemnity for injuries which would disable the insured "from prosecuting any and every kind of business pertaining to his occupation, an assured might recover on proof of an injury and showing that he was in the real estate business, and that he went to his office every day for a short time, but was unable to do any kind of work, at least a fair interpretation being, not that he must be so disabled as to prevent him from doing anything, but that he must be wholly disabled so as to prevent him from doing any and every kind of business pertaining to his occupation. *Turner v. Fidelity & Casualty Co.*, 70 N. W. 898, 899, 112 Mich. 425, 38 L. R. A. 529, 67 Am. St. Rep. 428.

There can be no recovery for total disability where the insured was able, during the whole period for which he claimed indemnity, to transact, and always did transact, some parts or some kinds of business pertaining to his occupation, and to some extent attended to all the duties of every kind connected with his business. *Spicer v. Commercial Mut. Acc. Co.*, 4 Pa. Dist. R. 271, 276.

Evidence that the insured in an accident policy had been disabled for a period of eight weeks, during four of which he had been at his place of business and performed light work, though not attending to his regular duties, did not show that he was totally disabled but for four weeks. *McKinley v. Bankers' Acc. Ins. Co.*, 75 N. W. 670, 671, 106 Iowa, 81.

A policy holder, whose regular duties were to buy goods of agents, and sell them to the people, and repair articles, such as chairs and tables, and who also trimmed caskets and made picture frames, was totally disabled when by an accident he was so injured that he could not walk without crutches for eight or ten months after the accident, and was not able to engage in any manual labor for more than a year thereafter. *Baldwin v. Fraternal Acc. Ass'n*, 46 N. Y. Supp. 1016, 1018, 21 Misc. Rep. 124.

An insurance policy providing for payment of a weekly indemnity during the continuance of total disability does not mean that the party shall not have the physical power, perhaps, to do something, even if he, in doing it, suffers great bodily pain. If he was disabled to that extent that whatever he did caused him suffering, and compelled him to stop in a short time, it may be properly described as total disability. *Hohn v. Interstate Casualty Co.*, 72 N. W. 1103, 1108, 115 Mich. 79.

The loss of the left arm alone does not constitute a total disability. *Smith v. Su-*

preme Lodge of Order of Select Friends, 61 Pac. 416, 62 Kan. 75.

An injury to the hand, so that it became useless as a hand, was an immediate, continuous, and total disability. *Lord v. American Mut. Acc. Ass'n*, 61 N. W. 293, 294, 89 Wis. 19, 28 L. R. A. 741, 46 Am. St. Rep. 815.

TOTAL INABILITY TO LABOR.

"Total inability to labor" does not confine the capability of the member's earning capacity to the same employment as that in which he was engaged at the time of becoming incapacitated, but requires such member to engage in any work or employment for which he is fitted, or which he is capable of performing. *Baltimore & Ohio Employees' Relief Ass'n v. Post*, 15 Atl. 885, 891, 122 Pa. 579, 2 L. R. A. 44, 9 Am. St. Rep. 147.

TOTAL LOSS (In Fire Insurance).

See "Absolute Total Loss"; "Actual Total Loss"; "Constructive Total Loss." See, also, "Total Destruction"; "Wholly Destroyed."

"Total loss," when applied to a building, means totally destroyed as a building—that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down and a new building erected throughout. There can be no total loss of a building so long as a remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis on which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends on the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as a basis. *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 88 N. W. 265, 267, 85 Minn. 48, 56 L. R. A. 108.

A building is a total loss where the remnant is inconsiderable, compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burned building. A brick building is a total loss where three of its walls are entirely destroyed by fire, and none of the joists, floors, or windowsills are left, though a portion of the fourth wall was used in the construction of a new building on the site of the old, over the protest of the constructors, who considered it unsafe. The foundation of a building is not within the contemplation of the parties to an insurance contract, and hence the question of injury to the foundation

should not be considered by the jury in reaching a conclusion as to the total loss. *Murphy v. American Cent. Ins. Co.*, 54 S. W. 407, 25 Tex. Civ. App. 241.

There can be no total loss of a building, within the meaning of an insurance policy, so long as the remnant of the structure standing is reasonably adapted for use as a basis from which to restore the building to the condition in which it was before the injury. *Royal Ins. Co. v. McIntyre*, 37 S. W. 1068-1074, 90 Tex. 170, 35 L. R. A. 672, 59 Am. St. Rep. 797.

"Total loss," as employed in a policy, is undoubtedly to be understood in its natural and usual sense, and where property was valued at \$3,900, and goods to the value of some \$70 were saved, the loss was total. *Singleton v. Boone County Home Mut. Ins. Co.*, 45 Mo. 250, 254.

If the materials of which the building was made have been destroyed by fire, so as to leave what remains of no material value as a building, though it may have value as salvage, there is a total loss, but if the remaining part of the building can, by repairing it, be restored to the former condition of the original just before the fire, then the loss is a partial loss. *Hartford Fire Ins. Co. v. Bourbon County Court (Ky.)* 72 S. W. 739, 740.

Loss of specific character.

Where a building is so injured by fire as to lose its specific character as a building, it is a "total loss," within the terms of an insurance policy, though some of the walls are standing, and some of the material is not destroyed. *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 18 S. W. 337, 66 Tex. 103, 59 Am. Rep. 613.

"Total loss," as used in Ky. St. § 700, providing that fire insurance companies in case of total loss shall be liable for the value of the property as fixed in the face of the policy, when applied to a building, does not mean that the materials of which the building was composed were all totally destroyed and obliterated. It is not necessary that all of the parts and materials composing the building should be absolutely and physically destroyed, but the inquiry always is, does the insured building, after the fire, still exist, preserving substantially its identity, or has it become so broken and disintegrated that it cannot be designated as the structure which was insured? There may be a total loss, within the meaning of the statute, even though some parts of the building may remain standing after the fire. *Palatine Ins. Co. v. Weiss*, 59 S. W. 509, 510, 109 Ky. 464.

The phrase "total loss," when applied to the subject of insurance, does not contemplate the entire annihilation or extinction of

the property insured; neither does it require than any portion of the property remaining after loss shall have no value for any purpose whatever; but it does mean only the destruction of the property insured to such extent as to deprive it of the character in which it was insured. Although some portion of the building may remain after the fire, yet if such portion cannot be reasonably used to advantage in the reconstruction of the building, or will not, for some purpose, bring more money than sufficient to remove the ruins, such building is, in contemplation of law, a total loss. *Liverpool & L. & G. Ins. Co. v. Heckman*, 67 Pac. 879, 881, 64 Kan. 388.

The term "total loss," in Rev. St. art. 2971, making the amount of an insurance policy a liquidated demand against the insurer in case of the total loss of the property, does not mean the utter destruction of the materials that enter into the construction of an insured house, but that the building has lost its specific character and identity as a house. The insurance was not against the destruction of the materials, but of the house, and, if the total value is destroyed as a house, appellant was liable, although portions of the walls were standing. *Royal Ins. Co. v. McIntyre* (Tex.) 34 S. W. 669.

With reference to loss of insured property, "total loss" does not mean an absolute extinction, and in an insurance on a building the question in estimating loss is not whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire, the thing insured still exists as a building. *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 450, 35 Am. Rep. 77.

"Total loss," as applicable to a building, means not that the materials of which it was composed were utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated as a building. When that has occurred, then there is a total destruction or loss. A total loss does not mean an absolute extinction. *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* (U. S.) 31 Fed. 200, 204.

The term "total loss," within the meaning of the valued policy law (Rev. St. 1889, § 5897), includes a loss of a building by fire, although a portion of the wall and the foundations remain, when such remaining portions cannot be utilized at less expense than to build anew. In this case the court approved an instruction that "by a total loss is meant that the building has lost its identity and specific character as a building, and

become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing." In *Havens v. Germania Fire Ins. Co.*, 27 S. W. 718, 123 Mo. 403, 26 L. R. A. 107, 45 Am. St. Rep. 570, the court in banc defined a total loss, within the meaning of a similar section, when applied to a building, to mean "totally or wholly destroyed as a building, although there is not an absolute destruction of all its parts. It matters not that some debris remains which may be useful or valuable for some purpose." *O'Keefe v. Liverpool, L. & G. Ins. Co.*, 41 S. W. 922, 923, 140 Mo. 558, 39 L. R. A. 819.

"Total loss" of a building, within the meaning of a fire insurance policy insuring against such loss, means the complete destruction of the insured property, so that nothing of value remains, and so that, though the materials of which the building was composed be not utterly destroyed or obliterated, and though part of the building be left standing, it has lost its character as a building, and has become instead a broken mass. The term does not mean an absolute extinction, it not being necessary that all the parts and materials composing the building are absolutely and physically destroyed; but the inquiry always is whether, after the fire, the thing insured still exists as a building. *Corbett v. Spring Garden Ins. Co.*, 50 N. E. 282, 283, 155 N. Y. 389, 41 L. R. A. 318.

Loss causing condemnation.

The term "total loss," in the law of fire insurance, applies to an injury to a building by fire to such an extent as to make it insecure and a menace to life, resulting in its condemnation by the proper authorities, and the denial by such authorities of the right to repair the building. *Monteleone v. Royal Ins. Co.*, 18 South. 472, 47 La. Ann. 1563, 56 L. R. A. 784.

Where a wooden building within the fire limits is injured to such an extent that it cannot be repaired or rebuilt under the law, it is a total loss, within the meaning of an insurance policy. *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 18 S. W. 337, 66 Tex. 103, 59 Am. Rep. 613.

TOTAL LOSS (In Marine Insurance).

"Total loss," as the term is used in the law of marine insurance, is of two kinds: "First, it signifies the total destruction of the thing insured; and, secondly, such damage to the thing insured that, though it may specifically remain, has rendered it of little or no value to the owner." *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. 264, 279.

"Total loss," as used in a marine insurance policy, means that the ship was actually lost by a peril of the sea, or any peril

covered by the policy, or that the ship sustained damage to such an extent that she could not be repaired, or that she was irreparable in the place where she was injured, or that it was impracticable to repair her, because the necessary materials and workmen could not be secured, or that it would be physically impossible to repair her except at an enormous cost. *Moss v. Smith*, 9 C. B. 94, 102, 103.

"In the English practice, a ship is a total loss when she has sustained such extensive damage that it would not be reasonable or practicable to repair her." The other measure of practice which the courts have adopted is this: If the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. The American rule recognizes the same principle, but fixes upon a different amount of expense as giving the right to abandon. If the expenses of repairing will exceed half the value of the ship when repaired, she is considered a total loss, according to the American authorities, and may be abandoned. On the occurrence of a stranding resulting in permanent destruction, the voyage is lost by a peril insured against, and the master thereupon becomes the agent of the cargo owners, and must act as the facts of the case require. These facts and his abandonment create a total loss, and the subsequent recovery of the vessel or a portion of the goods by extraordinary exertions does not alter this result. The chief question has been whether there must be an actual, total, physical loss of the thing insured, whether there must be demolition or an annihilation, or whether a destruction of all value to the owner, and hence a total loss to him, is sufficient. The current of authorities, both in this country and in England, as well as the conclusion of elementary writers, is in favor of the doctrine of constructive loss. Especially is this the rule where the voyage is broken up by the destruction of the vessel. *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 217, 4 Am. Rep. 664.

Emerigon says that a loss is total by submersion where there is no permanent vestige of the ship. But what is a vestige? If it is that which affords the means of recovery and restoration, whether visible or not, then such submersion, in his view, would not be a total loss. A ship may be wholly under water and out of sight, and yet perfectly within the control of the owner. There may be buoys and cables attached to her, by the aid of which she may be raised and removed as effectually as if above water. It certainly would not be sufficient, to avoid a total loss, to show that the damaged hulk of a vessel insured has been raised and brought in; but the same consideration would apply to a vessel greatly damaged by perils of the

sea, though she remains afloat. To repel the claim for a total loss, it must appear that the ship remains a good and sound vessel, capable, after reasonable repairs, of performing voyages and carrying cargoes; but whether she is so or not does not depend upon the single circumstance of submersion. *Sewall v. United States Ins. Co.*, 28 Mass. (11 Pick.) 90, 94, 95.

Abandonment.

Where a thing insured subsists in specie, an abandonment is necessary in order to create a total loss, and if, upon the happening of peril which suspends the voyage of a ship insured, and induces the necessity of repairs, the owners choose to make it a total loss, they should abandon to the insurers. *Martin v. Crockatt*, 14 East, 465, 466; *Bell v. Nixon*, 1 Holt, N. P. 423.

Where a thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment to the insurer in order to make it a total loss. *Tunno v. Edwards*, 12 East, 488, 490, 491.

A ship may be abandoned for a total loss, though the loss is less than half its value. *Da Costa v. Newnham*, 2 Term R. 407; *Parsons v. Scott*, 2 Taunt. 363; *Peele v. Merchants' Ins. Co.* (U. S.) 19 Fed. Cas. 98, 103 (citing *Milles v. Fletcher*, 1 Doug. 231).

"A total loss," says Chancellor Kent (3 Comm. p. 413), "may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damages to it as render it of little or no value. * * * In such cases the insured may abandon all his interest in the subject insured and all his hope of recovery to the insurer, and it falls upon him to pay as for a total loss." *Natchez & N. O. Packet & Navigation Co. v. Louisville Underwriters*, 11 South. 54, 55, 44 La. Ann. 714.

A vessel loaded with a number of barrels of flour was by accident sunk and destroyed, and the cargo damaged. There was no actual abandonment. As soon as practicable after the accident, and after the captain's protest, the flour was shipped to New Orleans, the nearest and best place for the sale of such damaged cargo. If the insured had been present at the time the injury occurred, there can be no doubt but what he would have made the abandonment. Under such circumstances, therefore, it was right for the court to calculate the damage as upon a total loss. *Portsmouth Ins. Co. v. Brazee*, 16 Ohio, 81, 87.

Capture.

"Total loss," as used in a marine insurance policy, construed to include a capture by one belligerent from another, as well as a detention or embargo by a foreign friendly

power; and a detention occasioned by an arrest at sea of a neutral by a belligerent vessel may also amount to a total loss. *Rhinelander v. Insurance Co. of Pennsylvania*, 8 U. S. (4 Cranch) 29, 42, 2 L. Ed. 540.

A "total loss" of a subject of maritime insurance does not necessarily suppose the actual destruction of the thing insured, but such loss may exist when the thing is in safety, but is for the time being lost to the owner or taken from his free use and possession. Such are the common cases of loss by capture by embargoes and by restraints and detentions of princes. On the other hand, the mere occurrence of such accidents does not constitute a total loss, if in point of fact the peril has passed away at the time of the abandonment. *Peele v. Merchants' Ins. Co.* (U. S.) 19 Fed. Cas. 98, 103.

Complete physical extinction.

Total loss of the value to the owner of a vessel and cargo is equivalent to a total physical loss. In an action upon a marine policy for the recovery of an actual total loss, the insured must therefore establish the physical extinction of the property insured, or the extinction of its value arising from the perils insured against. *Young v. Pacific Mut. Ins. Co.*, 34 N. Y. Super. Ct. (2 Jones & S.) 321, 331.

"Total loss," within the rule that the application of a bottomry bond is terminated by the total loss of the vessel, cannot happen if the ship exists in specie, although she may be so much injured on the voyage as not to be worth repairing and bringing to the ultimate place of departure. The doctrine of constructive total loss is not applicable to contracts of bottomry. *Delaware Mut. Safety Ins. Co. v. Goosler*, 96 U. S. 645, 657, 24 L. Ed. 863 (citing *Abb. Shipp.* [11th Ed.] 126).

Within the meaning of a policy on freight insuring a vessel and cargo against a total loss, a total loss of the subject of an insurance is where by the perils insured against it is destroyed or so injured as to be of trifling or no value to the insured, for the purpose and use for which it was intended. In the technical sense of the words "total loss," and for every beneficial purpose in which a contract of insurance can be employed, a ship foundered or burned at sea, or wrecked or broken upon the land, so as to be past relief or repair, is, specifically and as a vessel, totally destroyed, and such an event is a total loss; and, when it has happened from a peril insured against, it is a loss for which the underwriter is liable, notwithstanding a salvage—and a very considerable salvage—remaining. *Willard v. Millers' & Manufacturers' Ins. Co.*, 24 Mo. 561, 564, 565.

The words "total loss," as used in a policy of insurance insuring a ship, her cargo

and freight, against a total loss only, in their technical sense mean a ship foundered and burned at sea, or wrecked or broken on the land, so as to be past relief and repair, and, as a vessel, totally destroyed, and such an event is a total loss; and so, when it has happened from a peril insured against, it is a loss for which the insurer is liable, notwithstanding the salvage—and a very considerable salvage—remaining, and notwithstanding any restriction the policy may contain as being expressed to be an insurance against a total loss only, or as containing an exception or warranty on the part of the insured against average or partial losses. Insurance was on a ship, her cargo and freight, against a total loss only. The ship was cast ashore, the cargo was saved, and the vessel afterwards got off and carried into a safe harbor, where the master, not having funds to repair her, which, however, might have been done at less than half her value as agreed in the policy, sold her and the cargo to defray salvage and expenses incurred in attempts to preserve and secure her. In such a case the assured was not entitled to recover on the policy as for a total loss. *Murray v. Hatch*, 6 Mass. 465, 475.

Incapability of repair.

When an injury to an insured vessel can be repaired at an expense less than her value when repaired, the insured cannot recover for a total loss without abandoning to the underwriters. *Smith v. Manufacturers' Ins. Co.*, 48 Mass. (7 Metc.) 448, 453.

A vessel is a "total loss," within the meaning of an insurance policy, when it becomes of no use or value as a ship to the owner, and is as much so as if the vessel had gone to the bottom of the sea, or had been broken to pieces, and the whole or a greater part of the fragments had reached the shore as a wreck; and his loss is considered total where a prudent owner would not have repaired. *Irving v. Manning*, 6 C. B. 391, 419.

The term "total loss," within the rule that the owner may abandon to the insurer in case of total loss, includes damage to the vessel by any of the perils of the sea on the voyage insured which cannot be repaired at the port to which such vessel proceeds after the injury without expenditure of money to an amount exceeding half the value of the vessel at that port after such repairs. *Patapsco Ins. Co. v. Southgate*, 30 U. S. (5 Pet.) 604, 618, 8 L. Ed. 243.

In marine insurance a ship is a total loss when she has sustained such extensive damage that it would not be reasonably practicable to repair her. *Corbett v. Spring Garden Ins. Co.*, 50 N. E. 282, 284, 155 N. Y. 389, 41 L. R. A. 818.

If either a ship or voyage be lost, there is a total loss within the terms of the policy,

but where the extent of a loss was found to be 48 per cent. of the vessel only, and the vessel performed her voyage, but on her arrival was not worth repairing, there was no "total loss," within the policy. *Cazalett v. St. Barbe*, 1 Term R. 187, 190, 191.

Loss exceeding half value.

In order for insured to recover for a total loss, the injury to the thing insured must have exceeded 50 per cent. *Thornely v. Hebson*, 2 Barn. & Ald. 513, 519; *Marine Ins. Co. v. Tucker*, 7 U. S. (3 Cranch) 357, 379, 2 L. Ed. 466.

The term "total loss," within the meaning of a marine policy on a vessel, embraces damages to the vessel by any perils of the sea on the voyage insured which cannot be repaired at the port to which such vessel proceeds after the injury without an expenditure of money to an amount exceeding half the value of the vessel at that port after such repairs. *Patapsco Ins. Co. v. Southgate*, 30 U. S. (5 Pet.) 604, 618, 8 L. Ed. 243.

Seizure and detention.

"Total loss" is of two kinds: First, it signifies the total destruction of the thing insured; and, secondly, such damage to the thing insured, though it may specifically remain, as renders it of little or no value to the owner. A seizure and detention of a vessel and cargo, and the interruption thereby of the voyage insured by a policy of marine insurance, may be constructively a total loss, at the election of the insured. The insured is not obliged to abandon, though to be entitled to recover as for a total loss he must abandon to the insurers the effects and voyage insured. *Livermore v. Newburyport Marine Ins. Co.*, 1 Mass. 264, 275.

Stranding.

The mere stranding of a vessel is not *ipso facto* a total loss which will authorize an abandonment of the vessel; but it is always a question of evidence in such cases whether the stranding be attended with such circumstances as to produce a total loss, either because it is followed by shipwreck or other destruction of the property, or because the vessel cannot be set afloat, or because she cannot be repaired at the place of the peril for want of materials or workmen. *Patrick v. Commercial Ins. Co. (N. Y.)* 11 Johns. 9, 13.

Cargo.

The term "total loss," as applied to cargo, requires that the goods be annihilated; and thus, if certain coffee insured arrives in specie, it is not a total loss, though the value of the coffee be entirely destroyed. *Wallerstein v. Columbian Ins. Co.*, 26 N. Y. Super. Ct. (3 Rob.) 528, 536.

"Total loss," as the term is used in a policy, means actual destruction of the en-

tire subject-matter of the insurance. Thus, if goods of one kind in one ship are insured, by one description and valuation, against total loss only, the total loss of some of them, though in separate packages, is considered but a partial loss of one entire subject of insurance, and give no right to recover against the insurer as for a total loss of that part. In all cases where part of a cargo has been treated as a distinct subject of insurance, the goods lost have been either of a different kind from those saved, or were valued or described by packages or otherwise so as to distinguish them. *Pierce v. Columbian Ins. Co.*, 96 Mass. (14 Allen) 320, 321.

The term "total loss," as it is used in a marine policy against total loss of a cargo, means a destruction in specie; so that while some of the component elements of parts of the cargo may remain, still there is a total loss if the thing insured, in the character or description by which it was so insured, is destroyed. Thus, a machine is a total loss, though parts of it are recovered and tendered to the insured. *Great Western Ins. Co. v. Fogarty*, 86 U. S. (19 Wall.) 640, 643, 22 L. Ed. 216.

There may be a total loss of cargo without an actual annihilation of it, and when something is obtained from it in the nature of salvage. *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455, 461-463.

The doctrine of total loss respecting perishable articles may be thus briefly stated: If the article, or any part of it, arrives at the port of destination in specie, or can, with the exercise of reasonable diligence and care, be carried there in that condition, although it may be worthless there, there can be no total loss. If, by reason of the perils insured against, no part of it can be carried to the port of destination in specie, the loss is total. Where potatoes arrived at the port of distress, and all but a few on the top were greatly injured by sea water, or, to use the word of the witness, were "mush," there was a total loss. *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455, 461-463; *Hugg v. Augusta Ins. & Banking Co.*, 48 U. S. (7 How.) 595, 605, 12 L. Ed. 834.

The total loss which in the law of marine insurance will authorize the insured to abandon the projected adventure and throw the loss on the underwriter may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has the right to abandon the projected adventure and throw upon the underwriter the unprofitable and

disastrous subject of insurance. It has therefore been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss. It does not, however, appear that the exact quantum of damage which shall authorize an abandonment as for a total loss has ever become the direct subject of adjudication in the English court. The celebrated treatise *Le Guideon*, c. 7, art. 1, considers that a damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers, and from its public convenience and certainty has been adopted as the governing principle in some of the most respectable commercial states of the Union, and perhaps is now so generally established as not to be easily shaken. *Marcadier v. Chesapeake Ins. Co.*, 12 U. S. (8 Cranch) 39, 47, 3 L. Ed. 481.

In speaking of insurance against total loss of cargo, it was held that the insurer could not be liable when a cargo, or a part of it, had been sent on by the insured, and reached the port of destination. *Washington, J.*, says: "If the property arrive at the port of discharge reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as total, and demand an indemnity for partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment and demand a partial loss. But if the property insured be included within the memorandum, he cannot under any circumstances call upon the insurer for a partial loss, and consequently he cannot elect to turn it into a total loss." *Morean v. United States Ins. Co.*, 14 U. S. (1 Wheat.) 219, 224, 4 L. Ed. 75.

The term "total loss," in a marine policy covering a total loss of the cargo insured, consisting of hides, does not include a loss of the hides, consisting of many thousand in number, by the sinking of a lighter, when all the hides save 800 are recovered. *Blays v. Chesapeake Ins. Co.*, 11 U. S. (7 Cranch) 415, 418, 3 L. Ed. 389.

"A constructive total loss of a ship is not a constructive total loss of the cargo, if the cargo arrives safely at the port at which it may be sold or transhipped." *Taber v. China Mut. Ins. Co.*, 131 Mass. 239, 251.

TOUCH.

The general principle is that if the covenant relate to the mode of enjoying the leased lands, whether for the benefit of the reversion, or of other lands of the lessor, or of a business conducted elsewhere by him, it is a covenant which in the language of the

old cases touches or concerns the demised premises. *American Strawboard Co. v. Haldeman Paper Co. (U. S.)* 83 Fed. 619, 625, 27 C. C. A. 634.

The word "touching," as used in a bill of exceptions stating that a party offered in evidence sundry documents, letters, and other papers, touching the premises in question and matters in dispute, means simply "mentioning." *Gratz v. Gratz (Pa.)* 4 Rawle, 411, 431.

In maritime law.

The word "touch" and its derivatives is in a sense a nautical phrase. It is defined thus: "To come or to attain to; to arrive at; to reach; as, to touch their natal shore." And its use is illustrated as follows: "To touch at; arrive at; or come to this state; as in sailing. 'The next day we touched at Sidon.' Acts, xxxvii, 3." The word "touching," as used in Act May 6, 1882, c. 126, § 3, 22 Stat. 59 [U. S. Comp. St. 1901, p. 1307], relating to the touching of vessels having Chinese laborers on board at any port of the United States, is used to signify the opposite of "stay." Calling at a port for orders is a plain case of touching at such port. *In re Moncan (U. S.)* 14 Fed. 44, 46.

Where a vessel makes irregular and transient visitation to a port in course of her voyage to various ports, she is said to touch at each of the ports which she visits. A vessel plies between two places; she may touch at many. *San Francisco v. Talbot*, 63 Cal. 485, 487.

Liberty to touch at certain ports, when given in a marine policy, imports that such liberty is based upon a purpose to be accomplished by entering such ports, which is to be inferred from the character of the voyage, and by the cargo and the circumstances and nature of the adventure; and a reasonable delay at the authorized port, to accomplish such purpose, is not a deviation. *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7, 19.

A marine policy giving the vessel "liberty of touching at Cape Verde Island for stock" on her outward voyage should be construed to only authorize a stopping for the purpose of provisioning the vessel with live stock, such as is usual on a voyage and may be procured at the cape. *Maryland Ins. Co. v. Le Roy*, 11 U. S. (7 Cranch) 26, 31, 3 L. Ed. 257.

A marine policy giving the insured the right to touch at a certain port does not justify trading at such port, and hence trading will be a deviation which will avoid the policy. *United States v. The Paul Shearman (U. S.)* 27 Fed. Cas. 467, 469.

Arrival distinguished.

See "Arrive—Arrival"

TOUCHING PATENT RIGHTS.

"Touching patent rights," as used in Rev. St. U. S. § 699, giving appellate jurisdiction to the Supreme Court in any case touching patent rights, means a case in which the validity and the infringement of a patent are controverted, though the action be only upon a contract by which the plaintiff licensed the defendant to make and sell a patented article, and not a suit for infringing the plaintiff's patent. *St. Paul Plow Works v. Starling*, 8 Sup. Ct. 1327, 127 U. S. 876, 32 L. Ed. 251.

A suit against a patentee for specific performance of a contract alleged to have been made between defendant and complainant, by which the latter was to have the right to make and use the patented article and to enjoin defendant from interfering with such use, is not a suit "touching patent rights," within the meaning of the statute giving the federal courts jurisdiction of such suits. *Marsh v. Nichols, Shepard & Co.*, 11 Sup. Ct. 798, 802, 140 U. S. 344, 35 L. Ed. 418.

TOUS MES EFFETS.

"Tous mes effets" means "all or the whole of my effects and property," and, as used in the will of a French alien, was sufficient to pass the entire residuary estate of the testator to the beneficiary under the clause; and the fact that such words were introduced by the words "my carriage and horses included" was not for the purpose, and did not have the effect, of restricting or qualifying the former terms, but resulted only from the testator's anxiety that those articles should pass under the general term. *Ennis v. Smith*, 55 U. S. (14 How.) 400, 409, 14 L. Ed. 472.

TOW.

Towboat as common carrier, see "Common Carrier."

To tow means to drag a vessel forward in the water by means of a rope attached to another vessel, and implies that the act is done by those on board of the latter. *Webst. Dict.; Falconer, Marine Dict.* The tug simply furnishes the means of traction to the canal boat, which must be steered or navigated by those on board of her. "Navigating" does not mean "towing." Rev. St. U. S. § 4251 [U. S. Comp. St. 1901, p. 2929], providing that "no canal boat without masts or steam power, which is required to be registered, licensed, or enrolled, shall be subject to be libeled in any United States court for the wages of any person who may be employed on board thereof, or in navigating the same," does not apply to a claim for towing

such a canal boat. *Ryan v. Hook* (N. Y.) 34 Hun, 185, 191.

TOWAGE.

See "Extraordinary Towage."

"Towage" service is aid rendered in the propulsion of a vessel, irrespective of any circumstances of peril. *The H. B. Foster* (U. S.) 11 Fed. Cas. 948; *The Princess Alice*, 3 W. Rob. 138.

In *The Reward*, 1 W. Rob. 174, 177, it was said by Dr. Lushington: "I apprehend that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident. It is distinguished from salvage, which implies some degree of danger and some need of extraordinary assistance." *The Athenian* (U. S.) 3 Fed. 248, 249. Also quoted and approved in *McConochie v. Kerr* (U. S.) 9 Fed. 50, 53; *The Alaska* (U. S.) 23 Fed. 597, 607; *The Cache-mire* (U. S.) 38 Fed. 518, 521.

Towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress, and it is confined to vessels that have received no injury or damage. Towage, like pumping or steering, making sail, or any other ship work, may occur in the ordinary course of navigation, or may be a means of salvage; and whether it is to be paid for according to a quantum meruit, or at an agreed price, or by wages, or by a salvage compensation, must depend upon the circumstances under which it is performed. *The Plymouth Rock* (U. S.) 9 Fed. 413, 416.

Salvage distinguished.

There are two species of agreements which may be entered into by a vessel whose usual occupation is to tow vessels from one place to another. One is where she meets with a vessel disabled, and undertakes for any sum agreed on to bring the vessel from one port to another, or to a place of safety. That may be called an extraordinary towage. "Ordinary towage" is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. *The Kingaloch*, 28 Eng. Law & Eq. 596, 597.

Towage is not salvage, and, when considered by itself, is never compensative except on the principle of paying according to its worth for work and labor performed; that is to say, in legal phrase, it is paid for on the basis of quantum meruit pro opere et labore. *The Egypt* (U. S.) 17 Fed. 359, 370.

Salvage, as distinguished from towage, simply implies some degree of danger and need of assistance generally. *The Athenian* (U. S.) 3 Fed. 248, 249.

There is no generic difference between towage and salvage. In the absence of a contract, the towing of a vessel in peril or disabled is salvage. *Baker v. Hemenway* (U. S.) 2 Fed. Cas. 463.

As distinguished from towage salvage simply implies some degree of danger and need of assistance generally. The mere fact that a vessel is aground is enough to show that she is in a situation to have a salvage service. *The Athenian* (U. S.) 3 Fed. 248, 249.

TOWARD.

"Toward" means "in the direction to; with direction to; in a moral sense, with regard to; regarding; with ideal tendency to; nearly." *Webst. Dict.* As used in the statute which makes the killing of a human being, by a person who is provoked by the use of insulting language toward a female relative, manslaughter, it does not require that the insulting language should be addressed to the female personally, but any insulting language in the presence of the relative with reference to the female is sufficient. *Hudson v. State*, 6 Tex. App. 565, 576, 82 Am. Rep. 598.

A testator in bequeathing a certain sum in trust to his grandchildren, but providing that the income thereof should be applied towards their education and support, in the discretion of their fathers, assumes that the father would be charged with the burden, and signifies that the income from the trust fund was designed to assist in the discharging of the burden. *Dixon v. Bentley*, 25 Atl. 194, 195, 50 N. J. Eq. (5 Dick.) 87.

The word "toward," as used in the statute making it unlawful for any person over the age of ten years, with or without malice, purposely to point or aim any pistol or firearm at or toward any other person, means in the direction of. One who angrily seeks another sheltered in his own dwelling, and purposely points a gun at the dwelling house door, telling the occupant to come out and threatening to shoot him, is amenable under this statute. *Lange v. State*, 95 Ind. 114, 115.

TOWN.

See "County Town"; "Incorporated Town"; "School Town."
Any town, see "Any."

It may be said that the term "town" now includes almost every character of municipal

government from a city to a village, including places which are governed by a commission with some municipal governmental powers, and designated by such a title; and, if the functions of these different municipalities are similar, this term "town" would seem to include them all. *Herrman v. Town of Guttenberg*, 43 Atl. 703, 704, 62 N. J. Law, 605 (citing *Long Branch Police, Sanitary & Improvement Commission v. Dobbins*, 40 Atl. 599, 61 N. J. Law, 659).

"Town," as used in Act March 22, 1895, providing that the inhabitants of any district lying wholly in one county, and having a population exceeding a certain number, may become incorporated as a city, but such district shall not include any territory already within the limits of any incorporated city or town, means every species of municipal corporation above the grade of townships. *Stout v. Borough of Glen Ridge*, 35 Atl. 913, 914, 59 N. J. Law, 201.

"Towns," as used in Act April 20, 1886 (Laws 1886, p. 243), relating to the construction of sewers by towns, must be accepted in its broad, generic sense, embracing the whole range of bodies corporate, less than counties, established for local government. *Brown's Estate v. Town of Union*, 40 Atl. 632, 633, 62 N. J. Law, 142.

"Towns," as used in Const. art. 4, § 7, par. 11, providing that the Legislature shall not pass private local or special laws regulating the internal affairs of towns and counties, includes all municipalities, from townships up. *Burnet v. Dean*, 46 Atl. 532, 535, 60 N. J. Eq. 9 (citing *Van Riper v. Parsons*, 40 N. J. Law [11 Vroom] 1; *Pell v. City of Newark*, Id. 550).

In the historic case of *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 1, the word "town" was given a significance broad enough to include every municipality in the state, including cities. In *Pell v. City of Newark*, Id. 550, Chief Justice Beasley, speaking for the Court of Errors and Appeals, said that the word "towns," standing in its generic sense, embraced townships as well as cities, "and all other places corporate established for local government of the same grade as these, and also those of an inferior order, if any such there be." In *Banta v. Richards*, 42 N. J. Law (18 Vroom) 497, Mr. Justice Dixon, speaking for the court, said: "The word used in the law throughout is 'town.' This is a word of varying significance. * * * But so uncertain is this term 'town' that a construction that rested upon the word alone would be quite unsatisfactory." And the opinion held, in conclusion, that townships were not included among towns in the act under consideration. In *Brown v. New York & N. J. Telephone Co.*, 49 N. J. Law (20 Vroom) 624,

9 Atl. 754, the same learned jurist said: "The import of the word 'town' in our legislation is so variable that its signification in any particular enactment must largely depend upon the occasion and purpose of the law;" holding in conclusion that in the statute under consideration "the word 'town' should receive an interpretation broad enough to include all such places, whether they were formally styled 'towns,' 'townships,' 'boroughs,' or 'villages.'" In *Stout v. Borough of Glen Ridge*, 35 Atl. 913, 59 N. J. Law, 201, Mr. Justice Magie said: "It is undeniable that the word 'town' has been used in our legislation in different senses;" concluding that in the act under review it included every species of municipal corporation below that of city and above that of township. In *Brown's Estate v. Town of Union*, 40 Atl. 632, 62 N. J. Law, 142, Mr. Justice Van Syckel held that "the word 'towns' embraced the whole range of bodies corporate, less than counties, established for local government." And in *Long Branch Police, Sanitary & Improvement Commission v. Dobbins*, 61 N. J. Law, 659, 40 Atl. 599, in the opinion of the Court of Errors and Appeals, delivered by Judge Nixon, it was said arguendo: "If Long Branch is not a village, it certainly is a town." *Bliss v. Woolley*, 52 Atl. 835, 838, 68 N. J. Law, 51.

The word "town" is generic, comprehending cities. It was so held in the case of *Flinn v. State*, 24 Ind. 286. In *Obit. Bl.* top pages 81, 82, the word "town" is defined as follows: "The word 'town' or 'vill' has indeed, by the alteration of times and language, now become a generic term, comprehending in it the several species of cities, boroughs, and common towns." Where towns are vested with the power of local self-government, cities are also included under such designation and entitled to local self-government. *State v. Denny*, 21 N. E. 274, 278, 118 Ind. 449, 4 L. R. A. 65.

The word "town" is ambiguous. It may mean either a corporation, or simply a collection of people, independent of the fact of incorporation. A town is a collection of people, and it may be either an incorporated or an unincorporated town; so that in the title to alter and amend the several acts incorporating the town of S., and conferring upon the town of S. a municipal government, if the expression "town" was used in the sense of a corporation of that name, the purpose of the act might be simply to change the laws in reference to that corporation without changing the character of the corporation. On the other hand, if the town referred to in the title is simply a collection of people within the territory commonly known as the "town of S.," then any legislation having the effect of conferring upon these people a municipal government, whether that government be a town or a city gov-

ernment, would be authorized by the title. *Sessions v. State*, 41 S. E. 259, 260, 115 Ga. 18.

The term "town" signifies an aggregation of inhabitants and a collection of occupied dwellings and other buildings; and in a private action to abate a nuisance, where it is necessary to aver the existence or nonexistence of other property than plaintiff's, an allegation that the premises alleged to be injured are in a certain town gives rise to the presumption that there are other inhabitants and owners of property therein. *Siskiyou Lumber & Mercantile Co. v. Rosel*, 121 Cal. 511, 513, 53 Pac. 1118, 1119.

The legal municipal corporations in Ohio are cities, villages, and hamlets; but with utter propriety of language it may be said there are, all over the state, towns, both incorporated and unincorporated. And it is very evident that the Legislature in this act (*Laws 1891; 88 Ohio Laws*, p. 95), providing that all market houses, squares, etc., belonging to any town, etc., shall be exempt from taxation, was not speaking with reference to the legal classification of municipal corporations, so as to require terms of legal precision, but was making general provisions, applicable to towns in the popular sense. In strictness, there has been no municipality in this state for a long time legally known as a "town," yet all the while there are and have been aggregations of houses and inhabitants known as "towns," and the line that marks the size of an aggregation of this kind so as to include or exclude it from the general term "town" is not, and never has been, well drawn. *City of Toledo v. Yeager*, 8 Ohio Cir. Ct. R. 318, 323, 6 O. C. D. 273, 276.

Any municipal subdivision of a county, less than a city, is included within either of the terms "town" and "village," as is clearly apparent from the legislation of the state from the adoption of Rev. St. 1887, to the present. Our interpretation of these statutes is borne out by *Town of Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523. *Brown v. Village of Grangeville*, 71 Pac. 151, 152, 8 Idaho, 784.

A town is a civil and political corporation established for municipal purposes. Inhabitants of *Milford v. Godfrey*, 18 Mass. (1 Pick.) 91, 97.

"Town" is a generic word. Of the genus, cities and boroughs are species. *New York & L. R. R. Co. v. Drummond*, 46 N. J. Law (17 Vroom) 644, 646.

As any collection of houses.

The word "town" was originally from the Anglo-Saxon "tun," "an inclosure," and meant a collection of houses inclosed by a wall. When used in the title of an act for

the incorporation of towns and villages it will be presumed to have been used in its ordinary acceptation as meaning an aggregation of houses and inhabitants more or less compact. *Territory v. Stewart*, 23 Pac. 405, 406, 1 Wash. St. 98, 8 L. R. A. 106.

The dictionaries tell us that the word "town" signifies any walled collection of houses. Johnson. But that is its antique meaning. By modern use it is said to be applied to an undefined collection of houses or habitations, also to the inhabitants, emphatically to the metropolis. Again, a town is any collection of houses larger than a village, or any number of houses to which belongs a regular market, and is not a city. Johnson; Webster; Ogilvie. In New York and New England, towns are political units of territory into which the county is subdivided, and answer politically to parishes and hundreds in England, but are vested with greater powers of local government. In Maryland and most of the southern states, the word "town" is used in a broad sense to include all collections of houses, from a city down to a village. In Delaware the counties are subdivided into hundreds; the words "town" and "village" being indiscriminately applied to collections of houses. *Town of Enfield v. Jordan*, 7 Sup. Ct. 358, 361, 119 U. S. 680, 30 L. Ed. 523.

"Town," as used in Pen. Code, § 415, providing that every person who runs a horse race or fires a gun or pistol upon any of the public highways of any incorporated town shall be punished by a certain fine, etc., is used in the sense of a collection of dwellings, such as constitute a village (unincorporated). *Ex Parte Foley*, 62 Cal. 508, 511.

"Town," as used in Act April 29, 1897, entitled "An act to compile the several acts incorporating the town of Shelbyville, and the several acts amendatory thereto, into one act, and to amend the same, and repeal the acts in conflict with this act," will be construed in the ordinary and colloquial sense of a collection of houses occupied by people, referring to the county town of that name as such, and not as the name of a corporate entity. *Cooper v. Town of Shelbyville* (Tenn.) 57 S. W. 429, 434.

On the trial of an indictment against the turnpike trustees for erecting a gate within the town of T., the judge directed that the word "town" was to be taken in its popular sense of a collection of houses, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together; the fact of the houses being separated by gardens not preventing them from lying together. *Reg. v. Cottle*, 3 Eng. Law & Eq. 474.

"Town," as used in 3 & 4 Vict. c. 36, a local and personal act creating trustees of

certain turnpike roads which were described by definite points as some in the town of T., and which act was to be in operation for 31 years, and declared that it should not be lawful for the trustees to continue or erect any turnpike or tollgate roads across the said roads in the towns of T. and W. or in any other town, must be understood in a public sense as a congregation of houses, and not of the town as it existed at the passing of the act. *Reg. v. Cottle*, 16 Q. B. 412, 421.

In considering a statute of New Jersey declaring that "nothing in this act contained shall be construed to extend to narrowing, widening, or altering any street in any of the cities, towns, or villages in this state," etc., the chancellor said: "In giving a construction to this section of the act, some difficulty may occur in defining what the act means by 'town' and 'village.' The word 'town' is not here used as synonymous with 'township.' The whole state is divided into counties, and the counties subdivided into townships; so that, if we construe 'town' to mean the 'township,' the whole act would be defeated. It was obviously the intention of the Legislature to protect the established streets in the settled towns and villages of the state from the operation of the act. Certainly, no one can contend for a more liberal definition of the term 'town' than that of a collection of two or more inhabited dwelling houses. The mere fact of 50 or 100 acres of land being mapped out into streets and building lots cannot make a town." *Holmes v. Jersey City*, 12 N. J. Eq. (1 Beas.) 299, 304, 305.

"The terms 'plantation,' 'town,' and 'township' seem to have been used in the early colonies of Massachusetts almost indiscriminately to indicate a cluster or body of persons inhabiting near each other, and when they became designated by name certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies, and the like, which in effect made them municipal corporations, and no formal acts of incorporation were granted until long afterwards." *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 485.

The word "town" does not necessarily include only that part of an aggregation of dwelling houses which is within the corporate limits, but usually has reference merely to a geographical location, without regard to the corporate limits. An agreement to locate a college at a certain town does not necessarily mean within the corporate limits of the town, as contradistinguished from that town lying beyond the corporate limits. *Rogers v. Galloway Female College*, 44 S. W. 454, 456, 64 Ark. 627, 39 L. R. A. 636.

The word "town," as used in *Sayles' Ann. St. art. 541a*, allowing towns and plan-

tations to incorporate for school purposes only, means a collection of inhabited houses. The word carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a population scattered over the district engaged in agricultural pursuits or some other occupation requiring some considerable territory for its support. Therefore a tract of land containing 28 square miles, not more than 2 of which are covered by a town, can be incorporated for school purposes only. *State v. Edison*, 76 Tex. 302, 18 S. W. 263, 7 L. R. A. 733.

As a civil division of territory.

A town, under the township organization system of the state of Illinois, is a civil subdivision of a county, being created as a subordinate agency in the administration of the general state and local government; the distinction between such a town and other chartered municipal corporations proper, sometimes denominated "towns," being that a chartered town or village is given corporate existence at the request or by the consent of the inhabitants thereof, for the interest, advantage, or convenience of the locality and its people, while a town under township organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and as an agency of the state and county, to aid in the civil administration of affairs pertaining to the general administration of the state and county government, and is imposed upon the territory included within it without consulting the wishes of the inhabitants thereof. *People v. Martin*, 53 N. E. 309, 312, 178 Ill. 611; *Phillips v. Town of Scales Mound*, 63 N. E. 180, 182, 195 Ill. 853.

The word "town," philologically considered, is a change in the orthography and pronunciation of the Anglo-Saxon word "tun," from the verb "tyan," meaning to inclose; and "town," therefore, means an inclosure. It was used to denote a garden inclosed by a hedge, or a collection of houses inclosed by a wall. *Zell's Popular Encyclopedia* and *Johnson's New Universal Encyclopedia*. Its general and customary usage in England, as denoting a collection of houses or hamlets between a village or city, or its stricter legal or civil meaning, as denoting a civil corporation of larger territory, which might include a village or city, are somewhat foreign to the use of the word, and the civil and territorial subdivision or organization which it is used to signify in this country. Its first use in this country was to define the original or primary civil or governmental organizations of the early colonists of New England, who knew by bitter experience the oppressive tyranny of imperial law,

and who desired, above all things, to be governed not only by laws made by themselves in primary assembly, but having a limited and local application to their wants in small and independent communities. It can be seen that in the very nature and uses of such a local government the town must be, first, of limited territorial extent; second, of compact and contiguous territory; third, its boundary must be clearly defined and continuous; and, fourth, it should embrace within its government only those having a unity or similarity of interests. In New England, towns having been the first local civil governments, and antecedent to the formation of counties, the counties were made by a consolidation of its towns. In the western states, however, when an organic law is first made for the government of the whole territory, or a constitution is formed for the whole state, counties are formed first, and towns within them afterwards; but the same original idea and meaning of the town remain the same, and that is "a subdivision of a county," as defined in *Johnson's New Universal Encyclopedia*, and "subdivision of a county, as a parish is part of a subdivision of a diocese." "In popular usage, in America, the whole territory within certain limits." *Imperial Dict. Webster* defines town as "an inclosure; the whole territory within certain limits." In *Abbott's Law Dictionary* it is defined as "a walled place or borough." *Finch*, 80. All these definitions of "town" are strangely expressive of compactness, adjacency, and contiguity, such as "inclosure," "whole territory within certain limits," "defined portion of the state," and "a subdivision of a county." A town, in its name and uses, conveys the very idea of locality, vicinity, vicinage, and convenience. A town is a subdivision, in the singular; not subdivisions, or many subdivisions, in the plural. Aside from these definitions, all of which appear to be conclusive of the question, there is much force in the general and almost invariable usage, in this country at least, in the organization of towns and counties, as in precincts, districts, cities, and villages, in forming them of adjacent and contiguous territory. *Chicago & N. W. Ry. Co. v. Town of Oconto*, 6 N. W. 607, 608, 50 Wis. 189, 36 Am. Rep. 840.

Every borough or city, says *Tomlinson*, is a town. *Tom. Law Dict.* The greater necessarily includes the lesser, for a city begins as a village, extends into a town, and afterwards becomes a city by incorporation or otherwise, for there are cities that were never incorporated. *Co. Litt.* 109, with *Hargrave's Notes*, 2, 3. The word "town," according to *Blackstone*, has by alteration of times and language become a general term, comprehending under it the several species of cities, boroughs, etc.; and he adds, "A city is a town incorporated." 1 *Bl. Comm.* 114. In common parlance the word is fre-

quently applied to cities, as "leaving town," "coming to town," "out of town," etc. In the state of New York they have the political division of towns, cities, and incorporated villages, and that that particular political division is what is meant by the word "town" may in a given case be apparent from the purpose of the statute. Board of Com'rs of Public Charities and Correction of City of New York v. McGurrin (N. Y.) 6 Daly, 349, 355.

Towns, in Maine, as in the other New England states, are territorial divisions into which the territory of the state is divided by the Legislature for political purposes for the more convenient and effectual administration of certain functions of political government. The inhabitants of the particular territory are made a political agency, and political duties and liabilities for purposes of administration are imposed upon them, even without their consent. They are not a voluntary association. They cannot escape the duties and burdens imposed except by a removal of themselves and their property from the town territory. It is clear that such agencies are subject to such duties and liabilities only as are expressly or by necessary implication imposed upon them by the Legislature to effectuate the purpose of their creation. The powers of a town over the inhabitants and property within its territory are correspondingly limited to such as are necessary for the efficient discharge of those duties and liabilities; and even these limited powers are to be exercised upon the citizen and his property only with such precautions and in such manner as may be prescribed by the state. *Lovejoy v. Inhabitants of Foxcroft*, 40 Atl. 141, 142, 91 Me. 367.

"Towns" are only political subdivisions of the state made for the convenient administration of the government. They are component parts of the state, and, aggregately taken, are the state (*Wooster v. Plymouth*, 62 N. H. 208), constituting a portion of the sovereign power of the state. A municipal corporation is therefore not subject to a right of action against itself unless the right is conferred by statute in the exercise of the entire control over municipalities with which the Legislature is invested by the Constitution. *Davis v. Town of Rumney*, 38 Atl. 18, 19, 67 N. H. 591.

Towns in Connecticut and in other New England states differ from trading corporations, and even from municipal corporations elsewhere. They are territorial corporations into which the state is divided by the Legislature for political purposes, and for the convenient administration of government. They have only those powers which have been expressly conferred on them by statute, or which are necessary for conducting municipal affairs, and are what are known as "quasi corporations." In Connecticut, Mass-

achusetts and Maine, by common law or immemorial usage the property of any inhabitant might be taken on execution on a judgment against the town. The town could not make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned. *Town of Bloomfield v. Charter Oak Bank*, 7 Sup. Ct. 865, 869, 121 U. S. 121, 30 L. Ed. 923 (citing *Atwater v. Inhabitants of Town of Woodridge*, 6 Conn. 223, 228, 16 Am. Dec. 46; *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148; 5 Dane, Abr. 158; *Chase v. Merrimack Bank*, 36 Mass. [19 Pick.] 564, 569, 31 Am. Dec. 163; *Gaskill v. Dudley*, 47 Mass. [6 Metc.] 546, 39 Am. Dec. 750; *Adams v. Wiscasset Bank*, 1 Me. [1 Greenl.] 361, 10 Am. Dec. 88; *Fernald v. Lewis*, 6 Me. [6 Greenl.] 264; *Hopkins v. Town of Elmore*, 49 Vt. 176; Gen. Laws N. H. 1878, c. 239, § 8; *Reynolds v. Inhabitants of New Salem*, 47 Mass. [6 Metc.] 340; *Third School Dist. in Stoughton v. Atherton*, 53 Mass. [12 Metc.] 105; *Moor v. Newfield*, 4 Me. [4 Greenl.] 44; *Dill. Mun. Corp.* §§ 28-30, 266-268).

"Town" is defined by Laws 1890, c. 569, § 2, as a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of the local government and the administration of public affairs as have been or may be conferred or imposed on it by law, and will not be held to continue in existence detached, overlooked, shreds of territory destitute of inhabitants, which were left when the town was organized into a city and a town. *Town of Watervliet v. Town of Colonie*, 50 N. Y. Supp. 487, 490, 27 App. Div. 394.

"Town," as used in Const. art. 11, § 3, providing that laws may be passed providing for organization for municipal and other town purposes, denotes what is conveniently spoken of as the "New England town"—that is, a portion of the state bounded by geographical lines to which to a greater or less extent the power of self-government is committed. *State v. Sharp*, 6 N. W. 408, 27 Minn. 38.

A town is not a business or a charitable organization. It is simply a political organization, created as a convenient agent for the performance of certain governmental duties and purposes. Its powers are almost entirely political, and are properly limited to its duties. It has only such control over the citizen and his money or property as is expressly granted to it and is necessary to the performance of its duties to the public. Indeed, a town is only a trustee for the public. It does not own the money in its treasury, nor the municipal property generally, but holds them in trust for the public, and

subject to public control through the Legislature. *Thorndike v. Inhabitants of Camden*, 19 Atl. 95, 82 Me. 39, 7 L. R. A. 463 (citing Dill. Mun. Corp. § 61; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197).

Towns are political subdivisions formed for the purpose of aiding in carrying on the government of the state. In laying out highways by their selectmen, they act as mere instrumentalities of the government for the benefit of the public. *Lynch v. Town of Rutland*, 29 Atl. 1015, 66 Vt. 570 (citing *State v. Town of Burlington*, 36 Vt. 521; *Welsh v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Bates v. Same*, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95; *Buchanan v. Town of Barre*, 66 Vt. 129, 28 Atl. 878, 23 L. R. A. 488, 44 Am. St. Rep. 829; *School Dist. No. 1 of Weybridge v. Town of Bridgeport*, 63 Vt. 383, 22 Atl. 570),

Towns are quasi corporations, and in their characteristic qualities radically differ from trading and commercial corporations as to the liability arising from acts of agents. And in some essentials towns differ from ordinary municipal corporations, whose chartered powers are conferred at the request of the inhabitants, and to effectuate in some degree and to some extent purposes not public or governmental. Public duties and obligations are cast upon towns by the legislative power without reference to the will of the inhabitants of the town. Every inhabitant of the town is a member of the quasi corporation, and his individual property may be levied upon to satisfy executions against the town. *Turney v. Town of Bridgeport*, 12 Atl. 520, 521, 55 Conn. 412 (citing *Webster v. Town of Harwinton*, 32 Conn. 131; *White v. Town of Stamford*, 37 Conn. 578, 586; *Town of East Hartford v. American Nat. Bank*, 49 Conn. 539, 553).

As an estate.

In Ireland, it is frequent to describe the lands of great estates, even in their settlements, as "towns." The word appears to be a common and known description, and, in a description in ejectment of a "town and tenement," the words were synonymous terms. *Cottingham v. Rex*, 1 Burr. 623, 629.

As incorporated towns.

The word "town" shall be construed to mean an incorporated town containing a population of less than 5,000. Code Va. 1887, § 5 [1 Code Va. 1904, p. 8, § 5, subd. 16].

"Town," as used in Act June 15, 1883, authorizing the corporate authorities of towns, cities, and villages, and county boards, to issue licenses to sell liquors, means incorporated towns, and does not include a town created under a township organization. *People v. Town of Thornton*, 57 N. E. 841, 845, 186 Ill. 162.

"Town," as used in Laws 1895, c. 172, requiring the corporate authorities of any "village, town, or city" to establish voting precincts convenient for the inhabitants, refers to an incorporated municipality. *Stemper v. Higgins*, 37 N. W. 95, 97, 38 Minn. 222.

A "town," in its popular sense, has been defined to be a congregation of houses so reasonably near each other that the inhabitants thereof might be fairly said to dwell together. *Reg. v. Cottle*, 16 Q. B. 412; *Elliott v. South Devon Ry. Co.*, 2 Exch. 724; *Directors v. Blackmore*, L. R. 4 H. L. Cas. 610. Bishop says that the meaning of the word "town" varies more or less with the connection and subject. It may include cities or incorporated villages, or a mere congregation of dwelling houses not incorporated. *Bish. St. Cr. § 299a*. As used in the statute imposing a privilege tax on a private boarding house in a town, it may include an incorporated as well as an unincorporated town. *Murphy v. State*, 5 South. 626, 627, 66 Miss. 46.

"Town," as used in Sess. Laws 1885, p. 199, § 22, providing that contested elections of town and precinct officers shall be tried before the county court, means a municipal corporation—an incorporated town—and does not apply exclusively to certain territorial subdivisions, called "townships," into which counties in some states are divided. 'Town' is the generic term, used in this country as embracing all kinds of municipal corporations which have the right to make police rules or regulations and control persons and things within certain specified limits. *State v. Glennon*, 3 R. I. 276; *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 1." In the popular sense of the word, a "town" is a congregation of houses so near to one another that the inhabitants may fairly be said to dwell together. 2 Rap. & L. Law Dict. 1282. "Any collection of houses which is larger than a village and not incorporated as a city. *Webst. Dict.*" *County Court of Garfield County v. Schwarz*, 22 Pac. 783, 13 Colo. 291.

"Town," as used in Laws 1899, c. 11, § 51, imposing an annual license tax on the business of buying and selling fresh meat from offices, stores, stalls, or vehicles in cities and towns, applies only to incorporated towns, and not to an unincorporated locality having a population of from 2,000 to 4,000 people, and lying about a mile beyond the corporate limits of a town. In New England and some other states a town means always a township. *State v. Green*, 35 S. E. 462, 463, 126 N. C. 1032.

Code 1880, § 1047, providing that any person who may be injured by the locomotive or cars of a railroad company, while such cars are running at a greater rate of

speed than six miles an hour through any city, town, or village, shall have a right of action, etc., refers to an incorporated city, town, or village; and the statute applies to all violations of its terms within the legal or corporate limits of such city, town, or village, without regard to the irregular and variable lines of settlement and improvement of such city. *Illinois Cent. R. Co. v. Jordan*, 63 Miss. 458, 461.

In the construction of statutes the word "town" shall extend and be applied to any place incorporated, or whose inhabitants are required to pay any tax, and shall mean that city, town, ward, or place in which the subject-matter referred to is situate, or in which the persons referred to are residents, unless from the context a different intention is manifest. *Pub. St. N. H. 1901*, p. 63, c. 2, § 5.

The word "town" may include an incorporated town. *Rev. St. Utah 1898*, § 2498; *Code Iowa 1897*, § 48, subd. 18.

As a municipal corporation.

See, also, "Municipal Corporation"; "Municipality."

In New York towns are municipal bodies created by the statute. They have no original powers or rights, nor any rights except such as the statute gives them. In this respect they differ widely from the towns of Massachusetts and some of the New England states, which are original corporate bodies existing by the agreement of the inhabitants, and in some cases before the state or colony itself came into being. *People v. Burrell*, 35 N. Y. Supp. 608, 610, 14 Misc. Rep. 217.

Town Law, § 2, defines a "town" as a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and the administration of public affairs as have been or may be conferred or imposed on it by law. *Lyth v. Town of Evans*, 68 N. Y. Supp. 356, 358, 33 Misc. Rep. 221.

The word "town," as used in *Sess. Laws 1885*, p. 199, § 22, providing that "contested elections of town and precinct officers shall be tried before the county court as hereinbefore provided for the trial of contests of county officers, so far as the same is practicable," etc., refers to a municipal corporation—an incorporated town. *County Court of Garfield County v. Schwarz*, 22 Pac. 783, 784, 13 Colo. 291.

Parochial character.

St. 4 Geo. I, c. 1, providing that whenever a parish is created within a town, that part of the town which has not undergone the change shall ipso facto become a parish and be the first or principal parish,

shows that towns originally were both of a municipal and parochial character; and it has been held that on this account towns might, even before the establishment of a parish within their boundaries, separate these characters, and have distinct meetings of town and parish in relation to the subjects which appertain to each. *Inhabitants of Milford v. Godfrey*, 18 Mass. (1 Pick.) 91, 98.

"Town," as used in *Priv. St. 1815*, c. 115, § 6, requiring the trustees of the municipal fund in B. to apply the interest of the fund to the support of the ministry in B. in such way and manner as the inhabitants thereof in regular town meeting should direct, is construed in a limited sense, as referring to its parochial character only, in which capacity alone it was interested in the fund. *Richardson v. Brown*, 6 Me. (6 Greenl.) 355, 359.

Recording plat.

Recording a plat of land laid out as a town does not constitute the place a town, within the statutes of Oregon prohibiting the establishment of tollgates within the limits of any town, whether incorporated or not, but houses and inhabitants are necessary to constitute a town. *Milarkey v. Foster*, 6 Or. 378, 381, 25 Am. Rep. 531.

In this country there is no precise legal definition of the term "town," but a place containing one store doing business to the amount of \$4,000 per annum, a dwelling house for two families, a population of two families, numbering in all six persons, cannot be called a "town," in the popular sense of the term, though the owner of the land platted it into lots, blocks, and streets, and filed a plat with the county clerk. *Clements v. Crawford County Bank*, 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149.

Borough or village.

See, also, "Village."

A village and a town are not identical. A village is ordinarily less than a town, and more occupied by agriculturists; yet the two cannot be definitely distinguished by the size of the place or employment of the inhabitants. A statute that the word "town" may include cities as well as incorporated villages is a clear implication that it does not include unincorporated villages. *Truax v. Pool*, 46 Iowa, 256, 257.

The word "town" may include a village. *V. S. 1894*, § 4223; *Code W. Va. 1899*, p. 134, c. 13, § 17, subd. 21; *Rev. Codes N. D. 1899*, § 1176; *Gen. St. Minn. 1894*, § 1511; *Peck v. Weddell*, 17 Ohio St. 271; *Rev. St. Mo. 1899*, § 4160.

"Town," as used in the title of an act relative to municipal corporations, is synonymous with "village," as used in the body of

the act, so as to render the title sufficiently descriptive of the matter contained in the act. *Chicago, St. L. & N. O. R. Co. v. Town of Kentwood*, 22 South. 192, 49 La. Ann. 931.

The terms "town" and "village" are, within the meaning of the law, synonymous. *Martin v. People*, 87 Ill. 524; *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Town of Enfield v. Jordan*, 119 U. S. 680, 686, 7 Sup. Ct. 358, 30 L. Ed. 523. And hence the fact that in some of the proceedings for the organization of a village it was designated as a town, and that the village adopted the name of the town of C., does not invalidate the proceedings. *People v. Pike*, 64 N. E. 393, 394, 197 Ill. 449.

"Town," as used in 3 Gen. St. pp. 3458, 3461, pars. 9, 24, giving telephone companies the right to set their poles on public roads and highways of the state, provided no poles shall be placed in any streets of an incorporated town, etc., should be construed as broad enough to include municipalities formally styled "townships, boroughs, or villages," where the public highways were in fact streets as distinguished from country roads. *Inhabitants of Summit Tp. v. New York & N. J. Telephone Co.*, 41 Atl. 146, 147, 57 N. J. Eq. 123; *Broome v. Same*, 9 Atl. 754, 49 N. J. Law (20 Vroom) 624.

The term "town corporate" does not necessarily mean a city or town having exclusive jurisdiction. A borough may be a town corporate, within the licensing Act 9 Geo. IV, c. 61, § 1, though it has no separate court of quarter sessions. *Brown v. Nicholson*, 5 O. B. (N. S.) 468, 479.

"Towns," as used in a statute referring to incorporated towns, can be construed to include boroughs. The word "towns" in a statute is inexplicit in meaning, and must be interpreted by the context, or, that failing, by the necessity and occasion of the law. *Walling v. Borough of Deckertown*, 44 Atl. 864, 865, 64 N. J. Law, 203.

"Town," as used in Act March 22, 1895, (P. L. p. 551), providing that the inhabitants of any district lying wholly in one county, having a population exceeding 5,000, not including any territory within the limits of any incorporate city or town, may become a body corporate, cannot be construed to include boroughs. *Borough of Glen Ridge v. Stout*, 33 Atl. 858, 58 N. J. Law, 598.

City.

The word "town" may include a city. *Rev. Laws Mass. 1902*, p. 89, c. 8, § 5, subd. 23; *Pub. St. R. I. 1882*, p. 77, c. 24, § 8; *Code Iowa 1897*, § 48, subd. 16; *Rev. St. Utah 1898*, § 2498; *Gen. St. Minn. 1894*, § 255, subd. 14; *Id.* § 1511; *Rev. St. Me. 1883*, p. 59, c. 1, § 6, subd. 17; *V. S. 1894*, 19, 4223; *Mills' Ann. St. Colo. 1891*, § 4185, cl. 9; *Rev.*

St. Wis. 1898, § 4971; *Pub. St. N. H. 1901*, p. 528, c. 27, § 2; *Code W. Va. 1899*, p. 134, c. 13, § 17; *Rev. Codes N. D. 1899*, § 1176.

Any considerable collection of dwelling houses, especially as distinguished from the adjacent country, is a town; but "town" and "city" are not, as a matter of law, synonymous, the difference between the two consisting in size and population. *Wight & Wesslosky Co. v. Wolff*, 87 S. E. 395, 112 Ga. 169.

According to lexicographers there is no marked distinction between a city and a town, the former being more important than the latter. *Heard v. State*, 39 S. E. 118, 113 Ga. 444.

The word "town" is used to designate any collection of houses larger than a village. A town may consist of 20 houses or of 20,000. A city is even called a town. *Glasgow v. City of St. Louis*, 15 Mo. App. 112, 123.

"Town," as used in *Sess. Laws 1885*, p. 199, § 22, which provides that contested elections of town and precinct officers shall be tried before the county court, cannot be construed to include cities. *Booth v. County Court of Arapahoe County*, 33 Pac. 581, 18 Colo. 561.

"Town" is used to designate either a place where there are a number of adjacent occupied dwellings, or as a municipal corporation organized under various statutes of different states; but in either sense it includes a city, unless used in some connection which shows that a different meaning was intended, and is so used in *St. 1867-68*, p. 507, § 70, providing that all the swamp and overflowed salt marsh and tide lands within two miles of any town or village are excluded from the provisions of the act. *Klauber v. Higgins*, 49 Pac. 466, 467, 117 Cal. 451 (citing Board of Com'rs of Public Charities and Correction of City of New York v. McGuerrin [N. Y.] 6 Daly, 349; 1 Coke, Inst. 116; In re Road in Milton, 40 Pa. 300; Peck v. Weddell, 17 Ohio St. 271; *State v. Glennon*, 3 R. I. 276).

"Town," as a generic term, embraces all such primary municipal corporations as incorporated cities and villages; and, independently of any statutory provision, it has become a well-settled rule of construction that the term "town," when used in a general statute, may include cities, unless the contrary appears from the whole statute to have been the intent of the Legislature. *Odegard v. City of Albert Lea*, 23 N. W. 526, 527, 83 Minn. 351.

The term "town" is generic, and includes cities, and will be so construed under Act March 3, 1859, entitled "An act for the protection of sidewalks in towns and villages," etc. *City of Indianapolis v. Higgins*, 40 N. E. 671, 674, 141 Ind. 1.

The word "town" is generic, and includes cities. *State v. Craig*, 31 N. E. 352, 132 Ind. 54, 16 L. R. A. 688, 32 Am. St. Rep. 237; *McFarland v. Gordon*, 41 Atl. 507, 508, 70 Vt. 455; *Flinn v. State*, 24 Ind. 236, 287.

"Town," as used in P. L. 1895, p. 506, authorizing the inhabitants of any town, borough, or township, or part thereof, containing a population exceeding 5,000 inhabitants, to incorporate as a city, is used in its restricted sense to designate a particular species of municipality, and not in a generic sense. It is not permissible for another city to reorganize under this enactment. *City of Dover v. Grey*, 42 Atl. 674, 62 N. J. Law, 647; *Attorney General v. City of Dover*, 40 Atl. 640, 641, 62 N. J. Law, 40.

In its narrowest sense, "town" denotes something other than a city, but in its broader scope it comprehends such a municipality. Lord Coke in 1 Inst. 116, says that "a town is a genus, and a borough is a species." Bouvier's definition of the word "city" is a town incorporated by that name. *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 1, 4.

Rev. St. c. 19, § 120, provides that if any damage happen to any person, his team or other property, by reason of the insufficiency or want of repairs in any bridge of any town of the state, the person sustaining such damage shall have a right to sue for and recover same against such town. Held, that the word "town" does not include cities. *Beaudette v. City of Fond du Lac*, 40 Wis. 44, 45.

The word "town," in a statute giving a lien upon real property for labor done and material furnished by serving a notice in writing upon the town clerk of the town where real property is situated, does not include the city of Brooklyn, which is not one of the civil divisions of the state known as a "town," and has no officer known as a "town clerk," or who performs similar duties to those assigned to the clerks of the several towns throughout the state, and therefore the statute does not apply to the city of Brooklyn. *Rafter v. Sullivan* (N. Y.) 13 Abb. Prac. 262, 263.

The word "towns," as used in Rev. St. c. 19, § 120, imposing upon towns a liability for damages resulting from the insufficiency of highways, are applicable to the city of Milwaukee, since section 126 expressly declares that all the provisions of the chapter shall be applicable to all parts of the state except where special provisions inconsistent therewith are made in respect to particular towns, counties, cities, or municipalities. No such inconsistent provisions exist in the charter of Milwaukee. *Kittredge v. City of Milwaukee*, 26 Wis. 46, 48.

District.

The word "town" may be construed to include districts unless such construction

would be repugnant to the provisions of any act specially relating to the same. Rev. St. Wis. 1898, § 4971; Gen. St. Minn. 1894, § 255, subd. 14.

The word "town," as used in Const. art. 2, c. 1, providing that each town then incorporated, though it did not have 150 ratable polls, might elect one representative, etc., includes districts. *Hill v. Selectmen of Easthampton*, 4 N. E. 811, 813, 140 Mass. 381.

Same—School district.

School districts, being organized distinctly from each other and from the town in which they are located, and being authorized to establish and maintain their own high schools, are "towns," within Laws 1801, c. 89, § 9, making a town which did not maintain high schools of its own liable for the tuition of children residing therein and attending high schools therein or in any other town or city in the state. *Union School Dist. v. School Dist. No. 20*, 52 Atl. 850, 851, 71 N. H. 269.

Inhabitants.

Act 1852, No. 172, § 1, providing that the town of Jackson in a certain parish should be exempt from the payment of parish taxes, should be construed to mean the inhabitants of the town as well as the property of that corporation. *Parish of East Feliciana v. Levy*, 4 South. 309, 310, 40 La. Ann. 332.

Plantation.

The word "town" includes plantations, unless otherwise expressed or implied. Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 17; *Parker v. Williams*, 77 Me. 418, 422, 1 Atl. 183, 139.

Township.

See, also, "Township."

The word "town" may mean "township." Rev. Codes N. D. 1899, § 1176; Gen. St. Minn. 1894, § 1511; Gen. St. Kan. 1901, § 7342, subd. 17.

Const. 1865, art. 11, declaring that the General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto, should be construed to include townships, which are only geographical subdivisions of a county. "A township is a different thing from a town under the organic laws of Missouri. It has no power by itself to make independent contracts or to become bound in its separate capacity. The law has not vested it with that power. It forms an integral part of the county, and the county, to a certain extent, controls and acts for it."

Harshman v. Bates County, 92 U. S. 569, 573, 23 L. Ed. 747.

The word "town," as found in the statutes, is not always used in the same sense. In Rev. St. 1874, p. 1067, § 5, providing that counties adopting the township system for the management of county affairs should be divided into towns, a town is a species of a municipal corporation, and constitutes an integral part of the county; and such towns are clearly interwoven with the management of the county affairs, and generally embrace a township, according to government surveys. *Martin v. People*, 87 Ill. 524, 528.

"Town," as used in a stipulation not to resume business in the same town, may, by local usage, mean the town and its vicinity. The legal signification of the word is a collection of houses; yet, quite commonly in the United States, it is used to denote the whole territory within certain limits, and as synonymous with the word "township." *Steyer v. Dwyer*, 31 Iowa, 20, 21.

The word "town" is sometimes employed to designate a township, but the term "incorporated town" is seldom, if ever, employed to embrace such a body. *Harris v. Schryock*, 82 Ill. 119, 121.

"Town" as used in Supp. Revision, p. 652, § 12, requiring a water company to obtain the consent of a town before laying pipes under its streets, should be construed to include townships. *Inhabitants of Township of Saddle River v. Garfield Water Co.* (N. J.) 32 Atl. 978, 979 (citing *Broome v. New York & New Jersey Telephone Co.*, 49 N. J. Law [20 Vroom] 624, 9 Atl. 754); *Inhabitants of Township of Franklin v. Nutley Water Co.*, 32 Atl. 381, 383, 53 N. J. Eq. (8 Dick.) 601.

"Towns," as used in Act April 4, 1891 (P. L. 1891, p. 417), entitled "An act respecting the election and term of office of the clerk and collector or receiver of taxes in certain towns, boroughs, and townships," cannot be construed to include townships which are governed by special charters conferred by legislative enactment. *Goldberg v. Dorland*, 28 Atl. 599, 600, 56 N. J. Law, 364.

The term "towns" stands as a generic designation, embracing townships as well as cities, and all other places corporate, established for local government of the same grade as these, and also those of an inferior order, if any such there be, as used in Const. art. 4, § 7, par. 11, prohibiting special legislation regulating the internal affairs of towns, etc. *Pell v. City of Newark*, 40 N. J. Law (11 Vroom) 550, 555.

The word "town" is a word of varying signification. In the legislation of the state of New Jersey it is often and commonly employed to designate places incorporated for local government under special act, but not

clothed with all the powers usually conferred on cities. The word seems to denote this class in P. L. 1877, p. 198, enabling towns and townships to obtain a water supply; and in P. L. 1877, p. 222, authorizing the purchasing of steam fire engines in incorporated towns; and in P. L. 1878, p. 247, providing for the election of assessors and collectors in towns and villages. In this sense it excludes both cities and townships. Sometimes it is employed in a broad, generic sense, embracing both townships and cities, and the whole range of bodies corporate, less than counties, established for local government. *Banta v. Richards*, 42 N. J. Law (13 Vroom) 497, 498.

"Towns," as used in Const. art. 4, § 7, declaring that the Legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties, is a generic term, embracing within its meaning cities as well as townships and boroughs. *Sutterly v. Court of Common Pleas of Camden County*, 41 N. J. Law (12 Vroom) 495, 496 (citing *Pell v. City of Newark*, 40 N. J. Law [11 Vroom] 71, 29 Am. Rep. 266; *Id.*, 40 N. J. Law [11 Vroom] 550).

The word "town," as used in Pub. Laws 1887, p. 8, creating traction companies, and giving them the power to enter into contract with any passenger railway company to construct and operate motors for the traction of the cars of said company, and naming boroughs, towns, and cities, does not mean a borough or a city, but a township. *Philadelphia & West Chester Turnpike Co. v. Philadelphia & D. C. R. R.*, 5 Pa. Dist. R. 306, 308.

Unincorporated territory.

The popular use and meaning of the word "town," is a large, closely populated place, whether incorporated or not, as distinguished from the country or from rural communities. The legal as well as the popular idea of a town or city in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants; that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest, because residents of the same place, not different places; hence locality, not localities, vicinity, vicinage, near, adjacent, not remote. *City of Denver v. Coulehan*, 20 Colo. 471, 479, 39 Pac. 425, 427, 27 L. R. A. 751.

The word "town," as employed in a statute in relation to fencing and operating railroads, means a collection of houses larger than a village and smaller than a city, and has no reference to territory incorporated as a town under the township organization.

Cleveland, C. C. & St. L. R. Co. v. Green, 65 Ill. App. 414, 417.

In considering the validity of an execution sale made under a statute which required notice of the sale to be posted up in two of the most public places in the town in which the property was situated, the court said: "The word 'town,' as used in the statute on this subject, may be held to mean a place, the inhabitants of which are required to pay a tax. It can admit of no doubt that an unincorporated place, as this was at the time of the sale, having inhabitants and established territorial limits corresponding in extent to the general territorial character of towns, and included among towns in the general law for the apportionment of the public taxes, and required by law to pay its share of the said tax, must be a place, the inhabitants of which are required to pay a tax, within the meaning of the statute establishing this rule of construction, and therefore to be considered a 'town,' within the meaning of the act prescribing the mode of proceeding in the sale of an equity or right of redemption on execution." *Russell v. Dyer*, 40 N. H. 173, 184, 185.

In determining whether the term "town" or "city," within the meaning of Const. art. 16, § 15, providing that the homestead not in a town or city shall consist of not more than 200 acres of land, and that the homestead in a city, town, or village shall consist of lot or lots, embraces a certain tract of land, the fact of incorporation or not is not of controlling influence, and will not of itself determine that the land is or is not within the limits of a city or town. *Posey v. Bass*, 14 S. W. 156, 77 Tex. 512. The property in question may be within the corporate limits of a town or city, and still be a rural homestead, within the meaning of the Constitution, or it may be actually within the limits of a town or village not incorporated, and be an urban homestead in its character. *Wilder v. McConnell*, 45 S. W. 145, 146, 91 Tex. 600.

The condition and powers of so-called "unincorporated places" have been gradually approximating those of towns, so that under Rev. St. c. 1, § 4, providing that the word "town" may be construed to extend and be applied to any place incorporated, or the inhabitants of which are required to pay any tax," it may well be doubted if any substantial difference now exists between them. *Bow v. Allenstown*, 34 N. H. 351, 374, 69 Am. Dec. 489.

Ward.

The term "town," in Const. art. 8, § 5, providing that no town shall be divided in the formation of assembly districts, does not include city wards. *People v. Broome*, 20 N. Y. Supp. 470, 472, 66 Hun. 335.

The word "town" may be construed to include wards, unless such construction would be repugnant to the provisions of any act specially relating to the same. Rev. St. Wis. 1898, § 4971. See, also, Rev. Codes N. D. 1899, § 1176; Pub. St. N. H. 1901, p. 63, c. 2, § 5; Gen. St. Minn. 1894, § 1511.

Under the statute providing that the word "town," whenever used in any act, may be construed as meaning a city, ward, or district, unless such construction would be repugnant to the provisions of any act specially relating to the same, a justice of the peace of a ward of the city of Fond du Lac, which adjoins the town of that name, has jurisdiction of an appeal from the determination of the supervisors of the town in proceedings to lay out a highway, the statute requiring that such appeal be taken to a justice of the town or of an adjoining town. *State v. Goldstucker*, 40 Wis. 124, 130.

TOWN BOARD.

The words "town board" import the town board of supervisors, unless otherwise clearly indicated. Rev. St. Wis. 1898, § 4972.

TOWN CHARGES.

Other necessary town charges, see "Other."

TOWN CLERK.

"Town Clerk" is defined in 2 Bouv. Law Dict. 1127, in this wise: "A principal officer, who keeps the records, issues calls for town meetings, and performs generally the duty of secretary to the political organization." The town clerk, then, from the very nature of his duties, must be the officer of the town council to receive papers intended for it, and to see that such papers are presented to it, and a notice to the town clerk of injuries received, given by the party injured, and required in order to sustain a claim against a town for negligence, is properly served on such clerk. *Seamons v. Fitts*, 42 Atl. 863, 866, 21 R. I. 236.

The words "town clerk," in statutes, may mean the clerk of the town, ward, or city to which the subject-matter referred to belongs or in which it is situate. Pub. St. N. H. 1901, p. 64, c. 2, § 28.

The words "town clerks" may be construed to include city clerks. Pub. St. R. I. 1882, p. 77, c. 24, § 8.

TOWN COLLECTOR.

See "Collector."

TOWN COMMONS.

"Town commons" is land which is the property of the town, and remains common

and for public use generally. *Cutts v. Hussey*, 15 Me. 237, 239.

TOWN COUNCIL.

The words "town council" and the words "board of trustees," when used in relation to municipal corporations of Colorado, have practically the same meaning, and it is immaterial which form is used as the style of the enacting clause of an ordinance. *People v. Chipman*, 71 Pac. 1103, 1109, 81 Colo. 90.

The words "town councils" may be construed to include boards of aldermen. Pub. St. R. I. 1882, p. 77, c. 24, § 8.

TOWN ELECTION.

A special town meeting is not a town election, within Laws 1892, c. 680, § 86, as amended by Laws 1895, c. 810, requiring the town clerk to prepare ballots for any town meeting for the election of town officers, as no officer can be elected at such a meeting, and the phrase "town election," therefore, can only refer to the annual town meeting at which officers are elected. *People v. Sackett*, 44 N. Y. Supp. 593, 595, 15 App. Div. 290.

In statutes relative to elections, the term "town election" shall apply to any meeting held for the election of town officers by the voters, whether for a full term or for the filling of a vacancy. Rev. Laws Mass. 1902, p. 105, c. 11, § 1.

TOWN GOVERNMENTS.

The words "town governments," in Const. art. 11, § 4, providing that the Legislature shall establish a system of county and town governments, "were used to designate town organizations in their general features like those of other states, where town governments had been established when the Constitution was adopted. Under the system of town government in New England it has been the practice, by notice designating the questions to be presented, for the selectmen to call meetings of the voters of the town, which are presided over by a moderator and restrained by rules intended to secure orderly proceedings, at which the propriety and expediency of proposed measures may be considered, adopted, or rejected. The matters of local interest are discussed in the town meeting before they are passed on. 'The marked and characteristic distinction,' says Chief Justice Shaw, in *Warren v. City of Charlestown*, 68 Mass. (2 Gray) 84, 101, 'between a town organization and that of a city, is that in the former all the qualified voters meet, deliberate, act, and vote, whereas under a city government this is all done by their representatives.' " *Ex parte Wall*, 48 Cal. 279, 320, 17 Am. Rep. 425.

TOWN HOUSE.

"Town house" is defined to be a house or building in which is transacted the public business of a town, and as used in a devise, in which the testator gave certain lands to a town on condition that they shall not be used for any other purpose than as a place for a town house for said inhabitants, would include a building which had been erected for the purpose of a town house, the basement of which was used for a jail, though it appears that the town has rented temporarily portions of the building, which it had no occasion to use for the time being. *French v. Inhabitants of Quincy*, 85 Mass. (3 Allen) 9, 11.

TOWN LAWS.

A name used, in the portion of England conquered by the Danes, to indicate local laws which were enacted by the inhabitants of townships. Such laws were also called "by-laws." *Board of Health v. City of Yonkers*, 24 N. Y. Supp. 625, 626, 71 Hun, 149.

TOWN LOTS.

The terms "town or city lots," as used in the Constitution in the homestead clause, cannot be construed to embrace farm lots purchased from the town or city and used for farming purposes, when lying beyond the limits of the plan of the town and city proper; and this, though they may be included in the jurisdictional limits of the town or city. *Rogers' Adm'r v. Ragland*, 42 Tex. 422.

"Town lots" include all city and village lots, and all fractions and parts thereof. *Cobbey's Ann. St. Neb.* 1903, § 10407.

TOWN MEETING.

See "Annual Town Meeting."
As an election, see "Election."

A town meeting was originally a meeting of the town electors at one place for the election of town officers and for the transaction of other town business. In course of time it was found inconvenient to have the election at one place and compel all the voters of the town who desired to participate to vote at one place, and that resulted in a number of the towns being divided into election districts for the convenience of the voters. The elections were held on one day, and the town officers met at a subsequent day to canvass the result of the election of the several election districts, and also to transact such other business as might be brought before them. The latter day, the day when the town officers meet, has still retained the name of "town meeting" in such towns, though the actual election of the town officers takes place at a prior day; but, as used in Laws 1893, c. 344, § 1, providing that there

shall be elected at the annual town meeting in each town, etc., means the meeting at which the ballots are cast, and not the day the town officers canvass the returns. In re Foley, 28 N. Y. Supp. 608, 609, 8 Misc. Rep. 57.

The words "town meeting" have a definite and well-settled meaning, as used in Rev. St. 1874, c. 139, art. 6, § 1, reciting that the annual "town meeting" in the respective towns, for the election of town officers and the transaction of the business of the town, shall be held, etc., and are uniformly used to describe the annual meetings of the electors of the town for the purpose of electing township officers and transacting such business as the electors are by law authorized to transact at special meetings of the electors for such purposes, called pursuant to law. The words "town meeting" and the word "election" are not convertible terms. There may, it is true, at a town meeting, be nothing but an election, but there may be more. The theory of such a meeting is that the corporate body of the town is present for the purpose of transacting, and competent to transact, all the corporate business of the town not specially delegated to certain individual officers. *Chicago & I. R. Co. v. Mallory*, 101 Ill. 583, 588.

"A 'town meeting' is a deliberative body, and acts as such in determining all matters that may lawfully be determined by it, as any other deliberative body, except in the election of certain officers of the town, and except as to matters which, by express law, the question to be determined by the electors of town is required to be determined by a vote or ballot." *State v. Racine County Sup'rs*, 36 N. W. 399, 403, 70 Wis. 543 (citing *State v. Davidson*, 32 Wis. 114, 121).

The term "town meetings," in a strict sense, does not include meetings for the election of national, state, district, and county officers. *Commonwealth v. Smith*, 132 Mass. 289, 292.

The words "town meeting," as used in Pub. Laws, May 29, 1884, c. 447, providing that any town may at any town meeting abolish all the school districts therein, means any meetings, or meeting, in which the electors of a town may vote to express their opinions or desires on the question, and therefore a town divided into school districts cannot legally vote in district meetings on the question of abolishing its school districts. *Comstock v. Lincoln School Committee*, 17 R. I. 827, 828, 829, 24 Atl. 145.

TOWN OFFICER.

"Town or village officers," as used in Const. art. 10, § 2, providing that all city, town, and village officers shall be elected by the electors of such cities, towns, and vil-

lages, or some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose, means all those who are appointed or elected for cities, towns, or villages, and must reside and perform the duties of their offices within their respective localities, such as mayor, recorder, alderman, and the like. In re Whiting (N. Y.) 2 Barb. 513, 517.

In statutes relative to elections, the term "town officer" shall apply to any person to be chosen at a town meeting. Rev. Laws Mass. 1902, p. 105, c. 11, § 1.

A justice of the peace is not a "town officer." He is a branch of the judiciary, and his office and the tenure thereof are secure from legislative interference or control. *People v. Keeler* (N. Y.) 25 Barb. 421, 427.

"Town officers," as used in Const. art. 10, § 2, declaring that all town and village officers whose election is not provided for by such Constitution shall be elected by the electors of such towns or villages, etc., includes town collectors. *People v. McKinney*, 52 N. Y. 374, 380.

Though an agent for building a road is not, perhaps, in strictness a "town officer," yet a warrant for a town meeting to choose all necessary town officers is sufficient to authorize the choice of an agent to build the road, as the article in this form gives sufficient notice that one of the objects of the meeting is to choose the persons to transact the business of the town, and that under it not only the usual town officers may be chosen, but any committees or agents whose services may be required. *Baker v. Shephard*, 24 N. H. (4 Fost.) 208, 212.

TOWN ORDER.

A "town order," when payable to order and indorsed, is not, in the purview of the law, regarded as commercial paper in the hands of bona fide indorsees for value, so as to exclude evidence touching the legality of its inception; and whoever receives such orders is subject to the same defense that would be good against the payee. *Emery v. Inhabitants of Mariaville*, 56 Me. 315, 317 (citing *Willey v. Inhabitants of Greenfield*, 30 Me. [17 Shep.] 452; *Sturtevant v. Inhabitants of Liberty*, 46 Me. 459).

TOWN PAUPER.

A town pauper is one who is supported by the town. A state pauper is one who is supported to some extent at least by the state. *Town of Marlborough v. Town of Chatham*, 50 Conn. 554, 557.

TOWN POUND.

"It has been held that, by the grant or exception in a deed of conveyance of a town

pound, the land on which it stands is conveyed or excepted, not as an appurtenance, but as parcel." *Johnson v. Rayner*, 72 Mass. (6 Gray) 107, 110 (quoting *Wooley v. Inhabitants of Groton*, 56 Mass. [2 Cush.] 805).

TOWN SCHOOLS.

"Town schools," as used in Rev. St. c. 15, § 12, providing that towns shall have power to grant and vote money for the support of town schools, should not be limited to merely those schools which the towns are required to support under a penalty for refusal or neglect to do so, but to include other schools, in addition to those required by law to be supported by the town, in which the higher branches of knowledge were taught. *Cushing v. Inhabitants of Newburyport*, 51 Mass. (10 Metc.) 508, 512.

TOWN SERGEANTS.

The words "town sergeants" may be construed to include city sergeants. Pub. St. R. I. 1882, p. 77, c. 24, § 8.

TOWN SITE.

"Town site," as used in the statutes of Colorado, and in the states and territories of the West generally, means that portion of the public domain which is segregated from the great body of government land by the proper authority and procedure as a site for a town, and will not be held to apply to an unincorporated town or city. *Rice v. Colorado Smelting Co.*, 66 Pac. 894, 895, 28 Colo. 519.

TOWN TREASURER.

The words "town treasurers" may be construed to include city treasurers. Pub. St. R. I. 1882, p. 77, c. 24, § 8.

TOWN WAY.

"Town way," as used in the statutes relating to such ways, means a way which was originally laid out by the selectmen of the town. *Inhabitants of Blackstone v. Worcester County*, 108 Mass. 68.

"Town way," as used in Pub. St. c. 112, § 125, which provides that a highway or town way may be laid across a railroad previously constructed, etc., means a highway which is laid out by proceedings in which a town or city has original jurisdiction. *Boston & A. R. Co. v. City of Boston*, 2 N. E. 943, 140 Mass. 87.

"Town ways" are roads within the territorial limits of a particular town. *Inhabitants of Waterford v. Oxford County*, 59 Me. 450, 452.

Highway distinguished.

Town ways, in the Massachusetts system of public ways, are distinguished from highways, in that the latter "are laid out and may be altered or discontinued by the authorities having jurisdiction throughout the county, such as the county court, the court of general sessions, and, in modern times, the county commissioners, while the former are laid out and may be altered or discontinued by the selectmen with the approval of the town. In other respects they are alike, and equally parts of the system of public ways." *Butchers' Slaughtering & Melting Ass'n v. City of Boston*, 30 N. E. 94, 139 Mass. 290.

TOWNSHIP.

A township is generally spoken of as a municipality or municipal corporation; but, strictly speaking, every political subdivision of the state organized for the administration of civil government is a quasi corporation. *Rathbone v. Hopper*, 45 Pac. 610, 57 Kan. 240, 34 L. R. A. 674.

"Township," as used in Act April 16, 1870, relating to the building of a bridge across a stream which runs between two townships, means the several municipal divisions of a county. *City of Wilkes-Barre v. Luzerne County (Pa.)* 14 Luz. Leg. Reg. 183.

"Townships" in South Carolina are mere territorial subdivisions of land, with no public duty or function whatever, and no corporate or public purpose, so that an act declaring them corporations, and permitting them to subscribe to a railroad, is unconstitutional. *Atlantic Trust Co. v. Town of Darlington (U. S.)* 63 Fed. 76, 82.

"Townships" are a class of municipalities by themselves, and have no very important differences, unless it be the difference in population; otherwise, they are as generally alike as possible. The fact that a township is governed by a special charter, while other townships, the same class of municipalities, alike in all respects, are governed and regulated by general laws, does not place it in a class by itself. *Goldberg v. Dorland*, 28 Atl. 599, 600, 56 N. J. Law (27 Vroom) 364.

Townships, though possessing some corporate functions and attributes, "are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them to perform their public duties. They are denominated in the books and known to the law as "quasi corporations," rather than corporations proper. Per *Brewer, J.*, in *Beach v. Leahy*, 11 Kan. 23, 29 (cited in *Knowles v. Board of Education*, 7 Pac. 561, 566, 33 Kan. 692).

"Townships, though they are regarded as municipal corporations in the general

sense of that term, stand on a plane altogether different from that occupied by cities and villages. The latter are possessed of a much higher order of corporate existence than the former, and differ from them in many particulars. They are in law and in fact as distinct from one another as any two artificial beings could be, whatever their supposed resemblances may be. This is equally so with respect to their organization and jurisdiction. In the exercise of the powers conferred on them, they act wholly independently of each other, even where their jurisdiction extends over the same people and territory." *Dolese v. Pierce*, 16 N. E. 218, 220, 124 Ill. 140.

Townships exist only for the purpose of a general politic government of the state. All the powers with which they are intrusted are the powers of the state, and all the duties with which they are charged are duties of the state. *Travelers' Ins. Co. v. Oswego Tp.* (U. S.) 59 Fed. 58, 64, 7 C. C. A. 669.

"The terms 'plantation,' 'town,' and 'township' seem to have been used in the early colonies of Massachusetts almost indiscriminately to indicate a cluster or body of persons inhabiting near each other, and, when they became designated by name, certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies, and the like, which in effect made them municipal corporations, and no formal acts of incorporation were granted until long afterwards." *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 485.

Where a township trustee was also a trustee for the school township, and executed a contract wherein he described himself as the trustee for the township, he will be deemed to have meant the civil, not the school, township. *Jackson Tp. v. Home Ins. Co. of Columbus, Ohio*, 54 Ind. 184, 186.

The word "township," in Revision, § 824, which provides that notice of the presentation of a petition for the establishment of a road must be posted in three public places in every township through which the road passes, means townships as organized and defined by the state law and the congressional townships created by a federal enactment. *McCollister v. Shuey*, 24 Iowa, 362, 367.

The word "township," in Pub. Acts 1887, No. 200, providing that all highway labor and all money taxes assessed and collected within any township for highway purposes shall be expended within the limits of the township on which the same may be assessed, and in the act of 1889, re-enacting this clause in practically the same language, was evidently construed by the Legislature as meaning "surveyed townships." *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277, 279, 52 N. W. 468.

A township is a governmental agency to which is intrusted the care and superintendence of highways within its boundaries, and upon which is imposed the duty of repairing them and keeping them in order and removing obstructions, with power to levy and expend taxes for these purposes. In short, as to all matters pertaining to highways, a town is to the extent of these powers and duties a representative of the state, and a civil action to abate a public nuisance constituting an obstruction to a highway and to enjoin its maintenance may be maintained by a town in its own name. *Hutchinson Tp. v. Filk*, 44 Minn. 536, 537, 47 N. W. 255.

The word "township," as used in Revenue Act 1869, § 88, providing that the tax collector shall receive county warrants in payment of county taxes, and the orders or warrants, that may be payable on presentation, of any township, town, or city, for their taxes, is not to be taken in its literal sense; for, if it is, the provision that the orders or warrants of a township shall be received for its taxes has no meaning and can have no effect, since townships have neither taxes nor power to draw orders or warrants, and have no corporate capacity whatever. Without construing the word "township" to mean school district, the intention of the Legislature that the provision should apply to trustees' orders, as well as other orders and warrants, is very clear, because the reason for making them receivable for the school tax is as apparent and strong as for making county warrants receivable for county taxes, or city or town warrants for city or town taxes. *Wallis v. Smith*, 29 Ark. 354, 356.

The words "precinct," "township," and "school district," in an act relative to taxation, are held not to include municipal corporations. *Union Pac. Ry. Co. v. Ryan*, 2 Wyo. 408, 418.

All towns, villages, or cities having a population of 1,000 inhabitants or over are hereby declared "townships" for the purpose of the act relating to assessors. *Wilson's Rev. & Ann. St. Okl.* 1903, § 6721.

Boroughs.

"Township" includes a borough, as used in Act Feb. 17, 1859, providing that, on petition of the taxpayers of any township or school district, special auditors might be appointed to revise the accounts of the township or school district affairs. In re Borough of Frackville, 94 Pa. 56, 58. See, also, *McLorinan v. Overseers of Poor of Bridgewater Tp.*, 10 Atl. 187, 189, 49 N. J. Law (20 Vroom) 603.

Cities.

Act April 6, 1866 (P. L. 206), provides that any person or persons who shall have

resided in any township in the state for a period of 10 years shall be considered legally settled in the township. Held, that the word "township" was used in such act in its general and extended sense, to include cities, boroughs, and wards. *McLorinan v. Ryno*, 10 Atl. 189, 49 N. J. Law (20 Vroom) 608.

The cities of the state of Kansas are townships, within the meaning of the Constitution and statutes, for the purposes of the election of justices of the peace; and such officers, although elected within a city, are not strictly city officers. Their official duties are not limited to the boundaries of the cities in which they are elected, nor by the provisions of the charters or ordinances of the city in which they reside. Their civil and criminal jurisdictions are coextensive with their counties, except as otherwise provided by law. *State v. Parry*, 33 Pac. 956, 52 Kan. 1, 21 L. R. A. 669.

The words "counties and townships," in Const. art. 13, § 12, providing that the Legislature shall provide for the establishment of a library in each township, and that all the fines collected in the several counties and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries, includes all the municipal divisions of the state; and hence fines collected in the city of Detroit must be shared with the country towns of the county. *Wayne County v. City of Detroit*, 17 Mich. 390, 401.

Whenever the word "township" is used in the act relating to the drain commissioner, it shall be construed to mean "city," as the case may be. *Comp. Laws Mich. 1897*, § 4313.

The word "townships," as used in the act relating to the erection and preservation of bridges, shall be deemed to include cities and incorporated villages, both in their relation to each other and to townships. *Comp. Laws Mich. 1897*, § 4140.

Fractional townships.

Const. art. 10, § 2, provides that organized counties shall not be reduced to less than 16 townships, as surveyed by the United States, unless the act providing therefor be submitted to and ratified by the people of the counties. By act of the Legislature a new county was organized from two other counties, one of which had remaining 13 whole and 4 fractional townships; the latter containing 100 sections only. The court said: "Now, as surveyed by the United States, each of these fractional townships is treated and described as a separate and independent township, as much as those which are not fractional, and in describing land within them it would not be necessary to describe the township as fractional. We are there-

fore all of the opinion that these fractional townships are to be treated as whole townships under this provision of the Constitution." *Rice v. Ruddiman*, 10 Mich. 125, 135.

Precincts and wards.

"Township" includes wards, as used in How. St. § 1008, subd. 1, providing that all goods, wares, etc., employed in the business of the mechanical arts in any township other than where the owner resides shall be taxed in the township where the same may be, if he only hire or occupy a store, mill, etc., therein. *Comstock v. Grand Rapids*, 20 N. W. 623, 628, 54 Mich. 641.

"Township," as used in the freeholders' act, giving townships authority to raise money to construct and repair bridges, is by the expressed provisions of the act defined to include precinct and ward. *Whitall v. Gloucester County Board of Chosen Freeholders*, 40 N. J. Law (11 Vroom) 302, 304. See, also, *McLorinan v. Overseers of the Poor of Bridgewater Tp.*, 10 Atl. 187, 189, 49 N. J. Law (20 Vroom) 603.

The word "townships," as used in Laws 1897, c. 87, § 12, relating to the erection of public schools, and providing that townships in counties under the commissioner system shall petition to the commissioners of such county for that purpose, is used to designate political units of counties not under township organization, and should be construed as though the word "precincts" had been used, into which units counties are divided, instead of the word "townships." *Union Pac. R. Co. v. Howard County (Neb.)* 92 N. W. 579, 580.

The words "township" and "precinct" shall each include the other, and shall also include "towns" in counties under township organization. *Cobbey's Ann. St. Neb. 1903*, § 10,408.

Town.

See, also, "Town."

A "township" is a governmental corporation of very limited powers, through which the state operates for the construction and repair of the highways. The township cannot be regarded as bound, as between it and the creators of nuisances, to be on guard through its officers, few in number, with limited statutory duty and authority, for the purpose of protecting all the public roads of the township against wrongdoers, who through the negligent use of their own property injure the public highway. The township is a political subdivision of the territory of the state. It is organized by the state as a body politic and corporate, composed of its inhabitants, for the convenient exercise of portions of the sovereign power. It is a mere agency of government, with limited powers and duties. The organiza-

tion is involuntary, and the duties and liabilities of the corporation are statutory. The officers of the corporation are special public agents. Such subdivisions as townships are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. *Pittsburgh, C. C. & St. L. R. Co. v. Iddings*, 62 N. E. 112, 115, 28 Ind. App. 504.

The word "town" often means "township," but "township" never means "town," in the sense of a platted village or town site. The court will take judicial notice of the fact that a township, whether used in the sense of a municipal division of a county or of a township, according to government survey, has no subdivision known as "blocks." That term is applied only to the subdivisions of a platted town, village, or city. *Herrick v. Morrill*, 83 N. W. 849, 850, 87 Minn. 250, 5 Am. St. Rep. 841.

A township is a different thing from a town in the organic law of Missouri; the latter being an incorporated municipality, and the former only a geographical division of the county. *Harshman v. Bates County*, 92 U. S. 569, 573, 23 L. Ed. 747.

The term "townships" in a statute authorizing villages, cities, and townships to issue bonds in aid of railroads, does not include an incorporated town. *Welch v. Post*, 99 Ill. 471, 473.

The word "township," in Rev. St. c. 21, § 15, relating to cemeteries, and enacting that any city, village, or township may acquire lands for cemetery purposes by condemnation, is not used as being merely descriptive of the government subdivision of land. "The act in regard to cemeteries authorizes a township to acquire lands by condemnation. A mere governmental, geographical subdivision of land, not organized in a corporate or quasi corporate capacity, cannot institute or prosecute a condemnation proceeding. Consequently, if the word 'township,' as used in the act, confers authority upon one of the component subdivisions of a county, called into being by the act on township organization (3 Starr & C. Ann. St. p. 3916, authorizing the division of a county into towns, so that they shall conform to the townships according to the government survey, and enacting that the town shall be named in accordance with the express wish of the inhabitants), then the word 'township' is meaningless as used in the act in regard to cemeteries. It was evidently the intention of the township organization act to create townships whose corporate names should be towns, and that they should sue and be sued in and by such names. We are of the opinion that the Legislature intended to use the words 'town' and 'township' synonymously in referring to the po-

litical divisions of the county." The word "township" in the cemetery act being used in the sense of the word "town," the power to condemn for cemetery purposes is conferred by the statute on towns. *Phillips v. Town of Scales Mound*, 83 N. E. 180, 181, 195 Ill. 353.

TOWNSHIP EXPENSES.

"The term 'township expenses' is usually applied to the ordinary expenses of township government, and, as commonly used, would not cover many sums which it might be proper, and even necessary, that the township should raise for local purposes, as, for instance, school taxes, or a tax to pay a judgment against the township." *Upton v. Kennedy*, 36 Mich. 215, 220.

TOWNSHIP ORGANIZATION.

By "township organization" is meant the township system, by which a county is subdivided into townships or towns. Each of these towns constitutes a body corporate. The purely local affairs are intrusted to the town, to the town meetings of the several towns, or to township officers selected by the towns, while the general affairs of the county are conducted by a board constituted of the various township supervisors. The essential feature of township government lies in the application of the principle of local self-government. *Van Horn v. State*, 64 N. W. 365, 367, 46 Neb. 62.

TOWNSHIP TRUSTEE.

The "township trustee" is a public officer, having no private right or interest in the highways within the town; the duties enjoined upon him by law with reference to the highways being the duties which he owes to the public as its officer. Their duties are supervisory in their nature, and they are not bound as officers to perform manual labor in the maintenance of the highways. Being an officer of the township, he is a special public agent, and for his acts the township is not liable. *Pittsburgh, C. C. & St. L. Ry. Co. v. Iddings*, 62 N. E. 112, 115, 28 Ind. App. 504.

TOWN'S POOR.

"Town's poor," as used in a town record, reciting "Voted the rest of the town's poor that are not provided for be left to the care of the selectmen to dispose of," in its natural sense and unexplained, means the poor whom the town is permanently bound to support. It does not include persons receiving temporary relief. *Inhabitants of West Bridgewater v. Inhabitants of Wareham*, 138 Mass. 305, 307.

TOYS.

Broadly defined, a "toy" is an article mainly intended for the amusement of children. The fact that the word is so broadly defined does not warrant the conclusion that anything chiefly used to describe the object designed to amuse children is to be classified as a "toy." Metal thread, known as tinsel, tinsel thread, lametta, etc., but never as a toy, is not dutiable as a toy, under Tariff Act Oct. 1, 1890, merely because it is used almost exclusively for decorating Christmas trees. *Wanamaker v. Cooper* (U. S.) 69 Fed. 465, 466.

"Toys," as used in Tariff Act Oct. 1, 1890, par. 436, includes music boxes, small in size, of inferior quality, playing less than six tunes, not musically accurate, wound up with a key permanently affixed to the outside of the box, easily operated by a child, and costing 8.35 francs or less each. *Jacot v. United States* (U. S.) 65 Fed. 415, 418, 12 C. O. A. 666.

Slightly made magic lanterns, not sufficiently substantial to be used by mature persons, but rather by children, are dutiable as "toys," under Tariff Act Aug. 27, 1894, c. 349, § 1, par. 321, 28 Stat. 533. *Borgfeldt v. United States* (U. S.) 124 Fed. 457.

"Toys," as used in Tariff Act Oct. 1, 1890, par. 430, include slides designed for use in magic lanterns for the amusement of children. In re *Borgfeldt* (U. S.) 65 Fed. 791.

The term "toys," used in the tariff act, is to receive the signification ordinarily attributed to it in common usage, unless evidence shows that it has a different trade signification; but it is held that if decorated china earthenware is bought, sold, and used under the name of "toys," it is to be so classified for duty, whether the articles are used for playthings for children or for household purposes. *Zeh v. Cadwalader* (U. S.) 42 Fed. 525, 527.

TP.

"Tp.," as used in a deed of land described as "sections 22 and 28, Tp. 79, R. 13, Poweshiek County," is not uncertain or indefinite as to the location of the land. It is a contraction in almost universal use in describing lands, and everybody understands it to mean "township." *Ottumwa, C. F. & St. P. Ry. Co. v. McWilliams*, 32 N. W. 315, 316, 71 Iowa, 164.

TRACING.

"Tracing" is a mechanical copy or fac simile originally produced by following its lines with a pen or pencil through a transparent medium called "tracing paper." *Chapman v. Ferry* (U. S.) 18 Fed. 539, 540.

TRACK.

See "Railroad Track"; "Street Railroad Tracks."

TRACK TOOLS.

"Track tools," as used in Tariff Act March 3, 1883, schedule 2, making track tools dutiable at a certain rate, includes steel picks, spike hammers, or mauls, for driving spikes, and clawed bars used in the construction of railway tracks. *Procter v. Spalding* (U. S.) 26 Fed. 610.

TRACKAGE.

Under Sp. Laws 1874, c. 1, subc. 4, § 11, providing that the common council shall have power and authority to grant the right of way upon, over, and through any of the public streets, highways, alleys, public grounds, or levees of the city of St. Paul to any railway company, upon such limitations as they may prescribe by ordinance, the common council is only authorized to grant the right of "trackage," which is the right to construct and operate railroad tracks on and over the public grounds within the city, but not to occupy and use such grounds as a site for depots, freight houses, or other buildings. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 65 N. W. 649, 63 Minn. 330, 34 L. R. A. 184.

TRACT.

See "No Tract of Land"; "Separate Tracts or Parcels."

"Tract," in its common signification, does not imply anything as to the size of the parcel of land. *Cade v. Larned*, 27 S. E. 166, 167, 99 Ga. 588.

"Tract," as used in Act March 8, 1871, providing that the board of managers of the geological survey should, on application of at least five owners of separate lots of land included in any tract of land in the state which is subject to overflow from freshets, or which is usually in a low, marshy, boggy, or wet condition, are authorized to examine such tract and adopt a system of drainage, for the same may well embrace a district or large section of the same class of land described in the act and lying in a body. In re *Application for Drainage of Lands between Lower Chatham and Little Falls*, 35 N. J. Law (6 Vroom) 497, 508.

The word "tract" was used at common law to designate "that land which lies between ordinary high-water mark and low-water mark." *Andrus v. Knot*, 8 Pac. 763, 12 Or. 501.

The term "tract" means any contiguous quantity of land in the possession of,

owned by, or recorded as the property of the same claimant, person, or company. Rev. Codes N. D. 1899, § 1176; Ballinger's Ann. Codes & St. Wash. 1897, § 1658; Rev. St. Tex. 1895, art. 5064.

The word "tract," when used in the revenue act shall be construed to include, not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures, and improvements, and other permanent fixtures, effects of every kind thereon, and all rights and privileges belonging or in any wise pertaining thereto, except where the same may be otherwise denominated by this act. Hurd's Rev. St. Ill. 1901, p. 1494, c. 120, § 292, subd. 12.

TRACT DIVIDED INTO LOTS.

The term "tract divided into lots," in Limitation Act 1872, § 5 (McClell. Dig. 732) providing, upon the question of adverse possession, as against true title, that whenever it shall appear that the occupant or those under whom he claims entered into possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment for seven years, the premises so included shall be deemed to have been held adversely, except that, where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract, does not include a 40 of land. Kendrick v. Latham, 6 South. 871, 874, 25 Fla. 819.

TRACTION ENGINE.

A traction engine is a locomotive engine for drawing heavy loads upon common roads, or over arable land, as in agricultural operations, and is so used in 2 Hill's Ann. Laws, § 4139, providing that it shall be unlawful for any person to drive any steam traction or portable engine over any bridge without taking certain precautions for the safety of the bridge. Toedtemeler v. Clackamas County, 54 Pac. 954, 955, 34 Or. 66.

TRADE.

See "Coasting Trade"; "Coastwise Trade"; "Foreign Trade"; "Lawful Trade"; "Payable in Trade"; "Useful Trade."

All other trades, see "All Other." Apparatus of, see "Apparatus." Other trade, see "Other."

"Trade" means the craft or business which a person has learned and which he carries on as a means of livelihood; a purchase or sale; a bargain; specifically, in politics, a deal; the exchange of commodities for other commodities or for money; the business of buying and selling, or dealing by way of sale or exchange; commerce; traffic. In re Master Granite & Blue Stone Cutters' Ass'n of Philadelphia, 23 Pa. Co. Ct. R. 517, 520.

"Trade," as used in a contract guarantying milling machinery to make flour to satisfy the trade of the party to whom it is sold, means the trade in and around the place where the mill is situated. It would mean that the character of the flour should be such as would fairly and reasonably enable the purchaser to compete with other mills whose flour might be sold or used in that part of the country. Knowlton v. Oliver (U. S.) 28 Fed. 516, 518.

A chattel mortgage covenanting that the mortgagor would not "trade or exchange" any of the property mortgaged without the written consent of the mortgagee, and that in case he did the property so obtained should be held and taken in place of that disposed of, clearly indicates the giving of one article and the receiving of another, whether the article be money or what is ordinarily understood to be a chattel, and cannot be construed to require the mortgagor to substitute other like animals for animals which have died or articles used or consumed by the mortgagor. Hulsizer's Adm'rs v. Opdyke (N. J.) 13 Atl. 669. See, also, Hulsizer v. Opdyke (N. J.) 7 Atl. 879.

As any business for profit.

"Trade," as used in Const. art. 5, § 3, authorizing the Legislature to tax "trades, professions, franchises, and income," is employed in its broadest signification, and comprehends, not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants, and includes in this sense any employment or business embarked in for gain or profit. State v. Worth, 21 S. E. 204, 205, 116 N. C. 1007.

As buying and selling.

"Trade" is defined by Jacob in his Law Dictionary to mean mutual traffic, by selling or the exchange of articles, between members of the same community. Bouvier, in his Law Dictionary, defines "trade" as any sort of dealings by way of sale or exchange. Hence an agreement between dealers fixing the retail price of coal was an agreement in restraint of trade. People v. Sheldon, 21 N. Y. Supp. 859, 861, 66 Hun, 590.

In a lease of a house there was a covenant, with a clause of forfeiture, not to use

or exercise the trade of a butcher, baker, slaughter man, tobacco pipe maker, tobacco pipe burner, soap maker, sugar baker, dyer, distiller, coffee house keeper, tanner, or any offensive trade. Held, that the word "trade" meant only some business conducted by buying and selling, and hence the lease was not forfeited by the use of the house as a private lunatic asylum. *Wetherell v. Bird*, 2 Adol. & El. 161.

"Trade" as used in the title of Acts 1897, c. 94, reciting it to be "An act for the prohibition and punishment of those transactions and combinations calculated to lessen competition in trade or to influence prices of commodities," includes dealings in both imported and domestic commodities. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1039, 104 Tenn. 715, 78 Am. St. Rep. 941.

"Trade," as used in Pen. Code, § 211, providing that it shall be unlawful for any person to open on Sunday for the purpose of trade, or sale of goods, wares, and merchandise, any shop, store, or building, or place of business whatever, will not be held to mean pursuing a trade or exercising a trade, such as that of a barber, but trading in goods. *Dooly v. Russell*, 38 Pac. 1000, 1001, 10 Wash. 195.

Trade "in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally." Hence the sale of land is a trade. *May v. Sloan*, 101 U. S. 231, 237, 25 L. Ed. 797.

The charter of a bank of the United States, declaring that it should not directly or indirectly "deal or trade" in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money loaned, and not redeemed in due time, does not prohibit the corporation from purchasing promissory notes, but only denotes what may or may not be bought and sold by the bank. *Bank of United States v. Norton*, 10 Ky. (3 A. K. Marsh.) 422, 425.

Act Cong. April 10, 1816, c. 44, incorporating the Bank of the United States, and providing that it shall not directly or indirectly "deal or trade" in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged, for money loaned and not redeemed in due time, did not intend to prohibit purchases generally, but prohibited buying and selling for the purposes of gain. It meant to interdict the bank from doing the ordinary business of a trader or merchant in buying and selling goods for profit, and the words "deal" and "trade" were used in contradistinction to purchases made for the accommodation or use of the bank or result-

ing from its ordinary banking operations. *Fleckner v. United States Bank*, 21 U. S. (8 Wheat.) 338, 351, 5 L. Ed. 631.

As commerce or traffic.

"Trade" has been defined as the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange. "Commerce" has a broader meaning. It consists of intercourse and traffic, and includes the transportation of persons and property and the navigation of public waters for that purpose. *United States v. Cassidy* (U. S.) 67 Fed. 698, 705; *In re Grand Jury* (U. S.) 62 Fed. 840, 841; *United States v. Coal Dealers' Ass'n* (U. S.) 85 Fed. 252, 265; *United States v. Debs* (U. S.) 64 Fed. 724, 749.

In ordinary language the word "trade" is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation generally; and, third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts. Ordinarily, when we speak of "trade," we mean commerce or something of that nature; when we speak of "a trade," we mean an occupation, in the more general or the limited sense. As used in a statute seeking to make unlawful combinations to create or carry out "restrictions in trade," the word is used as the mere equivalent of commerce or traffic. *Queen Ins. Co. v. State*, 24 S. W. 397, 400, 86 Tex. 250, 22 L. R. A. 483; *United States v. Patterson* (U. S.) 55 Fed. 605, 639.

The words "commerce" and "trade" are not synonymous. Commerce relates to dealings with foreign nations, while trade, on the contrary, means mutual traffic among ourselves, or the buying, selling, or exchange of articles between members of the same community. *People v. Fisher* (N. Y.) 14 Wend. 9, 15, 28 Am. Dec. 501; *Hooker v. Vanderwater* (N. Y.) 4 Denio, 349, 353, 47 Am. Dec. 258.

The word "trade" properly means traffic in merchandise. Where a witness testified that "the whole trade was canceled by agreement of the parties," it was held that he meant the bargain which he had made with the other parties to the agreement. *Barrett v. Barron*, 13 N. H. 150, 161.

In construing the word "trade" as used in a policy of insurance on the cargo of a vessel, reciting that "there are goods on board contraband war, and that the insurance is not against illicit trade with the Spaniards, but is understood to cover the property under whatever papers the vessel may sail," the court said: "The obvious and most usual sense in which the word 'trade' is implied is to express traffic, commerce, exchange, dealing, not the voyage or destination of a ship, although sometimes the

term may be allowed that meaning, when the voyage or destination is named from the use or purpose to which it leads or is designed." *Higginson v. Pomeroy*, 11 Mass. 104, 112.

As occupation or profession.

One of the definitions of "trade" given by Webster is the business a man has learned by which he earns his livelihood. *Woodfield v. Colzey*, 47 Ga. 121, 124.

One of the legal definitions of "trade" is a way of living. It is an honest and a lawful occupation. *Beale v. Beck* (U. S.) 2 Fed. Cas. 1111, 1114.

The word "trade" has a secondary sense, by which almost any occupation is called a man's trade; as in the proverb, "Two of a trade can never agree." *In re Smith* (U. S.) 22 Fed. Cas. 394, 395.

"Trade, business, or calling," as used in Laws 1892, c. 602, requiring any person intending to conduct the "trade, business, or calling" of a plumber, etc., to submit to examination before engaging in the business, etc., are synonymous, and have relation to the mechanical employments; one's trade, etc., being that business which he has learned and fitted himself to follow. *People v. Warden of City Prison*, 39 N. E. 686, 689, 144 N. Y. 529, 27 L. R. A. 718.

"Trade," as used in a will requiring the beneficiaries to have some useful trade, should be construed in the broad sense of special occupation or profession, rather than in the ordinary sense of mechanical employment, and therefore bookkeepers, typewriters, and school teachers have a trade, within the meaning of the will. *Colby v. Dean*, 49 Atl. 574, 575, 70 N. H. 591.

Making of contracts.

"Trade or calling," as used in Code 1849, c. 196, § 16, providing that every free person found on a Sabbath day laboring at a "trade or calling," except in household or other work of necessity or charity, should forfeit a certain sum for each offense, cannot with propriety be said to include bargain making, contract making, or covenant making, in the common or technical meaning of the words "trade" or "calling," as distinguished from other trades or callings. It is true that persons more or less frequently make contracts in the course of their usual transactions, but the making generally of contracts, without reference to particular transactions, is not a trade or calling. *Raines v. Watson*, 2 W. Va. 371, 401.

Contracting.

Code Or. p. 211, exempting from execution tools and implements used by a person engaged in any "trade, occupation, or profession," does not include the business of a

building contractor. *In re Whetmore* (U. S.) 29 Fed. Cas. 921.

Dentistry.

"Trade," as used in a statute exempting from execution the tools of a mechanic necessary for carrying on his "trade," cannot be construed to include dentistry. The term "trade" is defined by Webster to denote the business or occupation which a person has learned and which he carries on for procuring subsistence or for profit, particularly a mechanical employment, distinguished from the liberal arts and learned professions and from agriculture. It is manifest that a pursuit requiring a correct knowledge of the anatomy and physiology of a part of the human body, as well as mechanical skill in the use of the necessary instruments, cannot be properly denominated a "trade." *Whitcomb v. Reid*, 31 Mass. 567, 569, 66 Am. Dec. 579.

Farming.

It is exceedingly doubtful whether farming can be called a "trade," within the true meaning of the statute providing that, where a minor shall serve an apprenticeship in any lawful trade for seven years in a town, he shall thereby gain a settlement therein. *Inhabitants of Leeds v. Inhabitants of Freeport*, 10 Me. (1 Fairf.) 356, 359.

"Trade comprehends every species of exchange or dealing, either in the produce of land, manufactures, or bills, or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, or merchandise, either by wholesale or retail. A profession, on the other hand, is said to be that of which one professes knowledge; the occupation, if not mechanical or agricultural, or the like, to which one devotes one's self; the business which one professes to understand or to follow as one's business. Neither of these words is equivalent to 'occupation' in its general sense. Therefore I do not think a farmer or a carpenter could be taxed as such, though one trading or dealing in the products of either might be liable as a trader." *State v. Hunt*, 40 S. E. 216, 217, 129 N. C. 686, 85 Am. St. Rep. 758.

Fishery.

The word "trade," as used in Act Cong. Feb. 18, 1793, c. 8, § 32, relating to the transferring of licensed vessels to be employed in any other trade than that for which they are licensed, is used in a broader sense as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or learned professions, it is constantly called a "trade." Thus, we speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a

shoemaker; and it is in this extended sense, that the word is used in this section. Therefore the cod fishery is a trade, within the meaning of the section, and so is the mackerel fishery. *The Nymph* (U. S.) 18 Fed. Cas. 506, 507, affirming *Id.* 509, 511.

Furnishing water to city.

Act April 14, 1853, as amended by Act April 30, 1855, authorizing the formation of corporations for the purpose of engaging in any "species of trade or commerce," foreign or domestic, includes a corporation organized for the purpose of furnishing a city with water. *People v. Blake*, 19 Cal. 579, 594.

Household service.

Household service in a city, town, or village may perhaps be said to be a sort of "trade or mystery," which may require apprenticeship; for it will require time and attention to make an expert waiter, and one so instructed will receive wages 10 times above that of an untaught servant. *Commonwealth v. Van Lear* (Pa.) 1 Serg. & R. 248, 252.

Insurance.

"Trade," as used in Sess. Laws 1889, c. 257, entitled "An act to declare unlawful trusts and combinations in restraint of trade products," should be construed to include the business of insurance. The commercial meaning of the word "trade" refers to the business of selling or exchanging some tangible substance or commodity for money, or business of dealing by way of sale or exchange in commodities. This may possibly be the most common signification which is given to the term; but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense it is any occupation or business carried on for subsistence or profit. *Anderson's Dictionary of Law* gives the following definition: "Generally equivalent to occupation, employment, or business, whether manual or mercantile; any occupation, employment, or business carried on for profit, gain, or livelihood, not in the liberal arts or in the learned professions." In *Abbott's Law Dictionary*, the word is defined as "an occupation, employment, or business carried on for gain or profit." Among the definitions given in the *Encyclopædic Dictionary* is the following: "The business which a person has learned and which he carries on for subsistence or profit; occupation; particularly employment, whether manual or mercantile, as distinguished from the liberal arts or the learned professions and agriculture." A like definition of the word is given in the *Imperial Dictionary*. *Rapalje & Lawrence's Law Dictionary* gives the restrictive definition of traffic, commerce, or exchange of goods for value, goods, or money. *Bouvier* limits the meaning to commerce, traffic, and of mechanics. The definition given by Webster is the

act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter. This author, however, gives the more enlarged meaning of the word as well, as follows: "The business which a person has learned and which he engages in for procuring subsistence or for profit; occupation; especially mechanical employment, as distinguished from the liberal arts, the learned professions, and agriculture; as we speak of the trade of a smith, of a carpenter, or mason, but not of the trade of a farmer or lawyer, or a physician." The broader signification given to the word by most of the lexicographers would fairly embrace and cover the business of insurance. In *re Pinkney*, 27 Pac. 179, 47 Kan. 89.

The word "trade" embraces within its meaning commercial traffic, and it also has a limited and a restricted significance, which applies to mechanical pursuits; but in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions and those that pertain to liberal arts and the pursuit of agriculture. In *The Nymph* (U. S.) 18 Fed. Cas. 506, Judge Story says: "The word is often, and, indeed, generally, used as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment, or business is carried on for the purpose of profit or gain or livelihood, not in the liberal arts or learned professions, it is constantly called a 'trade.'" As used in *Sayles' Civ. St. art. 2337*, it includes the business of an insurance agent, so as to entitle him to the exemption therein provided for. *Betz v. Maler*, 33 S. W. 710, 12 Tex. Civ. App. 219 (citing *Queen Ins. Co. v. State*, 24 S. W. 397, 86 Tex. 250, 22 L. R. A. 483; 26 Am. & Eng. Enc. Law, 226; *The Eliza*, 11 U. S. [7 Cranch] 113, 3 L. Ed. 286; *Chartered Mercantile Bank v. Wilson*, 3 Exch. Div. 108; In *re Pinkney*, 47 Kan. 89, 27 Pac. 179; *May v. Sloan*, 101 U. S. 231, 25 L. Ed. 797).

Interstate commerce.

The word "trade," in its usual sense, refers to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities. In a broader sense it is any occupation or business carried on for subsistence or profit, but does not mean interstate commerce. *State v. Phipps*, 31 Pac. 1097, 1098, 50 Kan. 609, 18 L. R. A. 657, 34 Am. St. Rep. 152.

Keeping meat market or grocery.

"Trade or business," as used in Gen. St. c. 133, § 32, exempting from execution the "tools, implements, and fixtures necessary for carrying on trade or business," applies to such as mechanics, artisans, handicraftsmen,

and others whose manual labor and skill afford means of earning their livelihood, and does not include those merely engaged in the business of buying and selling merchandise, nor to exempt the weights and measures, horses and carriages, or other articles used by them in their trade, and so does not apply to one engaged in keeping a meat market and grocer's shop. *Wallace v. Bartlett*, 108 Mass. 52, 54.

Manufacturing.

"Trade," as defined by Bouvier, embraces any sort of dealings by way of sale or exchange; commerce; traffic. Under Rev. St. c. 8, § 14, providing that all personal property employed in "trade" shall be taxed in the town where so employed on the 1st day of April, fire wood, pulp wood, and kiln wood, aggregating several hundred cords, and 200 piles cut from a tract of wild land and conveyed to a landing at the shore, on the tract, there to remain until sold in small quantities or by the whole lot to local or other parties as might thereafter be found expedient, were employed in trade. *Gower v. Inhabitants of Jonesboro*, 21 Atl. 846, 847, 83 Me. 142.

Where the business of a mill was the manufacture of lumber for sale, it falls within the legitimate definition of "trade"; so that logs intended for manufacture in that mill, and which were in fact manufactured there, which had been cut and hauled to the landing and were in transit to the mill, may fairly be considered as employed in the trade or business of that mill on that day, within the meaning and purpose of the statute providing that personal property employed in trade shall be taxed in the town where it was employed on the 1st day of April. *Inhabitants of Farmingdale v. Berlin Mills Co.*, 45 Atl. 39, 40, 93 Me. 333 (citing *Gower v. Inhabitants of Jonesboro*, 83 Me. 142, 145, 21 Atl. 846).

The court, in *Atwood v. De Forest*, 19 Conn. 513, said: "By the word 'trade' as used in Gen. St. § 1164, exempting the implements of a debtor's trade from attachment, means the business of a mechanic, strictly speaking, as the business of a carpenter, blacksmith, silversmith, printer, or the like; and it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer." *Davidson v. Hannon*, 34 Atl. 1050, 67 Conn. 312, 84 L. R. A. 718, 62 Am. St. Rep. 282.

Mining.

"The working of a mine under a bare mining right has been uniformly construed by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested in such right is that of a qualified partnership." *Smith v. Cooley*, 2 Pac. 880, 882, 65 Cal. 46.

Real estate business.

"Trade," as used in Laws 1870, c. 29, authorizing the formation of co-operative associations for the purpose of trade, will be construed to include the buying and selling of real estate. *Finnegan v. Noerenberg*, 53 N. W. 1150, 1151, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552.

Saddle and harness making.

The term "trade," within the meaning of the statute exempting from sale on execution all tools belonging to any trade, includes the combined business of saddle and harness making. *Nichols v. Porter*, 26 S. W. 859, 7 Tex. Civ. App. 802.

Selling liquor without license.

"Trade," as used in Tayl. St. p. 1550, § 32, exempting from execution the stock in trade, etc., of any person, used and kept for the purpose of carrying on his "trade or business," means lawful trade or business, and hence does not apply to a person engaged in the sale of intoxicating liquors without a license. *Walsch v. Call*, 32 Wis. 159, 161.

Sheet metal working.

"Trade," as used in Act April 29, 1874, § 2 (P. L. 73), authorizing a corporation to be created for the encouragement and protection of trade and commerce, should be construed in its popular sense, and includes particular trades, as well as trade in general. In popular understanding, roofing and sheet metal working is as plain a description of a trade as carpentering, or bricklaying, or mason work, or any other occupation belonging to the class of trades. In re *Roofing & Sheet Metal Contractors' Ass'n of Philadelphia*, 49 Atl. 894, 200 Pa. 111.

Single transaction.

The statute of limitations, excepting the "trade of merchandise between merchant and merchant" from the operation of the statute, does not include a joint purchase of goods, where one of the purchasers takes the whole goods and agrees to account to the other for his share of them, or proceeds, if any, and to charge no commission in case of sale; and hence the lapse of the stipulated time was a bar to an action on an account against the party who had received and sold the goods. *Murray v. Coster* (N. Y.) 20 Johns. 576, 582, 11 Am. Dec. 333.

Transportation of merchandise.

"Trade," as used in a statute exempting from attachment the implements of the debtor's trade, means the business of a mechanic, strictly speaking, as the business of a carpenter, blacksmith, silversmith, printer, or the like, and does not include one engaged in the transportation of merchandise; for that cannot be said to be the business of a mechanic, either by definition of the books or by the

common understanding and speaking of man, so as to exempt the horse, carts, and harness used in such business of transportation from attachment. *Enscoe v. Dunn*, 44 Conn. 93, 99, 26 Am. Rep. 430.

TRADE FIXTURES.

See "Barroom Fixtures."
As fixtures, see "Fixture."

"Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased, and may, as against the lessor and those claiming under him, be removed at the end of the tenant's term. *Herkimer County Light & Power Co. v. Johnson*, 55 N. Y. Supp. 924, 928, 37 App. Div. 257.

The casing in an oil or gas well and the derrick and other appliances used in drilling and operating it are "trade fixtures," and can be removed by the owner or lessee during the term of the lease. *Shellar v. Shivers*, 38 Atl. 95, 96, 171 Pa. 569.

A substantial dynamo house, built by a lessee on a solid stone foundation on land leased for use in the operation of an electric lighting plant, and a boiler house of rough lumber upon sills laid on stone or blocks, and a shaft house or shed constructed for the most part of lumber from buildings on the premises, as well as two dynamos placed in the dynamo house, are accessory to the trade, and hence "trade fixtures," subject to removal by the lessee on the termination of his lease. *Brown v. Reno Electric Light & Power Co.* (U. S.) 55 Fed. 229, 231.

A frame building used as a lumber office and as a place for the workmen of a lessee to sleep, and erected by such lessee, and also a bridge built of stringers, with plank nailed thereto, to give access to the office, are "trade fixtures," within the meaning of Civ. Code, § 1019, providing that a tenant may remove from the demised premises during his term anything affixed thereto for purposes of trade, etc. *Security Loan & Trust Co. v. Willamette Steam Mills Lumbering & Mfg. Co.*, 34 Pac. 321, 322, 99 Cal. 636.

A building erected by a tenant on the leased land, in fulfillment of a covenant in the lease, a breach of which would have forfeited it, and which the tenant under the terms of the lease has no right to remove, is not a "trade fixture," on which the lessee can execute a chattel mortgage to secure a creditor. *Deane v. Hutchinson*, 2 Atl. 292, 40 N. J. Eq. (13 Stew.) 83.

TRADE-MARK.

Right to, as franchise, see "Franchise."

A trade-mark "is the name, symbol, figure, letter, form, or device adopted and used by the manufacturer or merchant in order to designate the goods that he manufactures or sells, and to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise." *Moorman v. Hoge* (U. S.) 17 Fed. Cas. 715, 718 (quoting *Upton, Trade-Marks*, p. 9); *Albany Perforated Wrapping Paper Co. v. John Hoberg Co.* (U. S.) 102 Fed. 157, 158 (citing *Upton, Trade-Marks*, p. 9, c. 1); *United States v. Borgfeldt* (U. S.) 123 Fed. 193, 197 (quoting *Abb. Law Dict.*); *Leldersdorf v. Flint* (U. S.) 15 Fed. Cas. 280, 281 (citing *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828); *Hostetter v. Fries* (U. S.) 17 Fed. 620; *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.*, 28 N. E. 248, 249, 137 Ill. 231; *Candee v. Deere*, 54 Ill. 439, 456, 5 Am. Rep. 125; *Burke v. Cassin*, 45 Cal. 467, 469, 478, 13 Am. Rep. 204; *Munro v. Smith*, 8 N. Y. Supp. 671; *Shaver v. Shaver*, 6 N. W. 188, 189, 54 Iowa, 206, 37 Am. Rep. 194; *Parkland Hills Blue Lick Water Co. v. Hawkins*, 26 S. W. 389, 391, 95 Ky. 502, 44 Am. St. Rep. 254; *Larrabee v. Lewis*, 67 Ga. 561, 563, 44 Am. Rep. 735; *Rogers v. Taintor*, 97 Mass. 291, 297.

"Mark" means to make a visible sign on something; to affix a significant mark; to draw, cut, fasten, brand; to affix an indication to; to attach one's name or initials to. A "trade-mark," therefore, consists of the use in trade of such a mark placed upon goods manufactured by a particular person and placed in market with such marks for sale and trade. *Adams v. Helsel* (U. S.) 31 Fed. 279, 280.

"Trade-marks" are symbols by which men engaged in trade and manufacturing become known in the marts of commerce, and by which their reputation and that of their goods are extended and published. They are the means by which manufacturers and merchants identify their manufactures and merchandise. *Trade-Mark Cases*, 100 U. S. 82, 87, 25 L. Ed. 550.

A trade-mark is a particular sign or symbol, which by exclusive use becomes recognized as the distinguishing mark of the owner's goods, and for the protection of which the aid of equity may be invoked. *Schneider v. Williams*, 14 Atl. 812, 814, 44 N. J. Eq. (17 Stew.) 891 (citing 2 High. Inj. § 1063).

"Trade-mark" is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another from using it, because the mark or name denotes that articles so marked were manufactured by a certain person, and no one else can have the right to put the

same name on his goods and then represent them to have been manufactured by the person whose mark it is. *Osgood v. Allen* (U. S.) 18 Fed. Cas. 871, 873.

A trade-mark has been defined as an arbitrary symbol affixed by a manufacturer or merchant to a vendible commodity. The principal purpose of a trade-mark is to guaranty the genuineness of a product. It is, in fact, the commercial substitute for one's own autograph. In all ages it has been used to denote origin, and thus protect the purchaser, as well as the vendor. *Gowans v. Ahlborn Bros.* (Pa.) 4 Kulp, 81, 84.

A trade-mark is something used on salable articles to designate them as the articles made by A., and to distinguish them from similar articles made or sold by B. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 40 Atl. 534, 540, 70 Conn. 516.

The right which a manufacturer has in a trade-mark is everywhere recognized. The mark may consist of a name or a device, or a particular arrangement of words, or such words with some device of greater or less novelty, which has been applied to a manufacture to designate the goods as made by a particular person. When a manufacturer has thus distinguished the goods he makes by a peculiar device, so that they may be known in the market as his, he thereby acquires the right to whatever profits may result from his superior skill, knowledge, or honesty of process. A legal right to the use of a trade-mark springs from its usefulness to point out the original ownership of the article to which it is affixed, or to give notice to the public who is the producer. *Solis Cigar Co. v. Pozo*, 26 Pac. 556, 557, 16 Colo. 388, 25 Am. St. Rep. 279.

A trade-mark is defined to be a particular label or sign, indicating to those who wish to give the person using it their patronage that the article is made or sold by him or by his authority, or that he carries on business at a particular place. *Glen & Hall Mfg. Co. v. Hall* (N. Y.) 6 Lana. 158, 160.

"The function of a trade-mark is to indicate to the public the origin, manufacture, or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the article bearing it." *Dennison Mfg. Co. v. Thomas Mfg. Co.* (U. S.) 94 Fed. 651, 656.

The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed, or, in other words, to give notice as to who was the producer. *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.* (U. S.) 91 Fed. 376, 378, 83 C. C. A. 558.

The general rule laid down as to the selection of a trade-mark in the case of Del-

aware & H. Canal Co. v. Clark, 80 U. S. (13 Wall.) 322, 20 L. Ed. 581, is as follows: "The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or to give notice who was the producer. This may be done in many cases by a name, mark, or device well known, but not previously applied to the same article. An exclusive use can never be exclusively claimed of words in common use previously as applied to similar articles." The law accords to the manufacturer the exclusive right to an arbitrary name, as designating an article to which he is the first to apply it. *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 24 N. Y. Supp. 890, 894, 5 Misc. Rep. 78.

A trade-mark indicates the source, origin, or ownership of an article of merchandise on which it is placed. *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233. This means that the mark is calculated to distinguish the articles which bear it from those of other makers or vendors. It need not indicate any particular person as maker, manufacturer, or vendor, or give the name or address of either. When the mark has become recognized by purchasers as a distinctive designation of a particular manufacturer, maker, or seller of a certain quality of goods, it will be a sufficient indication of the origin or ownership, within the rule requisite to its protection as such, though purchasers may not, from the words or otherwise, be able to tell who is the particular maker or seller of the article. Its value is in its employment, marking the goods on which it is placed. This gives it the character of property. It is, then, a symbol of reputation or good will. *State v. Bishop*, 81 S. W. 9, 11, 128 Mo. 373, 29 L. R. A. 200, 49 Am. St. Rep. 569.

A trade-mark is a mere notice, an arbitrary mark or sign, put on an artificial product, whereby any person interested in the information may be assured as to the origin of said product. Such mark is a means for rendering more pronounced, distinctive, and valuable that species of property known as the good will of the business. A manufacturer, for instance, may use as a trade-mark a word arbitrarily selected. In so doing he acquires no property in the word as such. His right attaches to the peculiar and added function of the word in identification of his product by reason of its use. *Royal Baking Powder Co. v. Raymond* (U. S.) 70 Fed. 376, 380.

In the strict sense of the term, a trade-mark is applicable only to a vendible article upon which it is in some manner fixed or represented as a symbol, to indicate the origin or ownership of the article on which it is placed. But the same rules for protection against infringements are extended to names applied to other callings, or to pla-

ces of business, as to technical trade-marks. *Koehler v. Sanders*, 122 N. Y. 65, 72, 25 N. E. 235, 236, 9 L. R. A. 576 (citing *Howard v. Henriques*, 5 N. Y. Super. Ct. [3 Sandf.] 725).

Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Its object is twofold: First, to protect the party using it from competition with inferior articles; and, second, to protect the public from imposition. *Shaw Stocking Co. v. Mack* (U. S.) 12 Fed. 707, 710.

A trade-mark is a word, symbol, or device by which the wares of an owner are known in trade. Its object is, first, to protect the party using them from competition with inferior articles, and, second, to protect the public from imposition. The trade-mark brands the goods as genuine, just as the signature to a letter stamps it as authentic. *Kipling v. G. P. Putnam's Sons* (U. S.) 120 Fed. 631, 635, 57 C. C. A. 295.

A trade-mark is a mark or device attached by the manufacturer and seller of goods to the merchandise produced by him, in order to distinguish it from a like class of merchandise produced by others, and the right to the exclusive use of such mark accrues, not because he was the originator of the same, but because he has applied it to goods of his manufacture, and they have acquired a reputation in connection with such mark. *Dr. Jaeger's Sanitary Woolen System Co. v. Geo. Le Boutillier*, 15 N. Y. St. Rep. 117, 119.

"It is not necessary that a trade-mark should on its face show the origin, manufacture, or ownership of the article to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin." *Denniston Mfg. Co. v. Thomas Mfg. Co.* (U. S.) 94 Fed. 651, 656.

A trade-mark may consist of a token, letter, sign, or seal; and names, ciphers, monograms, pictures, and figures may be used, and numerals united. *Shaw Stocking Co. v. Mack* (U. S.) 12 Fed. 707, 711.

Any device, figure, or inscription which seems to indicate the personal origin of the goods may be adopted as a trade-mark. *McVey v. Brendel* (Pa.) 29 Wkly. Notes Cas. 1, 5, 6.

Mere words may become valid trade-marks, when they are merely arbitrary, or are indicative of origin or ownership in the original proprietor. *Burton v. Stratton* (U. S.) 12 Fed. 696, 699, 700.

"A trade-mark is intended to designate the origin of the particular article to which it is affixed, or to which it specially refers, and it gives notice to the world who the pro-

ducer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names and marks is governed by certain rules and limitations, which has been announced by the court." *Coffman v. Castner* (U. S.) 87 Fed. 457, 81 C. C. A. 55.

A "trade-mark" may consist in a name, or an emblem or device, used to indicate the nature, quality, or identity of an article of commerce, whether it consists of an article that any one is at liberty to fabricate, compound, or vend, or which originated with, or the exclusive right to manufacture or vend which is under the protection of a patent or otherwise in, the person or proprietor by whom the trade-mark was devised. It may exist where the name of the article and of the proprietor are so blended together that the right to the use of the name is indispensable to the use of the trade-mark, or may consist of the name alone of the manufacturer or proprietor, or may exist where the article fabricated is so made or shaped that the peculiar form of it is designed to and does serve as a trade-mark, as in case of a sewing machine, the iron framework of which was so constructed as to represent and form the two initial letters of the proprietor's name. *Hegeman v. Hegeman* (N. Y.) 8 Daly, 1, 4.

The mere name of a person, firm, or corporation cannot be a lawful trade-mark; but such name, accompanied by a mark sufficient to distinguish it from the same name when used by other persons, may be a lawful trade-mark. A mark or device, distinguished from other marks, when used in connection with a particular article, may designate, by association in the minds of purchasers and dealers, etc., the origin or ownership of such article as being in a particular manufacturer, and thus be a lawful trade-mark. *Smith v. Reynolds* (U. S.) 22 Fed. Cas. 634, 636.

In general a man may adopt for a trade-mark whatever he chooses; but, when he asserts and seeks to enforce exclusive right therein, it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device, or designation is purely arbitrary or fanciful, and has first been brought into use by him, his right to the exclusive use of it is unquestionable. But the mere designation of a quality as nourishing, applied to an article of drink, cannot be appropriated as a trade-mark. Neither can any general description, by words in common use, of a kind of article or of its nature or qualities. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 951, 39 Am. Rep. 286.

In discussing whether the word "insurance," as applied to an illuminating oil, is capable of constituting a legal trade-mark, the court says that, while insurance may by some process of association of ideas suggest the notion of safety, it is not synonymous with "safe," nor can it be said to describe any possible quality of oil, as the word is a noun substantive, not grammatically applicable to the description of the qualities of things, and concludes that it may properly become a trade-mark. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 951, 39 Am. Rep. 286.

A manufacturer, operating under the style of the "Perfection Mattress Company," and producing a mattress well known to the trade as the "Perfection Mattress," after he has sold out such business, may be restrained from carrying on a rival business, manufacturing mattresses exactly similar to the Perfection mattress, under the label of "Kyle Perfection Mattress," though such mattress was not protected by patent, since his purchaser had a right to the exclusive use of the term "Perfection Mattress," both as a trade-mark and under the sale of the good will of the Perfection Mattress Company. *Kyle v. Perfection Mattress Co.*, 28 South. 545, 546, 127 Ala. 39, 50 L. R. A. 628, 85 Am. St. Rep. 78.

A symbol does not become a trade-mark until it is actually stamped on or otherwise becomes affixed to the goods to be sold. *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305, 310.

Statutory definitions.

A trade-mark is a mark used to indicate the maker, owner, or seller of an article of merchandise, and includes, among other things, any name of a person or corporation, or any letter, word, device, emblem, figure, seal, stamp, diagram, brand, wrapper, ticket, stopper, label, or other mark, lawfully adopted by him, and usually affixed to an article of merchandise to denote that the same was imported, manufactured, produced, sold, compounded, bottled, packed, or otherwise prepared by him; and also a signature or mark used or commonly placed by a painter, sculptor, or other artist upon a painting, drawing, engraving, statue, or other work of art, to indicate that the same was designed or executed by him. Pen. Code N. Y. 1903, § 366.

The word "trade-mark" as used in defining offenses relating thereto, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any

goods to be of some particular class or description. Pen. Code Cal. 1903, § 353; Pen. Code Idaho 1901, § 4952.

The term "trade-mark," as used in provisions in the Penal Code punishing the forging and counterfeiting of trade-marks, etc., includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, or by any association or union of workmen, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, or by such association or union of workmen, other than any name, word, or expression generally denoting any goods to be of some particular class or description. Rev. St. Utah 1898, § 4485.

The term "trade-mark," as used in the title on trade-marks, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, tradesman, association, or union, whether incorporated or unincorporated, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, or by such association or union, other than any name, word, or expression generally denoting any goods to be of some particular class or description. Rev. St. Utah 1898, § 2720.

The phrase "trade-mark," as used in the chapter relating thereto, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman to denote any goods to be imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description, or the designation or name of any mill, hotel, factory, or other business. Pol. Code Mont. 1895, § 3160.

The phrase "trade-mark," as used in the chapter relating to trade-marks, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman to denote any goods to be goods imported, manufactured, produced, compounded or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description, and also any name or names, marks, or devices branded, stamped, engraved, etched, blown, or otherwise attached or produced upon any cask, keg, bottle, vessel, siphon, can, or other package used by any mechanic, manufacturer, druggist, merchant, or tradesman to hold, contain, or inclose

the goods so imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description. Pol. Code Cal. 1903, § 3196.

Color.

Trade-mark implies form, rather than color, and it consists of some peculiar name, symbol, figure, letter, or device whereby one manufacturer distinguishes his goods from like goods sold by other persons, and does not include color apart from a name or device. *Fleischmann v. Starkey* (U. S.) 25 Fed. 127, 128.

Commercial mark distinguished.

The distinction between a "trade-mark" and a "commercial mark" in the civil law of France is pointed out by Pouillet, *Marques de Fabrique*, § 6, where he says: "A trade-mark is not a commercial mark. * * * The trade-mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The commercial mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it to the consumer." *La Republique Francaise v. Schultz* (U. S.) 57 Fed. 37, 41.

Geographical name.

A geographical name cannot be appropriated for use as a trade-mark, and hence no one can acquire the right to the use of the name "Pocahontas" as descriptive of the locality or character of gold mines in what is known as the "Great Pocahontas Gold Field" of Virginia. *Coffman v. Castner* (U. S.) 87 Fed. 457, 460, 31 C. C. A. 55.

There can be no "trade-mark" in one's name or in a geographical name. *Sterling Remedy Co. v. Spermine Medical Co.* (U. S.) 112 Fed. 1000, 1003, 50 C. C. A. 657.

In selecting a trade-mark, the manufacturer or dealer must avoid words—e. g., geographical names—which are descriptive of the local origin of the goods, if other persons have the right to deal in goods of similar origin. When it has become generally known in the trade that this symbol or word has been taken by one dealer or manufacturer to indicate his goods, he acquires a title to it for that purpose, and no one else can use it, even innocently. *Cady v. Schultz*, 32 Atl. 915, 916, 19 R. I. 193, 29 L. R. A. 524, 61 Am. St. Rep. 763.

A person cannot by means of a trade-mark monopolize the name of the place where the article is manufactured. *Burton v. Stratton* (U. S.) 12 Fed. 696, 700.

Words which describe the place of manufacture of an article, and which do not designate, either expressly or by association,

the personal origin of the product, cannot be used as a trade-mark. *Pepper v. Labrot* (U. S.) 8 Fed. 29, 39.

The term "trade-mark" has been in use from a very early date, and generally speaking means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 21 Sup. Ct. 270, 273, 179 U. S. 665, 45 L. Ed. 365 (citing *Delaware & H. Canal Co. v. Clark*, 80 U. S. [13 Wall.] 311, 20 L. Ed. 581; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

Label distinguished.

A trade-mark may sometimes in form serve as a label, but it differs from a mere label in such cases, in that it is not confined to a designation of the article to which it is attached, but by words or design is a symbol or device which, affixed to a product of one's manufacture, distinguishes it from articles of the same general nature manufactured or sold by others, thus securing to the producer the benefits of any increased sale by reason of any peculiar excellence he may have given to it. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 732, 140 U. S. 428, 35 L. Ed. 470.

Method of arrangement.

A trade-mark must be something other than and separate from the merchandise itself, and hence a peculiar method of arranging soap in a box is not a trade-mark which can be legally registered. *Davis v. Davis* (U. S.) 27 Fed. 490, 492.

A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations. It is a sign or mark by which the manufactured articles produced by one person or firm or maker are distinguished from those produced by rival manufacturers. It must be distinctive, and indicate the personal, as distinguished from the geographical, origin of the article to which it is applied. The fact that a manufacturer has adopted a particular style of bottle does not prevent a rival from using a bottle of the same style, if the bottle is sold to the public generally; and the mechanical arrangement of bottles in boxes in which they are packed by a manufacturer cannot be claimed as a trade-mark. *Hoyt v. Hoyt*, 143 Pa. 623, 638, 639, 22 Atl. 755, 13 L. R. A. 343, 24 Am. St. Rep. 575.

Name descriptive of nature, kind, or quality.

There can be no trade-mark in a name descriptive of quality. *Sterling Remedy Co. v. Spermine Medical Co.* (U. S.) 112 Fed. 1000, 1003, 50 C. C. A. 657.

In *Filley v. Fassett*, 44 Mo. 176, 100 Am. Dec. 275, it was said the books are full of authorities establishing the proposition that any contrivance, design, device, name, symbol, or other thing may be employed as a trade-mark, which is adapted to accomplish the object proposed by it; that is, to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must possess the requisite characteristics, pointing out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. *Nicholson v. Wm. A. Stickney Cigar Co.*, 59 S. W. 121, 122, 158 Mo. 158.

A name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, cannot be employed as a trade-mark, and the exercise of it be entitled to legal protection. *Coffman v. Castner*, 87 Fed. 457, 460, 31 C. C. A. 55.

Any symbol or device not previously appropriated and affixed by a manufacturer to his own product to distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it, is a trade-mark. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. But in the exercise of the right to establish a trade-mark there are certain limitations which must be observed. No property can be acquired in any word, mark, or device which denotes merely the nature, kind, or quality of an article. *Appeal of Laughman*, 18 Atl. 415, 417, 128 Pa. 1, 5 L. R. A. 599.

A trade-mark may consist of some novel device, arbitrary character, or fancy word, applied without special meaning, which by use and reputation comes to serve a special purpose. Such words and devices are held to indicate sufficiently the true source and origin of the goods to which the trade-mark is applied, without particular addition of the name of the manufacturer or dealer. Words, however, which are merely descriptive of the kind, nature, character, or quality of the goods, cannot be exclusively appropriated and protected as a trade-mark. Title to a trade-mark is acquired and retained by appropriation and use. *Listman Mill Co. v. William Listman Milling Co.*, 60 N. W. 261, 262, 88 Wis. 334, 43 Am. St. Rep. 907.

"A trade-mark does not embrace a name alone, when it is applied to designate, not the article of a particular maker or seller, but the kind or description of the thing which is being sold." *Leclanche Battery Co. v. Western Electric Co.* (U. S.) 23 Fed. 276, 277.

The tendency of the later decisions in this country has been to narrow the use of the term "trade-mark" to its proper significance as an arbitrary symbol affixed by a manufacturer or merchant to a vendible commodity, and to exclude from use as such symbol words merely descriptive or generic, or merely expressive of quality, and also to exclude from designation as such labels, advertisements, signs, and the form, size, and general appearance of package of merchandise. The words "liver medicine," being purely descriptive, cannot be appropriated as a trade-mark. The name "Simmons" cannot be appropriated as a trade-mark, when it has become merely descriptive of medicine prepared under the formula of a Dr. Simmons, and is used by many people in connection with such medicine. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 23 S. W. 165, 175, 93 Tenn. 84.

A trade-mark is a symbol arbitrarily selected by a manufacturer or dealer and attached to his wares to indicate that they are his wares. In selecting such a device he must avoid words merely descriptive of the article or its qualities, or such as have become so by use in connection with known articles of commerce. *Cady v. Schultz*, 32 Atl. 915, 916, 19 R. I. 193, 29 L. R. A. 524, 61 Am. St. Rep. 763.

Name of periodical.

A trade-mark, as applied to a periodical for publication, is somewhat different from the mark, name, or symbol by which the products of a particular merchant may become known. Names, however, which are ordinarily used to make periodicals, magazines, and newspapers known to the public, are governed by the same general principles which apply to a trade-mark actually affixed to an article of manufacture and sale, and adopted to denote origin and ownership. *Forney v. Engineering News & Publishing Co.*, 57 Hun, 588, 10 N. Y. Supp. 814; *Commercial Advertiser Ass'n v. Haynes*, 26 App. Div. 279, 49 N. Y. Supp. 938; *Social Register Ass'n v. Howard* (U. S.) 60 Fed. 270. A property right in a name to a periodical undoubtedly exists, and no one has a right to use that name in connection with a similar publication. *Gannett v. Ruppert* (U. S.) 119 Fed. 221, 222.

Trade-name distinguished.

The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.* (U. S.) 102 Fed. 327, 331, 42 C. C. A. 376.

The use of a trade-name is in some respects different from that of a trade-mark. The latter usually relates to the thing sold, while in addition to this the former includes the source from which it comes and the individuality of the maker, both for protection and trade, and for avoiding confusion in business affairs, as well as for securing to him the advantage as any good reputation which he may have gained. The law of trade-mark is designed chiefly for the protection of the public; that of a trade-name for the protection of the party entitled thereto. A case, therefore, in regard to trade-name, is of somewhat broader scope than one relating to a trade-mark. *Armington v. Palmer*, 42 Atl. 308, 311, 21 R. I. 109, 43 L. R. A. 95, 79 Am. St. Rep. 786.

A trade-name is of a different character from a trade-mark. It is descriptive of the manufacturer or dealer himself as much as his own name is, and frequently, like the names of business corporations, includes the name of the place where the business is located. If attached to goods, it is designed to say plainly what a trade-mark only indicates by association and use. The employment of such a name is subject to the same rules which apply to the use of one's name of birth or baptism. Two persons may bear the same name, and each may use it in his business, but not so as to deceive the public and induce customers to mistake one for the other. The use of one's own name is unlawful, if exercised fraudulently to attract custom from another bearer of it. Trade-marks, properly so called, may be violated by accident or ignorance. The law protects them, nevertheless, as property. Names which are not trade-marks, strictly speaking, may be protected likewise, if they are taken with fraudulent intention, and if they are so used as to be likely to affect such intention. *Cady v. Schultz*, 32 Atl. 915, 916, 19 R. I. 193, 29 L. R. A. 524, 61 Am. St. Rep. 763.

The trade-name of an established enterprise is regarded as of importance, and the right to its exclusive use generally recognized. It is not in the nature of a trade-mark, and of necessity is closely connected with the good will. It is the designation by which the company is known and addressed by its patrons. *Millsbaugh Laundry v. First Nat. Bank*, 94 N. W. 262, 263, 120 Iowa, 1.

TRADE-MARK MEDICINE.

"Trade-mark medicine" must be held to be medicine as to which a similar monopoly to that of patent and proprietary medicines has been secured, by the use of a trade-mark or trade-name under which it is prepared and sold. Examples are to be found in such medical compounds, familiar on account of the extensive way in which they are advertised, as *Castoria*, *Peruna*, *St. Jacob's Oil*,

and a hundred others. *Johnson & Johnson v. Rutan* (U. S.) 122 Fed. 993, 998.

TRADE-NAME.

Trade-mark distinguished, see "Trade-Mark."

TRADE UNION.

See "National Trade Union."

See, also, "Union."

As an association, see "Association."

TRADER—TRADESMAN.

See "Itinerant Dealer or Trader."

A "trader" is a dealer in buying or selling, or barter. *Brown Mfg. Co. v. Deering*, 35 W. Va. 255, 258, 13 S. E. 383 (citing *Webst.*).

A trader is one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making profit. In re *Surety Guarantee & Trust Co.* (U. S.) 121 Fed. 73, 74, 56 C. C. A. 654.

A trader is defined in *Bouvier's Law Dictionary* as one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit. The word is defined in *Black's Law Dictionary* as one whose business it is to buy and sell merchandise or any class of goods, deriving a profit from his dealings; and the weight of authority seems to be that the proper description of the business of a trader includes both buying and selling either goods or merchandise or other goods ordinarily the subject of traffic. In re *New York & W. Water Co.* (U. S.) 98 Fed. 711, 713 (citing *Sutton v. Wheeley*, 7 East, 442, *Wakeman v. Hoyt* [U. S.] 28 Fed. Cas. 1350, 1351, In re *Chandler* [U. S.] 5 Fed. Cas. 447, In re *Smith* [U. S.] 22 Fed. Cas. 395, *Love v. Love* [U. S.] 15 Fed. Cas. 996, 999, and quoted in *Re Pacific Coast Warehouse Co.* [U. S.] 123 Fed. 749, 750).

The usual meaning of "trader" is "one who buys and sells goods; one who makes it his business to buy merchandise, goods, and chattels, and sell the same for the purpose of making a profit." In re *Minnesota & A. Const. Co.* (Ariz.) 60 Pac. 881, 884.

In *Re New York & W. Water Co.* (U. S.) 98 Fed. 711, it was held that the business of a trader includes both buying and selling goods or merchandise which are ordinarily the subject of traffic. Thus a company which agrees to sell diamonds on the installment plan, giving the purchaser the option to take the diamonds or a sum of money on completion of the payments, and which had never purchased, owned, or delivered any diamonds, is not engaged in trading pursuits.

In re Tontine Surety Co. (D. C.) 116 Fed. 401, 402.

A trader is one engaged in trade or commerce; one who makes a business of buying and selling, or of barter; a merchant. One who was engaged in a general mercantile business was a trader, within Code, c. 100, § 13, providing that "if any person shall transact business as a trader, with the addition of the words 'factor,' 'agent,' and 'company,' and fail to disclose the name of his principal or partner," all of the property, stock, or choses in action acquired or used in such business shall be liable for the debts of such person. *Morris v. Clifton Forge Grocery Co.*, 32 S. E. 997, 998, 46 W. Va. 197.

Where a stock of goods was set apart as an exemption, and the head of the family, without an order of court, continued to carry on a mercantile business, and sold the goods, and bought other goods with the proceeds, and still others on credit extended by merchants who had notice of the exemption, the head of the family is not, and cannot be as such, a "trader" within the meaning of the insolvent trader's act (Civ. Code, §§ 2716, 2722). *Powers v. Rosenblatt*, 38 S. E. 969, 113 Ga. 559.

One who bought and sold lumber, bought clay and made and sold bricks, and received and sold mowing machines on commission, was a "trader." *Huston v. Goudy*, 37 Atl. 881, 882, 90 Me. 128.

The word "tradesmen," as used in Pub. Laws 1891, relating to preferences for services, means persons who work at a trade, and probably also includes in the general phrase all the various kinds of skilled labor which are not specifically named in the earlier part of the act; but, in order to entitle a tradesman to the preference of the act, he must be hired, and not carry on an independent business. *Steininger v. Butler*, 17 Pa. Co. Ct. R. 97, 99.

Auctioneer.

A licensed auctioneer, going from town to town in a public stagecoach, and sending goods by public wagons, and selling the same on commission, by retail, or by auction at the different towns, is a "trading person," within the meaning of St. 50 Geo. III, c. 41, § 6, and must take out a hawker's and peddler's license. *Rex v. Turner*, 4 Barn. & Ald. 520.

Baker.

A person whose occupation is that of a baker, and who buys flour which he converts into bread, and then sells the bread to daily customers, is to be deemed a "tradesman," within the meaning of Bankr. Act 1867, § 29, and therefore not entitled to a discharge, where he has kept no books of account whatever. In re Cocks (U. S.) 5 Fed. Cas. 1154.

Clerk.

A clerk who had, within a few weeks before his bankruptcy, bought a carriage and sleigh, two pair of horses, a harness, and some cigars, and sold them again, but who had shown no intention to trade generally, and had not bought for the purpose of selling again, was not a "tradesman," within Bankr. Act 1867, § 29. In re Rogers (U. S.) 20 Fed. Cas. 1104.

Cigarmakers' union.

A cigar makers' international union which neither makes nor sells cigars, but directs its attention to cigar makers and seeks to promote the mental, moral, and physical welfare of its members, is not a "trader," and can have no distinctive trade-mark. *McVey v. Brendel* (Pa.) 29 Wkly. Notes Cas. 1, 5, 6.

Common carrier.

A trader, within the meaning of the bankruptcy act, does not include the business of a common carrier. Mining comes nearer to trading than does the business of a carrier, but a mining company has generally been held to be excluded from the scope of the bankruptcy act. In re Elk Park Min. & Mill. Co. (U. S.) 101 Fed. 422; In re Keystone Coal Co. (U. S.) 109 Fed. 872. A theatrical company has been held not susceptible of bankruptcy. In re Oriental Society (U. S.) 104 Fed. 975. Nor is a water company which buys and sells water as a part of its regular business. In re New York & W. Water Co. (U. S.) 98 Fed. 711. A saloon is excluded. In re Chesapeake Oyster & Fish Co. (U. S.) 112 Fed. 960. And a club. In re Fulton Club (U. S.) 113 Fed. 997. Almost directly in point is the decision of the District Court of the Eastern District of Pennsylvania in Philadelphia & L. Transp. Co. (U. S.) 114 Fed. 403. In re H. J. Quimby Freight Forwarding Co. (U. S.) 121 Fed. 139, 140.

Contractor.

One who contracts with a railroad company to grade and build its road is not, by virtue of such contract and his acts under it, a "trader," within Bankr. Act 1867 (14 Stat. 536) § 39, and the suspension of his commercial paper is not, therefore, an act of bankruptcy. The most usual meaning of trader is one who buys and sells goods. In a writ, or deed, or indictment, it would not be regular to describe one as a trader, whose business it was to build or undertake works upon the land of other people. Bouvier, in his Law Dictionary, defines "trader" as one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit. The word "trader" is the exact equivalent of the phrase "any person using the trade of merchandise in gross or by retail." In re Smith (U. S.) 22 Fed. Cas. 394, 395.

Dealer.

A "trader" is one engaged in trade or in the business of buying and selling, and the term is synonymous with "dealer." *State v. Barnes*, 85 S. E. 605, 606, 126 N. C. 1063.

Farmer.

If a man exercise a manufacture from the produce of his own land as a necessary or general mode of reaping or enjoying that produce and bringing it advantageously to market, he is not a "trader," though he buy the necessary ingredients and materials to fit it for market. But where the produce of the land is merely the raw material of a manufacture, and used as such, and not according to the usual mode of enjoying the land—in short, where the produce of the land is an insignificant article in comparison with the whole expense of the manufacture—there he ought to be considered as a trader. *Wells v. Parker*, 1 Term R. 84, 38.

In Rev. St. § 5110, forbidding a discharge in bankruptcy to certain classes of persons, if the applicant has not kept proper books of account, the word "tradesman" should not be deemed to include all persons who buy and sell, but persons habitually in a business of buying and selling, such as is usually understood to require keeping books of account. As this section is penal, it should be confined to persons clearly within its objects and policy. A discharge should not be refused to a farmer because he occasionally bought stock or produce to sell again, and did not keep systematic books. In *re Cote* (U. S.) 6 Fed. Cas. 614, 615.

The words "trader" and "tradesman," are not synonymous, and as used in the bankrupt law ("trader," in the provision relative to stopping payment of commercial paper; and "tradesman," in that requiring keeping books of account) they denote somewhat different vocations. "Trader" may mean any one who makes a business of trading; but "tradesman" should be limited to shopkeeper, one who keeps a building for trading, and does not include one whose business was farming, and buying and selling live stock, though it may extend to a working artisan or mechanic. In *re Ragsdale* (U. S.) 20 Fed. Cas. 1334.

Furniture dealer.

Where a bankrupt, for a year before filing his petition, was engaged in the business of buying and selling furniture on his own account, having a shop where his goods were displayed and sold, he was a "merchant or tradesman," under Bankr. Act 1867, § 29, requiring a merchant or tradesman to keep proper books of account in order to be entitled to a discharge in bankruptcy. In *re Newman* (U. S.) 18 Fed. Cas. 96, 97.

Live stock dealer.

A bankrupt, who is engaged in farming and trading live stock, is not a "tradesman," within the meaning of Rev. St. U. S. § 5110, providing that a merchant or tradesman shall not be discharged in bankruptcy who has failed to keep proper books of account. Primarily, the word "tradesman" means one who trades, as does also the word "trader," and they have been treated by courts in many instances as synonymous. But in their general application and usage they describe different vocations. By "tradesman" is usually meant a shopkeeper. Such is the definition given the word in Burrill's Law Dictionary. It is used in this sense by Adam Smith. He says (*Wealth of Nations*): "A tradesman in London is obliged to hire a whole house in that part of the town where his customers live. His shop is on the ground floor." Dr. Johnson gives the same meaning. In *re Ragsdale* (U. S.) 20 Fed. Cas. 175.

One who is engaged in farming and trading live stock may be designated as a "trader." Primarily the words "trader" and "tradesman" mean one who trades, and they have been treated by the courts to be in many instances as synonymous, but in their general application and usage they describe different vocations. By "tradesman" is usually meant a shopkeeper. In *re Ragsdale* (U. S.) 20 Fed. Cas. 175.

"Trader," as used in the bankrupt act, relating to bankruptcy of a manufacturer and trader, embraces a wide field of operation. It is of no consequence in what one may trade. The only question is, does he buy and sell articles which are subject to trade and commerce. In *re Cowles* (U. S.) 6 Fed. Cas. 672. Selling horses or other stock, or the products of a farmer, does not constitute him a trader, within the meaning of the act. If a farmer buys horses or other stock, or products of another farmer to sell again, and this constitutes a part of his business, he then becomes a trader, and subjects himself to the provisions of the bankrupt act. In *re Kenyon*, 1 Utah, 47, 49 (citing In *re Chandler* [U. S.] 5 Fed. Cas. 447).

A person who in the course of a few months is engaged with another in purchasing 100 cattle, and sells them to the proprietor of an establishment for canning beef, in pursuance of a previous contract with such proprietor, is a "trader," within the meaning of that term in Rev. St. c. 70, § 44, relating to insolvency, requiring a trader to keep a cash book. A trader is one who sells goods substantially in the form in which they are bought. Any general definition of the word "trader" would fail to suit all cases. Each case has its peculiarities. We are to look to the object to be attained by the requirement that the trader shall keep a cash

book. *Sylvester v. Edgecomb*, 76 Me. 499, 500.

"Tradesman," as used in Rev. St. U. S. § 5110, providing that a merchant or tradesman should not be discharged in bankruptcy who had not kept books of account, cannot be fairly stretched to mean "trader," in the large sense of the old bankrupt law, and does not include a farmer who occasionally bought and sold horses, cattle, and hay. In both England and the United States, the word "tradesman" has most often been used as synonymous with "shopkeeper," and not seldom as a person who supplies daily or occasional wants, as a butcher or baker, or even a plumber or carpenter, whether he keeps a shop or not. But in both countries it is a signification much more restricted than that given to "trader" in the old bankrupt law. The word might in many connections be used in the sense of any man who trades, but it is doubtful if that is at the present time its usual signification, and whether it has that meaning in the section in question. The meaning of "tradesman" is substantially the same as "shopkeeper." In *re Cote* (U. S.) 6 Fed. Cas. 614, 615.

Persons who are engaged in buying and selling cattle, butchering, and farming some, their business amounting to from \$2,000 to \$3,000 a year, the bulk of which was in the buying and selling and butchering of the cattle, and the farming merely incidental, are "tradesmen," within the meaning of the bankrupt law, denying the right of discharge of tradesmen who do not keep proper books of account. In *re Bassett* (U. S.) 8 Fed. 266, 269.

Livery stable keeper.

"Trader," as used in Insolvent Law 1878, § 42, which declares that the debtor shall not be discharged if, being a merchant or trader, he does not after the passage of the act keep a cash book and other proper books of account, includes a livery stable keeper. *Groves v. Kilgore*, 72 Me. 489, 490.

A person who keeps in a stable horses belonging to other persons, and feeds such horses with food which he buys, and receives pay for the food which such horses consume, in the amount paid for keeping the horses on livery, and sells the food, is a merchant or tradesman within Rev. St. U. S. § 5110, subd. 7, in respect to the discharge of a bankrupt. In *re Odell* (U. S.) 18 Fed. Cas. 574.

A trader is a person engaged in buying and selling articles of merchandise, and does not include a livery stable keeper. *Hall v. Cooley* (U. S.) 11 Fed. Cas. 217, 218.

Lumber dealer.

We have found no American decisions directly upon the point as to what consti-

tutes a trader within the bankruptcy act, but the decisions are numerous under the English bankrupt act of 1825. Under that act a person engaged in the manufacture and sale of lumber would be regarded as a trader. The commercial definition of a trader is one who makes it his business to buy merchandise or things ordinarily the subjects of commerce and traffic. In *re Cowles* (U. S.) 6 Fed. Cas. 672, 674.

Manager of steamer.

Rev. St. § 5110, cl. 7, providing that no bankrupt, being a "merchant or tradesman," shall be discharged from his debts who has not kept proper books of account, cannot be construed to include a person superintending the running of a steamer, and who, as treasurer of the corporation owning her, received and disbursed the moneys earned by the steamer. In *re Merritt* (U. S.) 7 Fed. 853, 854.

Manufacturer.

An insolvent debtor, who for several years prior to his petition in insolvency was engaged in purchasing small parcels of timber lands and timber growth, cutting and removing timber there, or manufacturing the same at his mill into staves and headings, constructing the materials into barrels, the business involving the employment of several men, and a capital of \$1,800, is a "trader," within the meaning of the insolvent law, and not entitled to a discharge unless he has kept books of account. In *re Merryfield*, 18 Atl. 891, 892, 80 Me. 233.

"Trader," as used in Revenue Act 1877, c. 156, § 12, providing that any trader carrying on the business of buying or selling goods, wares, or merchandise, of whatever name or description, shall pay a certain privilege tax, means one who sells goods substantially in the form in which they are bought; the difference between the sums paid and received constituting the profit of the business. A trader is one engaged in trade, or in the business of buying and selling. One who carries on the business of buying timber and converting it into lumber for sale is not a trader, but rather a manufacturer. *State v. Chabourn*, 80 N. C. 479, 481, 30 Am. Rep. 94.

The important fact, in determining whether a person is a "trader or merchant," within the meaning of Act 1878, § 42, declaring that a debtor should not be discharged if, being a "merchant or trader," he had not kept a cash book, is whether such person, being a seller, is also a buyer. To constitute a trader, it is not necessary that he should sell the articles in the same condition as when he bought them. A butcher who buys cattle and sells beef, a shoemaker who buys leather and sells shoes, a baker who buys his meal and sells bread, a brick-

maker who buys his earth and sells bricks, a carriage maker who buys his material and sells carriages, are held to be traders within the bankrupt and insolvent laws. *Groves v. Kilgore*, 72 Me. 489, 490.

Act April 22, 1843, exempting from execution the "necessary tools of a tradesman," does not exempt the printing or stamping blocks of a printer of oilcloth, costing from \$1,000 to \$1,500, used in the business, requiring peculiar and extensive buildings, numerous workmen, and some capital. The word "tradesman," as here used, should be construed to mean the poor handicraftsman, whose needs it was intended to provide for, and not to extend to a person who is rather to be denominated as a "manufacturer." *Richie v. McCauley*, 4 Pa. (4 Barr) 471, 472.

A stair builder, who bought lumber and other materials, and by the labor of workmen employed by him wrought such materials into stairs for persons who gave him orders, and received as compensation from such persons a gross price for stairs delivered complete, was a "merchant or tradesman," within the meaning of the bankrupt act, relating to the keeping of books, and he was none the less a tradesman because he was also a manufacturer of the stairs, or because he did not resell the lumber and other materials in the same state in which he bought them. *In re Garrison* (U. S.) 10 Fed. Cas. 49.

The word "tradesman," as used in the federal bankrupt act, has a very limited signification. The English authorities hold that a man who owned land, or a man who rented land and held it for a term of years, and carried on the business of brickmaking as a means of realizing the profits to be derived from his land, is not a tradesman, and they have said that the act refers to smaller merchants or tradesmen, or a shopkeeper; and this was the meaning put upon the term by Lowell, J., in the case of *In re Cote* (U. S.) 6 Fed. Cas. 614, when he said that the term referred "only to the smaller class of merchants." *In re Stickney* (U. S.) 23 Fed. Cas. 77, 79.

The owner of timber lands, who cuts the trees and manufactures them into lumber for sale as means of realizing profit from his real estate, is not thereby rendered a "trader" under the bankruptcy laws; but where timber lands are purchased for the purpose of manufacturing and selling lumber, and in connection with the purchase of the land, were bought a large quantity of sawed lumber for sale, such purchasers become traders. *Hall v. Cooley* (U. S.) 11 Fed. Cas. 217, 218.

Merchant distinguished.

See "Merchant."

Miller.

One who in connection with a partner is operating a flouring mill, buying wheat, grinding it into flour, and selling it for a profit, and also operating a warehouse, receiving in store and buying and selling grain, is a "trader," under any definition of that somewhat indefinite term. *Daniels v. Palmer*, 29 N. W. 162, 164, 35 Minn. 347 (citing *Newland v. Bell*, Holt, N. P. 222; *King v. Simmonds*, 1 H. L. Cas. 754; *In re Ryan* [U. S.] 21 Fed. Cas. 105; *In re Smith* [U. S.] 22 Fed. Cas. 394; *In re Elles*, 5 Law Rep. 273; *Wakeman v. Hoyt*, Id. 309; *Bouv. Law Dict.*).

Oil land owner.

The owner of oil lands, who divides it into leaseholds and receives the rent in oil, is not a trader within Bankr. Act 1867 (14 Stat. 517). *In re Woods* (U. S.) 30 Fed. Cas. 529, 530.

Physician.

Code, § 2031, declaring that the accounts of merchants, tradesmen, and mechanics, which by custom become due at the end of the year, bear interest, etc., should be construed to include physicians, though the word "tradesmen" does not, perhaps, ordinarily cover physicians, but they have a trade, an art, a mystery. They usually give it a more dignified name, to wit, profession; but as time rolls on and new ways come in, we have professors of dancing and almost every other occupation. One of the definitions of "trade" given by Webster is the business a man has learned by which he earns his livelihood, which is within the true meaning of the word "tradesman." *Woodfield v. Colzey*, 47 Ga. 121, 124.

Saloon keeper.

The words "tradesmen or merchants," within Rev. St. § 5110, subd. 7, requiring merchants or tradesmen to keep proper books of account as a condition to a discharge in bankruptcy, includes a person whose only regular business is keeping a saloon and selling there for cash and on credit at retail liquors and cigars. *In re Sherwood* (U. S.) 21 Fed. Cas. 1285.

An innkeeper, or retail dealer of liquor, is a trader, within Bankr. Act 1867. *In re Ryan* (U. S.) 21 Fed. Cas. 105. But see, *In re Chesapeake Oyster & Fish Co.* (U. S.) 112 Fed. 960, 961.

Smuggler.

A smuggler may be a "trader," within St. 1 Jac. I, c. 15, § 2, as being a person who seeks his trade or living by buying and selling, although such buying and selling be illegal. *Cobb v. Symonds*, 5 Barn. & Ald. 516.

Speculator in grain and stocks.

"Merchant or tradesman," as used in Bankr. Act 1867 (14 Stat. 517), authorizing bankruptcy proceedings to be brought against a person, being a merchant or tradesman, although, according to the lexicons, generally meaning a person engaged in buying and selling, and therefore would include a person engaged in the business of buying and selling grain, yet such term could not be extended to include a person engaged in buying and selling stocks with a view to his own profit, to be made by the excess of the selling price over the buying price, where he kept no office, did not act as commission broker for others in buying and selling stocks, and his buying and selling was done through brokers, who purchased in their own names but for his account, they paying for the stocks with their own funds and the bankrupt being their debtor for the amounts paid; and yet a clergyman or a physician or a lawyer might carry on the same business in the same way in addition to his regular professional business, and no one would call him, in consequence thereof, a merchant or tradesman. In re Marston, 16 Fed. Cas. 857.

The words "merchant or tradesman" involve the idea of a dealing with merchandise in some form or other. In their ordinary and natural signification they do not include one who makes profits by buying and selling shares and speculation, whether for himself or for others. Such a person would not in ordinary parlance be said to be engaged in trade. In re Woodward (U. S.) 30 Fed. Cas. 542, 543.

A trader is one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. A person who, outside his regular business, from time to time buys and sells mining stock, is not thereby made a trader. Ex parte Conant, 77 Me. 275, 277, 52 Am. Rep. 759.

Theatrical manager or society.

The Revised Statutes of the United States, relating to the keeping of proper books of account by a "merchant or tradesman," who becomes bankrupt, cannot be construed to include a theatrical manager, who had no other business, who bought costumes, machinery, etc., for use in his business, and also on a few occasions had sold some such property. In re Duff (U. S.) 4 Fed. 519, 521.

A "trader" is one who either sells, or buys and sells. The term does not include a theatrical society, which merely gives performances of one kind or another, to which the public are attracted by the skill of the performers, so that such a society cannot be adjudged an involuntary bankrupt under Bankr. Act July 1, 1898, § 4b, 30 Stat. 547, c.

541 [U. S. Comp St. 1901, p. 3423]. The skill of such performers is not sold. It is merely exhibited for hire. The fact that the society must buy scenery and stage appliances and furniture, which it may afterwards sell again, is of no importance. In re Oriental Soc. (U. S.) 104 Fed. 975.

Traveling salesman.

The term "clerk, laborer, or tradesman," in a statute giving a preference out of a fund raised by execution against his employer to a clerk, laborer, or tradesman, does not include a traveling salesman who sells on commission for a furniture manufacturer. Witmer v. Miller, 12 Pa. Co. Ct. R. 363, 364.

Trust company.

A trust company, engaged in buying and selling stocks, bonds, and other securities, is not a "trader" within the bankruptcy act. In re Surety Guarantee & Trust Co. (U. S.) 121 Fed. 73, 75, 56 C. C. A. 654.

TRADING.

The word "trading" may have meanings which vary with its different applications. In laws concerning navigation, every vessel carrying a cargo or passengers may, in general, be considered as trading. United States v. The Ohio (Pa.) 9 Phila. 448, 460.

A vessel licensed for fisheries is engaged in a "trade other than that for which she is licensed" when she takes on board goods with intent to transport them on an illicit voyage, such act constituting a trading. The Two Friends (U. S.) 24 Fed. Cas. 433, 434 (citing The Active v. United States, 11 U. S. [7 Cranch] 100, 3 L. Ed. 232).

"Trading, dealing, and trafficking" within the meaning of a statute providing that no person shall trade, deal, and traffic in this state as a peddler, hawker, or petty chapman in any foreign goods, wares, and merchandise, characterizes the act of carrying about and offering such goods for sale. Merriam v. Langdon, 10 Conn. 460, 471.

TRADING CAR.

Code 1880, § 585, imposing a tax for the privilege of running a trading car, cannot be construed to include a car which a railroad company runs over its track, supplied with provisions and clothing suitable for the wants of its employes, delivering such supplies to its laborers in payment of the wages due them, selling to no other persons, and not to the laborers, except in payment of wages. Vicksburg & M. R. Co. v. State, 62 Miss. 105, 107.

TRADING CORPORATION.

A trading corporation is a commercial corporation engaged in buying and selling.

The word "trading" is a much narrower word than "business," when applied to corporations, and, though a trading corporation is also a business corporation, a business corporation may properly be any corporation organized for the furtherance of private transactions. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 669, 4 L. Ed. 629; *Adams v. Boston, H. & E. R. Co.* (U. S.) 1 Fed. Cas. 90, 92.

Boarding stable.

A corporation, the principal business of which is conducting boarding stables wherein it boards horses for its customers, including the complete care of them, and also the care of wagons and carriages, harness, etc., is engaged principally in trading or mercantile pursuits, within Insolvency Act 1898, § 4b, and therefore may be adjudged an involuntary bankrupt. In re *Morton Boarding Stables* (U. S.) 108 Fed. 791, 794 (following In re *Odell* [U. S.] 18 Fed. Cas. 574).

Construction company.

A trader is one who buys and sells goods; one who makes it his business to buy merchandise, goods, and chattels, and sells the same for the purpose of making profit; so that a corporation organized to construct railroads, turnpikes, ditches, etc., which temporarily furnished its employes with groceries, clothing, etc., was not a person engaged in trading or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. In re *Minnesota & A. Const. Co.* (Ariz.) 60 Pac. 881, 884.

Educational institution.

The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it a business or trading corporation. *McLeod v. Lincoln Medical College of Cotner University* (Neb.) 96 N. W. 265, 268.

Hospital.

A private hospital conducted for profit is a trading corporation. In re *San Gabriel Sanatorium Co.* (U. S.) 95 Fed. 271, 273.

Laundry.

A corporation engaged in laundry business is not engaged in either trading or mercantile business, within the meaning of the bankruptcy act. In re *White Star Laundry Co.* (U. S.) 117 Fed. 570, 571.

Mining corporation.

A mining corporation is not a trading or manufacturing corporation, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p.

3428], providing that a petition in involuntary bankruptcy may be maintained against corporations engaged principally in manufacturing, trading, or mercantile pursuits. In re *Elk Park Min. & Mill. Co.* (U. S.) 101 Fed. 422, 423.

A corporation engaged principally in buying and selling ore is engaged in trading, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. In re *Chicago Joplin Lead & Zinc Co.* (U. S.) 104 Fed. 67, 68.

Public warehouse.

A corporation conducting a public warehouse, in which it receives and stores grain and other merchandise for hire, issuing receipts therefor, is not engaged in trading or mercantile pursuits, and is not subject to be adjudged an involuntary bankrupt. In re *Pacific Coast Warehouse Co.* (U. S.) 123 Fed. 749.

Saloon and restaurant.

A corporation engaged in running a saloon and restaurant is not a mercantile or trading corporation, within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], describing corporations which may be adjudged involuntary bankrupts. In re *Chesapeake Oyster & Fish Co.* (U. S.) 112 Fed. 960, 961.

Water company.

The business of a water company is not a trading or mercantile pursuit, although it is authorized to buy, sell, use, and deal in water for manufacturing purposes, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. In re *New York & W. Water Co.* (U. S.) 98 Fed. 711, 713.

TRADING PARTNERSHIP.

Wherever the business, according to the usual modes of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers, and subject to all the obligations, incident to that relation. *Dowling v. National Exch. Bank of Boston*, 12 Sup. Ct. 928, 930, 145 U. S. 512, 36 L. Ed. 795; *Schellenbeck v. Studebaker*, 41 N. E. 845, 847, 13 Ind. App. 437, 55 Am. St. Rep. 240; *Kimbro v. Bullitt*, 63 U. S. (22 How.) 256, 268, 16 L. Ed. 313; *Masterson v. Mansfield*, 61 S. W. 506, 507, 25 Tex. Civ. App. 262; *Randall v. Merideth*, 13 S. W. 576, 582, 76 Tex. 669. If the partnership contemplates periodical or continuous or frequent purchases, not as incidental to the occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership.

otherwise it is not. Huey v. Fish, 40 S. W. 29, 32, 15 Tex. Civ. App. 455 (citing Bates, Partn. 327); Randall v. Merideth, 13 S. W. 576, 76 Tex. 669; Phillips v. Stanzell (Tex.) 28 S. W. 900, 902; Masterson v. Mansfield, 61 S. W. 505, 507, 25 Tex. Civ. App. 262.

TRADING VOYAGE.

"Trading voyage," as used in shipping articles for a voyage from Boston to the Pacific, Indian, and Chinese Oceans or elsewhere on a trading voyage, points to a commerce by buying and selling on account of the original owners and shippers, and not to the intermediate transportation of cargoes and freight. The latter employment is usually denominated a "freighting," and not a "trading," voyage. Brown v. Jones (U. S.) 4 Fed. Cas. 404, 406.

TRADING WITH ENEMY.

"Trading," as used in reference to trading with an enemy, does not mean that signification of the term which consists in negotiation or contract, but the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation of contract, therefore, has no connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed; and this definition may be substituted for that of trading with an enemy. A citizen of the United States who withdraws his property acquired before the war from the enemy's country after he has full knowledge of the war, without the permission of the government, is engaged in trading with the enemy, subjecting the property engaged therein to confiscation. The word "trading" is used in the sense of "negotium" or "negotiation." The Rapid, 12 U. S. (8 Oranch) 155, 162, 3 L. Ed. 520; Id. (U. S.) 20 Fed. Cas. 297, 300.

TRADITION.

Tradition is knowledge, belief, or practices transmitted orally from father to son or from ancestors to posterity. In re Hurlburt's Estate, 35 Atl. 77, 81, 68 Vt. 366, 85 L. R. A. 794.

The word "tradition," in reference to the admission of tradition or general reputation to prove boundaries, etc., in common sense and in law must mean that which is derived from the declarations of those who live or were living at a time, if not ancient, at least comparatively remote. Thus, evidence that a certain tree was understood to be a corner tree in 1886 is not admissible as a tradition. Westfelt v. Adams, 42 S. E. 823, 825, 131 N. C. 379.

The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer. Civ. Code La. 1900, art. 2477.

TRAFFIC—TRAFFICKING.

"Traffic" is the buying of something from another or the selling of something to another. In re Cameron Town Mut. Fire Lightning & Windstorm Ins. Co. (U. S.) 96 Fed. 756, 757.

Traffic is either state or interstate traffic, according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic. Ft. Worth & D. C. Ry. Co. v. Whitehead, 26 S. W. 172, 173, 6 Tex. Civ. App. 595.

Webster defines the word "traffic" to mean "to sell; to buy; to trade; to pass goods and commodities from one person to another for an equivalent in goods or money." The meaning of such word is so well understood that, in a prosecution for keeping open a liquor saloon for "traffic" on Sunday, the charge of the court that, if the jury believed defendant kept a saloon open for the purpose of traffic on Sunday, he should be convicted, and that the term "traffic," as employed, has its usual and commonly accepted meaning, was sufficient without a further definition of the word. Levine v. State, 34 S. W. 969, 970, 35 Tex. Cr. R. 647.

"Trafficking in liquors" is defined by Laws 1896, c. 112, § 2, as meaning sales of liquor in quantities of less than five gallons. People v. Hamilton, 39 N. Y. Supp. 531, 536, 17 Misc. Rep. 11.

"Trafficking," as used in Laws 1896, c. 112, § 31, forbidding the trafficking in liquors without a liquor tax certificate, is equivalent to the word "sales," as used in the act of 1892 prohibiting sales of liquor without a license. People v. Hamilton, 39 N. Y. Supp. 531, 536, 17 Misc. Rep. 11.

"Trafficking, trading, and dealing" within the meaning of a statute providing that no person shall trade, deal, and traffic in this state as a peddler, hawker, or petty chapman in any foreign goods, wares, and merchandise, characterizes the act of carrying about and offering such goods for sale. Merriam v. Langdon, 10 Conn. 460, 471.

Deal synonymous.

The words "traffic in" are synonymous with the word "deal." Clifford v. State, 29 Wis. 327, 329.

Manufacture distinguished.

"Manufacture."

Employment of laborer.

Traffic is commerce; trade; sale or exchange of merchandise, bills, money, and the like; the passing of goods or commodities of one person to another for an equivalent in goods or money; and, as applied to interstate commerce, it is the sale of itinerant vendors, in one state, of the goods, wares, and merchandise of other states; and the regulation of sales of goods which are in another state for the purpose of introducing them into another state in which the negotiation is made. And the business of procuring labor contracts to be performed in another state cannot be properly denominated "traffic," labor not being an article of merchandise or a commodity. It is toll, mental and physical. *Williams v. Fears*, 35 S. E. 699, 701, 110 Ga. 584, 50 L. R. A. 685.

Sale by manufacturer.

The phrase "trafficking in intoxicating liquors," as used in the chapter relating to intoxicating liquors and cigarettes, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes; but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer, of the same in quantities of one gallon or more at any one time. *Bates' Ann. St. Ohio*, 1904, § 4364-16.

A manufacturer of intoxicating liquors, who carries on the business of selling them elsewhere than at the manufactory, is engaged in the traffic. *Jung Brewing Co. v. Talbot*, 53 N. E. 51, 59 Ohio St. 511.

Sale in original package.

Gen. Laws 1885, c. 296, § 4, making it criminal to "vend, sell, deal, or traffic" in intoxicating liquors, etc., without a license therefor, includes the sale of a keg of beer as an original package by the agent of a brewer, as the plain meaning of the words includes such sale. *Pelts v. State*, 32 N. W. 763, 68 Wis. 538.

Sale at wholesale.

"Traffic," as used in the schedule to the Constitution, § 18, which provides that "no license to traffic in intoxicating liquors shall be hereafter granted in this state, but the General Assembly may, by law, provide against evils resulting therefrom," includes the wholesale, as well as the retail, traffic in liquors. The word "traffic" has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money, and a

trafficker is one who traffics, a trader, a merchant. No limit as to amount is fixed in the section, and it is plainly as much traffic to deal in a given commodity by the wholesale as at retail. *Senior v. Ratterman*, 11 N. E. 321, 324, 44 Ohio St. 661.

Use by owner.

The word "traffic" is defined by Bouvier as "commerce, trade, sale, or exchange of merchandise, bills, money, and the like." Webster defines it as "commerce either by barter or by buying and selling trade." This word, like "trade," comprehends every species of dealing in the exchange or passing of goods and merchandise from hand to hand for an equivalent, unless the retaining may be expected. It signifies appropriately foreign trade, but is not limited to that. In Comp. St. c. 50, § 15, the term "traffic in intoxicating liquors" will be held to mean the sale or furnishing of liquors to third persons, and not the use thereof by the saloon keeper himself. *Curtin v. Atkinson*, 54 N. W. 131, 133, 36 Neb. 110.

TRAGEDY.

A tragedy is a dramatic representation. *Commonwealth v. Fox (Pa.)* 10 Phila. 204.

TRAILER.

"Trailer" is a term applied to a passenger coach attached to a grip car of a cable road, or to the car on an electric line containing the motive power. *Steege v. St. Paul City Ry. Co.*, 50 Minn. 149, 150, 52 N. W. 393, 16 L. R. A. 379.

Trailing cars, which are excluded from Laws 1893, c. 63, requiring persons operating electric cars to provide each car with an inclosure to protect the employes from the inclemency of the weather, are such cars as are not operated or controlled by a power applied to motors attached to them, but which are merely drawn by cars equipped with motors. *State v. Hoskins*, 59 N. W. 545, 58 Minn. 35, 25 L. R. A. 759.

TRAIN.

See "Accommodation Train"; "Freight Train"; "Passenger Train"; "Wild Train."

The word "train," as used in the train railroad companies' act, entitled "An act to provide for the construction of train railways," is defined to be a continuous or connected line of cars or carriages on a railroad. *Detroit City Ry. v. Mills*, 48 N. W. 1007, 1009, 85 Mich. 634.

As used in a contract of sale of standing timber "with the right for his train, tram-

road, wagons, and employes to enter on the lands and remove the timber," the word "train" refers to a railroad train, and implied the right to build the railroad on the land, and to cut and remove such timber as was reasonably necessary in clearing a right of way. *Waters v. Greenleaf-Johnson Lumber Co.*, 20 S. E. 718, 719, 115 N. C. 648.

In construing the statute in reference to the liability of a railroad for injuries resulting by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train, the court says the statute in referring to a signal, switch, locomotive engine, or train seems to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who wholly or in part control its movements. The charge and control is of that whose characteristic is rapid and forceful motion. It relates to locomotive engines as a whole, and not to the individual parts which make up the train or engine. *Thyng v. Fitchburg R. Co.*, 30 N. E. 169, 170, 156 Mass. 13, 32 Am. St. Rep. 425.

"Train," as used in St. 1887, c. 270, giving a right of action in certain cases for a personal injury caused by the negligence of any person in the service of the employer who has the charge or control of any locomotive, engine, or train upon a railroad, means a locomotive and one or more cars coupled together and run upon a railroad. *Dacey v. Old Colony R. Co.*, 26 N. E. 437, 438, 153 Mass. 112.

An engine with cars attached, which were being pushed on a side track for cleaning purposes, is a "train," within St. 1887, c. 270, § 1, rendering a railroad company liable for injuries by reason of the negligence of one in control of a train thereof. *Shea v. New York, N. H. & H. R. Co.*, 53 N. E. 396, 173 Mass. 177.

Moving cars detached from engine.

"Train," as used in St. 1887, c. 270, § 1, cl. 8, providing that an employe of a railway company may recover for injuries due to the negligence of the person in charge or control of its trains, etc., generally signifies cars in motion, and a number of cars coupled together and moving from one point to another from an impetus imparted by a locomotive which had been detached constitutes a train, within the meaning of the statute. *Caron v. Boston & A. R. Co.*, 42 N. E. 112, 113, 164 Mass. 523.

Single engine.

The word "train" is usually understood to consist of one or more engines with one or more cars attached for the purpose of being moved to another place. A single en-

gine is not a train; yet it is a common practice to run them alone, and often for long distances, at high speed. *Larson v. Illinois Cent. R. Co.*, 58 N. W. 1076, 1077, 91 Iowa, 81.

As a structure.

See "Structure."

TRAMP.

The genus "tramp" in this country is a public enemy, and he is numerous and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman, and child, in so far as they do not promptly and fully supply his demands. He is a thief, a robber, often a murderer, and always a nuisance. He does not belong to the working classes, but is an idler. He does not work, because he despises work. It is a fixed principle with him that, come what may, he will not work. He is so low in the scale of humanity that he is without that not uncommon virtue among the low—of honor among thieves. He will steal from a fellow tramp, if in need of what that fellow has, and will resort to violence when that is necessary. The tramp has therefore become a well-known, vicious class, which the state may enact laws concerning. *State v. Hogan*, 58 N. E. 572, 574, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626.

A tramp is a wandering, homeless vagabond, and the objection to an indictment for obtaining money by false pretenses that a person of ordinary care would not have loaned money to a stranger or tramp, is not good where the indictment alleged that the prosecuting witness had had important business with defendant, who had been introduced to him as a man of means and large property. *Miller v. State*, 73 Ind. 88, 92.

The word "tramp" indicates a foot traveler, a trampler; often used in a broad sense for a vagrant or wandering vagabond. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow, who wanders about the country seeking to secure his living without toil. Because a man is a tramp, he is not necessarily dangerous. And hence the fact that tramps are caught stealing a ride upon a train is not sufficient to cause the employes on the train to suspect that they were carrying concealed weapons, so as to render the railroad company liable to passengers for injuries caused thereby. *Savannah, F. & W. Ry. Co. v. Boyle*, 42 S. E. 242, 244, 115 Ga. 836, 59 L. R. A. 104.

If a transient person roves from place to place, begging, living without labor or visible means of support, he shall be deemed a tramp. *V. S.* 1894, 4761.

All transient persons who rove about from place to place, begging, and all vagrants living without any labor or visible means of support, who stroll over the country without lawful occasion, shall be deemed tramps. Gen. St. Conn. 1902, § 1836.

Any person going about from place to place, begging, or subsisting upon charity, and for the purpose of acquiring money or a living, and who shall have no fixed place of residence or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp. P. & L. Dig. Laws Pa. 1894, vol. 2, col. 4781, § 15.

A tramp is any person, not blind, over 16 years of age, and who has not resided in the county in which he may be at any time for a period of 6 months prior thereto, who, (1) not having visible means to maintain himself, lives without employment; or (2) wanders abroad and begs, or goes about from door to door, or places himself in the streets, highways, passages, or public places to beg or receive alms; or (3) wanders abroad and lodges in taverns, groceries, alehouses, watch or station houses, outhouses, market places, sheds, stables, barns, or uninhabited buildings, or in the open air, and does not give a good account of himself. Crim. Code N. Y. 1903, § 887a.

The following described persons are declared to be tramps: All persons who shall come from any place without the state, or from any state, county, township, borough, or place within the state, and have no legal settlement in the places in which they may be found, and live idly and without employment, and refuse to work for the usual and common wages given to other persons for like work in the place where they then are, or shall be found going about from door to door, or placing themselves in the streets, highways, or roads, to beg or gather alms, and can give no reasonable account of themselves or their business in such place. Gen. St. N. J. 1895, p. 3681, § 1.

Under Code 1873, § 4130, defining vagrants, and Acts 23d Gen. Assem. c. 43, § 2, providing that no male person, 16 years of age or over, who is physically able to perform manual labor, and is a vagrant, within the purview of section 4130 of the Code, who is found wandering about practicing common begging, having no visible calling or business to maintain himself, and is unable to show reasonable effort, and in good faith, to secure employment, shall be deemed a tramp, all tramps are not, therefore, vagrants, and a police judge will not be entitled to the fees provided for in case of tramps for prosecutions against vagrancy. City of Des Moines v. Polk County, 78 N. W. 249, 252, 107 Iowa, 525.

Under Laws 1883, c. 342, § 1, declaring every male person over 16 years old, who is

a vagrant within the meaning of Rev. St. 1543, to be a tramp, if he be without visible means of support, and be found drunk and disorderly or be found and arrested in a town in which he is not an actual inhabitant, and making such offense a felony, every tramp is a vagrant, and may still be arrested and punished as such, instead of for the higher offense. Johnson v. Waukesha County, 25 N. W. 7, 8, 64 Wis. 281.

TRAMP CORPORATION.

Tramp corporations are those companies which are chartered in one state without any intention of doing business therein, but operate entirely in other states. State v. Georgia Co., 17 S. E. 10, 12, 112 N. C. 34, 19 L. R. A. 485 (citing 25 Am. Law Rev. 352; 26 Am. Law Rev. 193).

TRAMWAY.

In the ordinary use of the word, "tramway" means a railroad or railway over which cars are operated; so that a platform which was used to carry away the lumber from a sawmill will not be held to be a tramway, in the absence of proof that the parties understood same to be a tramway, within the meaning of fire insurance policy containing a warranty that a continuous clear space shall be maintained between the property insured and any woodworking establishment, "tramways" excepted. Gough v. Jewett, 52 N. Y. Supp. 707, 709, 32 App. Div. 79.

TRANSACTION.

On a trial under Comp. St. §§ 1356, 1366, requiring every person who shall carry on any lottery, etc., to pay a license fee, and providing that any person who shall transact any business requiring a license fee, without first obtaining the same, shall be deemed guilty of a misdemeanor, the use in the charge of the word "transact" as the equivalent of "carry on" is not error, since the word "transact" should be construed as synonymous with "carry on," in view of sections 202, 204, providing that words and phrases are to be liberally construed and according to approved and common usage. Territory v. Harris, 19 Pac. 286, 287, 8 Mont. 140.

TRANSACTIONING BUSINESS.

See, also, "Carry on Business"; "Doing Business."

Pub. Laws N. Y. c. 281 (St. 1833), forbidding the "transaction of business" in the name of a partner not interested in the firm, means such business as is usually carried on by the firm with persons with whom they

are accustomed to have business dealings. The evil sought to be remedied was the use of the name of one not interested in the firm to induce credit to be given and to impose on the public; hence the law was only meant to apply to dealings between the individual reasonably using the firm name and the persons transacting the business, connected in a general way with the usual course of business carried on by the firm, since it was only against fraud and imposition which might be practiced on innocent parties who dealt with the persons who transacted business in the name of a party not interested, or whose interest has ceased, that the statute was directed. A firm engaged in the millinery business, which executed a lease in the firm name after one of the partners were dead, was not "transacting business," within the meaning of the statute. *Sparrow v. Kohn*, 109 Pa. 359, 362, 58 Am. Rep. 726.

"Transaction of business," as used in reference to a foreign corporation, is not necessarily synonymous with the term "doing business." It does not necessarily mean that the main business of the corporation must be carried on in the state, or something in the nature of that business, or that capital must be employed in the state. And as used in the law requiring foreign stock corporations, having an office for transaction of business in the state, to keep a stockbook open for the inspection of stockholders, all that the statute requires is that something relating to the business of the corporation, or part of it, be carried on in the office. The transfer of stock is such a transaction of business. *People v. Montreal & B. Copper Co.*, 81 N. Y. Supp. 974, 976, 40 Misc. Rep. 282.

Adjusting loss.

Laws 1853, c. 466, § 23, as amended by Laws 1875, c. 555, imposes a penalty on agents acting for foreign insurance companies without procuring a certain certificate. Held, that an agent of a foreign company, while in the state adjusting a loss, was not "transacting the business of fire insurance," within the meaning of such phrase in the statute, inasmuch as the adjustment of a loss is merely a means of ascertaining the amount of an admitted indebtedness, which action could not have been within the intent of the Legislature. *People v. Gilbert* (N. Y.) 44 Hun, 522, 524.

Bringing suit.

Civ. Code, § 567, enacts that no foreign corporation shall transact any business within the territory until it shall have filed a copy of its charter, appointed a resident agent, etc. Held, that in an action by a foreign corporation which had not complied with the statute it was not necessary for the corpora-

tion to allege compliance, inasmuch as the phrase "transact business" does not mean or include the exercise of a corporation's right to sue. *American Buttonhole, Overseaming & S. M. Co. v. Moore*, 8 N. W. 131, 134, 2 Dak. 280.

Under a statute (Laws 1864, p. 617) prohibiting a foreign corporation from transacting business in this state until it appoints a resident agent therein, it is held that the business which the corporation is prohibited from transacting is the regular business in which it is engaged, and that the maintaining of a suit in the state courts against a resident debtor is not transacting business therein, within the meaning of the statute. *Orange Nat. Bank v. Traver* (U. S.) 7 Fed. 146.

Filling unsolicited order.

"Transacting business in the state," within the meaning of the Laws of 1899, requiring foreign corporations transacting or soliciting business in Texas to obtain a permit, does not include the act of a corporation doing business in another state in shipping goods on an unsolicited order to a resident of Texas. *Zuberlied Co. v. Harris* (Tex.) 35 S. W. 403, 404.

Making contract.

The mere entering into a contract with a city for street lighting by a foreign corporation did not constitute "transacting business within the state," under the statute declaring that no foreign corporation shall transact business within the state until certain things have been done. *Hogan v. City of St. Louis*, 75 S. W. 604, 605, 178 Mo. 149.

Making contract or sale outside of state.

Comp. Laws, § 1683, provides that it shall not be lawful for any person or persons to act within the state as agent, or otherwise, in transacting or receiving applications for insurance, or in any manner to aid in transacting the business of fire and marine insurance for any foreign company without complying with certain provisions of the law. Held, that the making of a contract of fire insurance on a building situated in the state of Michigan, the insured being a Michigan corporation, but the contract having been made outside the state, was not "transacting business," within the phrase as used in the statute. *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, 351, 354.

Act April 3, 1899, providing that any foreign corporation that may desire to "transact business in this state or solicit business in this state, or establish a general or special office in this state," shall be required to file a copy of its articles, does not apply to a sale of goods to a resident of Texas at the place

of business of the corporation in a foreign state, where it is not stated that the parties contemplated shipping the goods from that state into Texas. *Reed v. Walker*, 21 S. W. 687, 688, 2 Tex. Civ. App. 92.

Making single loan.

"Transaction of business," within the meaning of Rev. St. p. 712, § 6, prohibiting the keeping of an office of discount and deposit for the transaction of business, is not shown by evidence that the cashier of a foreign corporation made a single loan of money on a borrower's check; it appearing that the transaction was an isolated one, and that the corporation kept no office for banking purposes in the state. *Suydam v. Morris Canal & Banking Co.* (N. Y.) 6 Hill, 217.

Purchasing note.

Hill's Ann. Laws, § 3276, providing that a foreign banking corporation, before transacting business in this state, must execute a power of attorney, and cause the same to be recorded in the county clerk's office, etc., was intended to prohibit foreign corporations from coming into the state for the purpose of transacting their ordinary corporate business, and does not apply to mere purchasing of a promissory note. *Commercial Bank of Vancouver v. Sherman*, 43 Pac. 658, 659, 28 Or. 573, 52 Am. St. Rep. 811.

TRANSACTION.

See "Binding Transaction"; "Illegal Transaction"; "Long Transactions"; "Personal Transaction."

A "transaction" is defined by Worcester as "the act of transacting or conducting any business; negotiation; management; a proceeding;" and by Webster as "that which is done; an affair." *Sheehan v. Pierce*, 23 N. Y. Supp. 1119, 1121, 70 Hun, 22.

A transaction is the doing or performing of any business or affair; and hence the delivery of a written instrument is part of a transaction, since it would be incomplete without the delivery. *Kroh v. Heins*, 67 N. W. 771, 774, 48 Neb. 691.

A transaction may not be confined to what is done in one day, or at one time, or at one place. Immediateness is tested not by closeness of time, but by logical relation. *First Nat. Bank v. Wisdom's Ex'rs*, 63 S. W. 461, 464, 111 Ky. 135.

A transaction is whatever may be done by one person which affects another person's rights, and out of which a cause of action may arise. *Scarborough v. Smith*, 18 Kan. 399, 406.

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit,

adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. Civ. Code La. 1900, art. 3071.

In reference to counterclaim.

By the Code of Civil Procedure defendant may plead as a counterclaim a cause of action which tends to diminish or defeat plaintiff's recovery, where it is a cause of action arising out of the contract or transaction set forth in the complaint or enacted with the subject of the action. Held, that the word "transaction" is broader than the word "contract," and, in case the defendant's cause of action arises out of the transaction out of which the plaintiff's transaction arose, it may be pleaded as a counterclaim; and hence defendant, in an action for the conversion of money obtained by him as agent for the sale of goods, under contract that such money should be paid directly by the purchaser to plaintiff, may set up that plaintiff had broken the contract, had conspired with others to deprive defendant of his rights, and that a balance was due to defendant. *Ter Kulle v. Marsland*, 31 N. Y. Supp. 5, 8, 81 Hun, 420 (cited in *Deagan v. Weeks*, 73 N. Y. Supp. 641, 642, 67 App. Div. 410).

Every contract may be said to be a transaction, but every transaction is not a contract. *Deagan v. Weeks*, 73 N. Y. Supp. 641, 642, 67 App. Div. 410 (citing *Xenia Branch Bank v. Lee* [N. Y.] 7 Abb. Prac. 372).

The word "transaction," used in Code Civ. Proc. § 501, providing that a counterclaim may be interposed when it arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim, includes actions of tort. *Deagan v. Weeks*, 73 N. Y. Supp. 641, 642, 67 App. Div. 410; *Heigle v. Willis*, 3 N. Y. Supp. 497, 498, 50 Hun, 588.

In an action for assault and battery, defendant counterclaimed for the use of excessive force by the person assaulted, and it was contended that the successive assaults were not parts of the same transaction; but the court held that such assumption is unwarranted; that the word must be used in a very limited and technical sense in order to say that, as each party gains ascendancy in a continuous fracas, the one transaction terminates, and a new and separate one commences. *Gutzman v. Clancy*, 90 N. W. 1081, 1083, 114 Wis. 589, 58 L. R. A. 744.

The manifest purpose of the statutes allowing counterclaims in favor of a defendant against a plaintiff arising out of the same transaction is to allow parties to the same suit to settle in such suit, as far as convenient and practicable, all controversies arising out of the same contract or transaction set forth in the complaint; and the word "transaction" should not be construed to ap-

ply only to such transactions as are in the nature of contracts, if not strictly contracts. *Pelton v. Powell*, 71 N. W. 887, 888, 96 Wis. 473.

"Transaction," as used in the statement that a counterclaim must arise out of the same transaction set forth in the petition, means "the actual facts and circumstances from which the rights result and which are averred, not the mere form and manner in which the facts are averred, and includes all that is said and done in connection with a purchase and sale, or other trade or contract, and all that is said and done in connection with the perpetration of a fraud or cheat." *Deford v. Hutchinson*, 25 Pac. 641, 644, 45 Kan. 318, 11 L. R. A. 257.

The cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, so as to authorize it to be set up as a counterclaim, implies that it arose out of some agreement or business affair between the parties. Thus, if A. were to sell to B. personal property, and falsely represent its condition or quality, in an action by A. for the price B. could set up the fraud as a counterclaim, it being easy in that case to see how B.'s claim arises out of the same transaction counted on by A.; but if B. had tortiously carried away A.'s property, and the latter at the same time committed a wrong against B., or obligated him in some way to pay B. a sum of money, it cannot be contended that that claim arises out of the same transaction constituting the foundation of A.'s claim for the trespass, which therefore cannot be set up. *Loewenburg v. Rosenthal*, 22 Pac. 601, 603, 18 Or. 178.

In reference to joinder of actions.

A transaction is something which has been transacted; that is, acted out to the end. This notion of completed action characterizes the word in the Latin language, from which, through the Normans, we have derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a judicial term to signify an agreement of parties in settlement of differences. Citing Dig. II, 15, "De Transactionibus"; Civ. Code France, art. 2044. So it is held that where the purchaser of machines claims they are not according to contract, and notifies the seller to take them away, and the seller agrees to take them back, but the purchaser forcibly prevents their removal, and continues to use them, all the acts and agreements of the parties in reference to the machines constitute one transaction, within the meaning of Gen. St. § 878, providing that several causes of action may be united in the same complaint if all are on claims arising out of the same transaction, etc. *Craft Refrigerating Mach. Co. v. Quinn-*

plac Brewing Co., 29 Atl. 76, 77, 63 Conn. 551, 25 L. R. A. 856.

The word "transaction" is used in the statute in reference to the joinder of actions as authorized by Code, § 267, in the sense of the conduct of finishing up an affair, which constitutes, as a whole, the subject of an action. *Cheatham v. Bobbitt*, 24 S. E. 13, 14, 118 N. C. 343.

The word "transactions," as used in the statute relating to the uniting of several causes of action where they all arise out of the same transaction, or transactions connected with the same subject of action, means whatever may be done by one person which affects another's rights, and out of which a cause of action may arise. *Scarborough v. Smith*, 18 Kan. 399, 406.

"Transactions connected with the same subject-matter," as used in the statute authorizing joinder of causes of action, means that both causes of action set up in the complaint must proceed, in a general sense, from the same wrong. Thus one having a cause of action for injunction to restrain operation of a steam railroad on a highway is entitled to join an action for damages for personal injuries suffered while driving along a highway in consequence of his horse becoming frightened by the noise of the passing steam engine, since both claims arose from the same wrong or transaction, namely, the unlawful obstructing of the highway by the railroad; both actions being, therefore, "transactions connected with the same subject-matter of action." *Lamming v. Gaulusha*, 31 N. E. 1024, 135 N. Y. 239.

A right of action for slander and one for false imprisonment of plaintiff at the time the words were uttered cannot be united in one action, under Code Civ. Proc. § 484, as being causes arising "out of the same transaction," as neither was a transaction, in any proper sense of the word. *De Wolfe v. Abraham*, 45 N. E. 455, 456, 151 N. Y. 186.

Under Comp. Laws, § 4932, subd. 1, authorizing the joinder of causes of action arising out of the "same transaction or transactions connected with the same subject of action," the holder of a note secured by a trust deed may in one action seek to foreclose the trust deed, to set aside a prior foreclosure made by the trustee without plaintiff's knowledge or consent, to enjoin the county treasurer from issuing to a trustee a tax deed for the mortgaged premises, and to adjust the equities of the various parties. *Bush v. Froelick*, 66 N. W. 939, 940, 8 S. D. 853.

Transactions with decedents.

"Transaction" is defined by Webster as follows: "The doing or performing any business; management of any affair; perform-

ence; that which is done; an affair; as the transactions of the exchange." It is defined in Anderson's Dictionary of Law to be "whatever may be done by one person which affects another's rights, and out of which a cause of action may arise." And the treating and prescribing for a patient during an illness of some months was a transaction with the patient which would prohibit the physician from testifying as to the services rendered such patient, as against his representative. *Garwood v. Schlichenmaier*, 60 S. W. 573, 574, 25 Tex. Civ. App. 176.

"Transaction," as defined by Webster, is the doing or performing of any business; the management of an affair. Effecting the novation of notes, whether by word of mouth or through written correspondence, is a "transaction," within Code Tenn. § 4565, prohibiting a party from testifying as to any "transaction with or statement by" a deceased person. *Montague v. Thomason*, 18 S. W. 264, 265, 91 Tenn. (7 Pickle) 168.

The term "transaction," as used in statutes relating to the admissibility of evidence in regard to transactions with deceased persons, has not been given a very definite meaning by the courts. Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise, is a transaction. It is a broader term than "contract," for, while every contract is a transaction, every transaction is not a contract. But the courts have interpreted the term as the justice of each case seemed to demand, rather than by any abstract definition, as will be seen by the decided cases. The execution of a note by a deceased person, or the delivery of a letter or of property, is such a transaction with the deceased as to render the adverse party incompetent to testify to the same, under the statute. The word "transaction" means the doing or performing any business; the management of an affair. *Cunningham's Adm'r v. Speagle*, 50 S. W. 244, 246, 106 Ky. 278.

Rev. Code, § 2704, prohibiting the plaintiff in a suit against an administrator from testifying as to "transactions with or statements by a deceased party," does not apply to testimony of the plaintiff, in an action for trespass in taking plaintiff's tools, that he found such tools during the intestate's life in the shop of the latter, as it was not a personal transaction with deceased. *Miller v. Clay*, 57 Ala. 162, 164.

"Transactions or communications," as used in a statute prohibiting evidence as to "transactions or communications with deceased persons," mean "every variety of affairs which form the subject of negotiations or actions between the parties, and include every method by which one may derive impressions from the conduct or actions of another." *Holliday v. McKinne*, 22 Fla. 153.

The word "transaction," as used in Code Civ. Proc. § 329, relating to the competency of witnesses as to a transaction with decedent, embraces every variety of affairs the subject of negotiations, actions, or contracts between parties. *Harte v. Reichenberg*, 92 N. W. 987, 3 Neb. (Unof.) 820.

"Transactions and communications," as used in the Code of Civil Procedure, excluding certain witnesses from testifying to personal transactions or communications between themselves and the deceased person, means "every method by which one person can derive any impression or information from the conduct, condition, or language of another." *Holcomb v. Holcomb*, 95 N. Y. 316.

The mere fact that a witness had a conversation with a deceased person is not a transaction within the meaning of Code, § 399, prohibiting testimony as to a transaction or communication with a deceased person. *Hier v. Grant*, 47 N. Y. 278, 281.

A contract, whether express or implied by law, is a transaction; and, when one person testifies that he did work and labor for another generally, he must be taken as testifying to a "transaction," within the meaning of that word in Code, c. 130, § 23, prohibiting persons from testifying as to transactions between themselves and a decedent under certain circumstances. *Poling v. Huffman*, 37 S. E. 526, 529, 48 W. Va. 639.

TRANSACTOR.

A transactor is one who transacts or conducts any business or affairs. *Holcomb v. Holcomb* (N. Y.) 20 Hun, 156, 159.

TRANSCRIPT.

See "Complete Transcript."

Webster defines a transcript to be that which has been transcribed; a writing or composition consisting of the same words as the original; a written copy. In re *Evingson*, 2 N. D. 184, 190, 49 N. W. 733, 734, 33 Am. St. Rep. 768.

"Transcript" means, according to Webster: "First. A copy; a writing made from and according to an original; a writing or composition consisting of the same words with the original. Second. A copy of any kind." Mr. Anderson, in his *Law Dictionary*, defines a transcript to be: "First. A copy of an original record. Second. To copy or to copy officially." Mr. Bouvier defines a transcript to be a copy of an original writing or deed. *Waitman v. Bowles*, 58 S. W. 686, 690, 3 Ind. T. 294.

The word "transcript" suggests the idea of an original writing. The word, not only in its popular but legal sense, means a copy

of something already reduced to writing. Worcester defines it as "a writing made from or after an original; a copy." Burrill defines it as "a copy, particularly of a record." Bouvier, "a copy of an original writing or deed." *State v. Board of Equalization of Washoe County*, 7 Nev. 83, 95.

The term "transcript," as it relates to an appeal, has been given a modified or different meaning from that which originally obtained. Instead of being a copy of the judgment roll or final record, it is now a certified copy of so much of the record as may be necessary to present intelligently the questions to be decided, which, as well as the abstract, must be accompanied with a copy of the judgment or decree appealed from, notice of appeal, etc. *Backhaus v. Buells*, 72 Pac. 976, 977, 43 Or. 558.

Hill's Ann. Laws, § 541, subd. 1, defines a transcript to be a copy of a roll or final record, or the pleading, orders, papers, and journal entries that constitute such roll or record, together with a copy of the notice on appeal. *Tatum v. Massie*, 44 Pac. 494, 495, 29 Or. 140.

A transcript of a judgment is a copy of the judgment; hence a duly certified copy of a judgment is a transcript thereof within the meaning of the statute which provides for the filing of transcripts of judgments. *Hastings School Dist. v. Caldwell*, 19 N. W. 634, 635, 16 Neb. 68.

A transcript is none the less sufficient as a transcript of a judgment because more is certified than the statute requires. *Funk v. Lamb*, 92 N. W. 8, 9, 87 Minn. 348.

The word "transcript," as used in Code, § 587, providing that county judges, justices of the peace and others upon request, and upon being paid the lawful fees thereof, shall furnish an authenticated transcript of their proceedings, implies that the document referred to shall be a copy of some original document; and the language, taken in connection with Comp. St. c. 20, relating to dockets required to be kept by county judges, refers to a transcript of the entries required to be made upon the docket, and does not require a transcript of all papers filed or of all evidence offered in the case. There is no authority, therefore, for a county judge to sign a bill of exceptions embodying affidavits used as evidence on motions to dissolve an attachment. *Moline, Milburn & Stoddard Co. v. Curtis*, 57 N. W. 161, 163, 38 Neb. 520.

Under Rev. Codes, § 417, specifying certain cases wherein the court may order a transcript of the shorthand notes, whether all the testimony is ordered transcribed, or only a portion thereof, alike it is denominated a "transcript," and it is the transcript

which the party may file with the clerk. *Kaeppler v. Pollock*, 76 N. W. 987, 989, 8 N. D. 59.

The word "transcript," in Code Cr. Proc. arts. 181, 182, providing that if a party to a habeas corpus proceeding desires to appeal, and the case has been tried before a court in session, the record is made up by the clerk and certified to by him, just as in any other case, and that, if tried before a judge in vacation, the transcript may be prepared by any person under the judge's direction, and certified to by such judge, "embraces the proceedings which have been reduced to writing and properly authenticated, and a transcript of the statement of facts, if such is desired." *Ex parte Malone*, 33 S. W. 360, 361, 35 Tex. Cr. R. 297.

Act Cong. March 3, 1797, makes a transcript from the books of the treasury evidence in suits between the United States and receivers of public money. Held, that the whole accounts, as they appear in the books, the elements out of which the reported balance is found, together with all the proceedings which have been had concerning them, shall be certified and submitted to the court and jury, that it may be adjudged whether the sum or balance for which the suit is brought be fairly made up and is justly due. *United States v. Patterson* (U. S.) 27 Fed. Cas. 462, 463.

Act Cong. March 3, 1797, enacting that, in suits against delinquent revenue officers, a transcript from the books of the proceedings of the treasury shall be evidence, means substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence, while a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed, as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books. *United States v. Gausson*, 86 U. S. (19 Wall.) 198, 212, 22 L. Ed. 41.

Abstract distinguished.

An abstract of a record is a statement of the substantial contents thereof, and differs from a transcript, in that the latter is a copy of the record. *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. C. 278, 283.

A transcript is defined by the authorities to be a copy of an original record, and, un-

der a statute which requires that a certified transcript of the judgment of a justice court is required to be filed in order to become a lien upon real estate, a mere abstract of the judgment rendered by the justice, instead of a certified copy thereof, is not a transcript, and does not create a lien. Such filing of a mere abstract of the judgment was an entire failure to meet the requirements of the statute in this respect, and amounted to nothing. The abstract fails to show upon its face that the judgment debtor was either served with process, appeared in court, or had any notice whatever of the commencement of the action, and does not even show that a complaint had been filed, or in fact show that the justice had any jurisdiction whatever to render a judgment. *Dearborn v. Patton*, 4 Or. 58, 61.

TRANSFER.

A transfer given by a street railway company is the evidence of the passenger's right to ride, and resembles in this respect a railroad company's ticket. *Herbert v. Baltimore County Com'rs*, 55 Atl. 876, 879, 97 Md. 639.

A transfer is a ticket given to passengers on street railroads who have paid the usual fare, entitling them to leave the car at a certain designated point, and, without further payment of fare, but upon presentation and delivery of the transfer check, pursue their travels upon the connecting line. It is part of the passenger's contract with the company that he may thus transfer to and ride upon the connecting road. It serves a two-fold purpose: First, to the passenger, as an evidence of his contract, by which he is entitled to continue his journey upon the connecting road; and, second, to the company, as a means of identification afforded to its conductors and servants, by which they may know that the passenger presenting the transfer is entitled to ride without further payment of fare. *Ex parte Lorenzen*, 61 Pac. 68, 69, 128 Cal. 431, 50 L. R. A. 55, 79 Am. St. Rep. 47.

"Transfers," as used in a contract authorizing a street railway to construct its tracks on condition of giving and accepting transfers to and from other railroads, means for the same fare, so that the railroad company did not comply with the contract when it required a fresh fare. *Gaedeke v. Staten Island M. R. Co.*, 60 N. Y. Supp. 598, 605, 43 App. Div. 514.

A transfer ticket is a mere token to be used for the convenience of the road. It is not a contract between the road and the passenger. It is a statement by the initial conductor to the subsequent conductor of what the contract is, and what the passenger is entitled to, and, if it is not correct, the fault

is not that of the road. Nor can passengers be required to verify the acts of the conductor, but they may presume that he acts correctly. The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read. Others are children. None of them have the time or opportunity, in the rush of travel, to scrutinize the ticket, and in many instances, if they did, they could not understand the devices used by the company. The passenger has the right to presume that the conductor has given him a proper ticket, and, if he make a mistake, it is the fault of the company, for which it is liable; and, if the passenger in good faith accept the ticket, he is not bound to stop and scrutinize it to see that no mistake has been made. *Memphis St. R. Co. v. Graves*, 75 S. W. 729, 730, 110 Tenn. 232.

TRANSFER.

See "Absolute Transfer"; "Fraudulent Transfer"; "Indirect Transfer"; "Legal Transfer"; "Voluntary Transfer"; "Chain of Transfer."

A transfer is an act or transaction by which property of one person is by him vested in another. This, without the use of some qualifying word, is the legal meaning of the term. *Pearre v. Hawkins*, 62 Tex. 434, 437 (citing Abb. Dict.; Bouv. Dict.; Webst. Dict.).

Transfer is an act of the parties or of the law by which the title to property is conveyed from one living person to another. Rev. Codes N. D. 1899, § 3508; Civ. Code S. D. 1903, § 915; Civ. Code Mont. 1895, § 1430; Civ. Code Cal. 1903, § 1039.

"The words 'transfer and assign' mean, in legal proceedings, if not otherwise restricted, a transfer by writing. The meaning of the words, of course, depends upon the connection in which they are used, and the subject to which they relate." *Andrews v. Carr*, 26 Miss. 577, 578.

"Transfer," when used in its ordinary sense, is applicable to real property, and is either synonymous with the word "sale," or imports something more than or subsequent to sale (selling being one mode of transferring property), and, as used in a lease, providing that the lease should be void if there should be a transfer of the property during the term, means a transfer of the title, and not a transfer of possession. *Ober v. Schenck*, 65 Pac. 1073, 1075, 23 Utah, 614.

A partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affect-

ed by the statute of frauds. *McKnight v. Bell*, 19 Atl. 1036, 1037, 135 Pa. 358.

The phrase "to be transferred," in a devise to trustees of all testator's copyhold lands "to be transferred" to testator's son as soon as he shall attain the age of 21 years, means to deliver the land up to him. *Player v. Nicholls*, 1 Barn. & C. 336, 341.

Where a testator, after providing for the disposition of the income of certain property which was left in trust to his executors, directed them to pay, deliver over, and transfer, subject to such directions, all the rest and residue of his property to his children in equal shares, each child to come into possession and control at majority, the term "to pay and deliver over" is more appropriately applied to a disposition of personal estate, but the term "transfer" was obviously used with reference to the real estate, or such part of it as might be possible to transfer to the children in specie, and precludes the notion that testator intended, at all events and under all circumstances, to have the real estate converted into money. In *re Thompson's Estate*, 1 N. Y. Supp. 213, 215.

Testator made several small bequests, and then bequeathed and devised the residue of his estate to his executors in trust for his brother, sisters, and son; providing that the funds for his brother and sisters should be of a sufficient amount to yield a specified sum annually, and that the balance should be for the fund for his son, and giving the executors discretionary authority to sell the real property. He directed that the words "trust funds" should be construed to include real as well as personal property, and authorized the executors to retain, as part of the trust funds, any stocks, bonds, or other "investments whatever" which he had. On the death of the son the principal of his trust fund was to be transferred and paid by the executors to testator's next of kin, to whom he gave, devised, and bequeathed the fund accordingly. The executors were further authorized, in their discretion, to transfer and pay over to the son any portion of his trust fund, in which case the testator gave, devised, and bequeathed this to the son. Testator left sufficient personal property to pay all debts and bequests, and to create all the trust funds, except that of the son. Held, that the use of the word "transferred," in addition to the words "pay over," and the use of the word "devise," indicate that testator contemplated that at the time of the distribution there would be real estate to be transferred to those entitled thereto, and that he devised the same accordingly, and that the will did not operate as an equitable conversion of the real estate into personalty. In *re Lee's Will*, 83 N. Y. Supp. 299, 305, 85 App. Div. 295; In *re Coolidge*, Id.

5 U. S. Stat. 456, § 12, providing that all "assignments and transfers" of the right by such statute prior to the issuing of the patent for public lands under pre-emption laws shall be null and void, cannot be construed as meaning a conveyance with covenants for title, and with warranty, purporting to pass the fee simple of lands and tenements. The term "assignments and transfers" is used when applied technically to describe a transfer of an estate for years, or an equitable interest or a chattel. *Franklin v. Kelley*, 2 Neb. 79, 88.

The foreclosure of a mortgage on real estate, and the becoming absolute of the title in the mortgagee by the failure to redeem, constitute a transfer of the property, within the meaning of the statute which provides that real estate of any taxpayer shall be liable for office taxes for one year and afterward, until a transfer thereof. *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243.

The term "transfer" means to convey or pass the right of one person over to another, unless the general meaning is restricted or limited by something accompanying it—as, for example, that the transfer was for a limited time or for a particular purpose; and where the petition showed that the holder of a Spanish grant of land had transferred the same to another, who petitioned to the commandant for permission to possess and build on the lot, and received such permission, and did so build, the word "transfer" was construed to indicate a conveyance of all interest in the land, and not that such transferee entered as a licensee. *Innerarity v. Mims' Heirs*, 1 Ala. 660, 669.

"Transfer," as used in Code 1873, § 1310, providing that no railroad terminating at or near the city of Council Bluffs shall make any transfer of freight, passengers, or express matter outside the limits of the state, etc., means the act of removing freight, passengers, and express matter, and is intended to cover the removal of cars, with their burdens, from one road to another, as well as the change of their burdens from the cars of one company to those of another. *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 338, 24 Am. Rep. 773.

The word "transfer," in the provision of the statute for the voluntary dissolution of corporations, which declares void all transfers, etc., of the choses in action or other assets of a corporation seeking to avail itself of that statute, made in payment of or as security for a debt or for any other consideration, means a passing over to another of an existing right to the thing transferred, which right shall survive the transfer. It does not include the extinguishment or satisfaction of a chose in action, either by payment in full, or by part payment which is taken in full satisfaction. There is no mean-

ing of the word "transfer" which carries the idea of an act of extinguishment, or any other idea than that of a passing over of a right of title or property in a thing from one to another. If the word is construed by its surroundings in the section, and they are all held to be ejusdem generis, which is a true rule of interpretation, the same result must follow. The associates of the word "transfers" are the words "sale, assignment, mortgage, and conveyance." Each of them has the meaning of a passing from one to another in whole or in part, absolutely, or upon conditions of an existing right which shall survive the act of passing over. *Sands v. Hill*, 55 N. Y. 18, 21, 22.

The word "transfer," as used in a contract of purchase of land, stipulating that a manufacturing company shall transfer its works to certain land, does not require that the identical buildings and machinery be removed. *Hanna v. St. Joseph Land Co.*, 126 Mo. 1, 13, 28 S. W. 652.

By an instrument which would "have transferred or in any manner have affected" property, as used in the definition of forgery, is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of or change the character of property of every kind, and which can have such effect when genuine. *Pen. Code Tex. 1895*, art. 537.

In bankruptcy law.

"Transfer," as used in the bankruptcy act shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. *U. S. Comp. St. 1901*, p. 2430; *In re Baker-Ricketson Co.* (U. S.) 97 Fed. 489, 491; *In re Doscher* (U. S.) 120 Fed. 408, 413; *In re Rome Planing Mill Co.* (U. S.) 96 Fed. 812, 814; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 443, 21 Sup. Ct. 906, 45 L. Ed. 1171; *Sherman v. Luckhardt*, 70 S. W. 388, 389, 96 Mo. App. 320.

The Supreme Court, in the case of *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, said "transfer" is defined to be not only the sale of property, but every other and different mode of disposing of and parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means or manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished; that is, a preference enabling the creditor to obtain a greater percentage of his debt than any other creditor or the same

class. Thus a deposit of coin, legal tender notes, bank bills, indorsed checks, and drafts, to be placed to the credit of the depositor, and subject to his draft, amounts to a preference, which would have to be surrendered by the bank before it could prove the balance of its claims. *In re Stege* (U. S.) 116 Fed. 342, 344, 54 C. C. A. 116.

The payment of a debt in money is a transfer, within the meaning of such term as used in the bankruptcy act. *In re Conhalm* (U. S.) 97 Fed. 923, 925.

An order given by a bankrupt to certain creditors is a transfer. *Marden v. Sugden*, 52 Atl. 74, 75, 71 N. H. 274.

A payment of money is a transfer of property, within the meaning of Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. *In re Sloan* (U. S.) 102 Fed. 116, 117.

Payments by an insolvent on a running account, where new sales succeed such payments, do not constitute transfers of property, creating a preference, under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. *In re Sagor* (U. S.) 121 Fed. 658, 659, 57 C. C. A. 412.

A transfer with intent to hinder, delay, or defraud creditors, within the meaning of the United States bankrupt act of 1867, which makes void any transfer of property, etc., "with intent to hinder, delay, or defraud creditors," is a transfer after the party making the transfer became bankrupt or insolvent, or made by him in contemplation of bankruptcy or insolvency. *In re Dunham* (U. S.) 8 Fed. Cas. 33, 34.

The words "conveyance, transfer, assignment, or incumbrance," as used in Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt within four months prior to the filing of a petition, with intent to hinder, delay, or defraud creditors, shall be void, applies to a transfer or incumbrance of property, real or personal, rather than to the payment of money upon a pre-existing debt. *Blakey v. Boonville Nat. Bank* (U. S.) 96 Fed. 267, 268.

The terms, "assignment, transfer or conveyance, directly, indirectly, absolutely or conditionally," in Gen. St. c. 118, § 89, forbidding any assignment, transfer, or conveyance, directly, indirectly, absolutely, or conditionally, by an insolvent debtor, with a view to prefer a creditor, includes a consignment of goods to be sold for or on account of the consignor; and therefore such a consignment is prohibited by the statute if the consignee is authorized by it to apply the

avails of the sales to the payment of a pre-existing debt which the consignor owes him. *Burpee v. Sparhawk*, 97 Mass. 342, 344.

In conveyance of real estate.

The words "transfer" and "assign" are not the usual operative words in a conveyance of real estate, but are sufficient to transfer the title. *Sanders v. Ransom*, 20 South. 530, 531, 37 Fla. 457.

No particular form of words is necessary to effect a conveyance of real estate. Any words which denote the intention of the parties to a deed to transfer the title from one to the other are sufficient to make a conveyance. 2 Bl. Comm. 298; 4 Kent, Comm. 460; *Bridge v. Wellington*, 1 Mass. 219. The words "mortgage, assign over, and transfer," in a deed, are sufficient to pass the legal title and estate to the premises described therein. *Gambrel v. Rose* (Ind.) 8 Blackf. 140, 141, 44 Am. Dec. 760.

Where in certain instruments the operative words used are "transfer and sell," the instruments are sufficient and operative to convey the interest and title of the grantors in the property described. *Whalon v. North Platte Canal & Colonization Co.*, 71 Pac. 995, 999, 11 Wyo. 313.

In a conveyance the word "convey" means to transfer the title or property. The word "convey" means to transfer the title from one person to another. It has the same legal effect as the word "grant," which has become a generic term applicable to the transfer of all classes of real property. In New York the operative word of conveyance is "grant," but Chancellor Kent says: "As other modes of conveyance operate equally as grants, any words showing the intention of the parties would be sufficient." The word, then, "convey," or "transfer," in a deed, is of equivalent signification and effect as "grant." And to construe a deed containing the words "have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey," as a bargain and sale, is to ignore the word "convey," and give it no effect in the conveyance, which is executed with the formalities required by the statute. *Lambert v. Smith*, 9 Or. 185, 193.

In fraud of creditors.

A fraudulent transfer of property is a fraudulent disposition of it. *Howard v. Caperton* (Tex.) 3 Willson, Civ. Cas. Ct. App. § 313.

The word "transfer," as used in a statute making it a ground for attachment that the debtor has transferred his property in order to defraud creditors, means placing it in the hands of another under pretense of title. *Hopkins v. Nichols*, 22 Tex. 206, 210.

"Transfer," as used in Comp. Laws, c. 32, § 28, prohibiting the fraudulent sale,

8 Wds. & P.—18

transfer, secretion, or disposal of property with intent to defraud creditors, means to transfer or pass over the right of the owner to another. A transfer is the act by which the owner could make over and deliver possession and control of it to another with intent to vest the real or apparent ownership of it in such other person. *Herold v. State*, 31 N. W. 258, 261, 21 Neb. 50.

Between husband and wife.

A "transfer" is defined to be the act by which the owner of a thing delivers it to another person, with the intent to pass the rights which he had in it to the latter. Under Gen. St. tit. 13, § 21, which provided that no sale or transfer by a husband of the personal property of his wife, or of his interest therein, should be valid, unless she should join with him in a written conveyance of the same, a pledge of furniture belonging to a married woman, and held by her husband as trustee for her under the statute, as security for a liability assumed by the pledgee for the husband, was not a transfer, within the meaning of the statute. *Robertson v. Wilcox*, 36 Conn. 426, 429.

In inheritance tax law.

"Transfer" means the present passing of property, without regard to whether the actual possession and enjoyment follow immediately or come at some future time. In *re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311. The word "transfer," as used in the tax law, has its ordinary signification, and means the handing over or parting with property with intent to pass it, or certain rights in it, to another, who becomes the transferee. In *re Gould's Estate*, 156 N. Y. 423, 51 N. E. 287. Much confusion has apparently arisen because it has not always been borne in mind that the transfer taxed at the death of the testator is only a transfer which occurs at his death, not a future transfer which may take place, or because the present transfer with future enjoyment, and the future possible transferee, often unknown, have not always been so clearly distinguished. Therefore a contingent remainder is not subject to the transfer tax. In *re Plum's Estate*, 75 N. Y. Supp. 940, 942, 37 Misc. Rep. 466.

Prior to the amendment of tax law by chapter 76 of the Laws of 1899, the word "transfer" had been determined by the courts to have its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. In *re Gould's Estate*, 156 N. Y. 423, 428, 51 N. E. 287, 288. After the passage of the amendment, this definition was applied to it in *re Vanderbilt's Estate*, 66 App. Div. 27, 74 N. Y. Supp. 450, and resulted in making the amendment inoperative; it being reasoned that a transfer without a transferee was a

thing impossible. The most recent decision of the Court of Appeals upon this subject is *In re Brez's Estate*, 172 N. Y. 609, 64 N. E. 958. The effect of these decisions is to hold that for the purposes of the act a transfer is the passing of the title of a valuable interest out of or from the estate of a decedent, though the transferee is not now ascertainable. *In re Le Brun's Estate*, 80 N. Y. Supp. 486, 487, 89 Misc. Rep. 516.

The word "transfer," in Tax Law, § 230, as amended by chapter 336, Laws 1890, providing that when property is transferred in trust or otherwise, and the estates of the transferees are dependent upon contingencies whereby they may be wholly or in part created, defeated, or extended, a tax shall be imposed upon such transfer at the highest rate which on the happening of such contingency will be possible, is used in its ordinary signification, namely, that the owner of the thing delivers it to another with the intent of passing the rights which he has in it to the latter. *In re Vanderbilt's Estate*, 74 N. Y. Supp. 450, 454, 68 App. Div. 27.

Where a testator bequeaths a legacy to a creditor in payment of his claim, and the creditor accepts it, it is a transfer, within the meaning of Laws 1892, c. 399, declaring that "a tax shall be and is hereby imposed on the transfer of any property . . . when the transfer is by will." *In re Gould's Estate*, 51 N. E. 287, 288, 156 N. Y. 423.

Any transfer of property made by will, whether such transfer is for the purpose of paying debts or as a gratuity, is a transfer, within the inheritance tax law. *In re Rogers' Estate*, 75 N. Y. Supp. 835, 837, 71 App. Div. 461.

The word "transfer" is defined in Laws 1892, c. 399 (section 22 of the act entitled "An act in relation to taxable transfers of property"), as to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, or bequest, grant, deed, bargain, sale, or gift. *In re Hall's Estate*, 34 N. Y. Supp. 616, 617, 88 Hun. 68; *In re Hoffman's Estate*, 38 N. E. 311, 312, 143 N. Y. 827.

Of insurance policy.

Where, in an action on a fire policy, the petition alleged that the policy had been transferred, assigned, and delivered to petitioner, the words "transferred and assigned" did not necessarily mean that the transfer was in writing, and the defendant had a right to know whether the purpose was to allege and prove an assignment or not. *Hartford Fire Ins. Co. v. Amos*, 25 S. E. 575, 98 Ga. 533; *Amos v. Hartford Fire Ins. Co.*, Id.

The difference between the assignment of the interest of the assured in a life policy and the transfer or renewal to a third person

of a policy is that the former is a contract between the assignor and the assignee only, while the latter is a contract to which the insurer is a party. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 27, 52 Am. Rep. 245.

Of insured property.

The term "transfer" or "termination of interest of insured" was used in a policy to render certain by a positive stipulation that the policies of the company should not be obligatory any longer than the property insured continued in the individual name in the policy as owner, and that by transfer of his interest the policy should be void. It is believed that the nullity they pronounce is generally understood as relating to cases where the insured has absolutely and permanently divested himself of all interest in the subject-matter of the insurance. Being, then, without any interest at the time of the loss, the insured has sustained no injury. Thus the policy becomes inoperative and void. *Power v. Ocean Ins. Co.*, 19 La. 28, 29, 36 Am. Dec. 665.

A fire policy on merchandise, providing that it shall be void in case of any sale, alienation, transfer, or change of title in the property insured, construed not to include a mortgage on the property, since the giving the mortgage without a change of possession of the property did not constitute an alienation, sale, or transfer of title. *Van Deusen v. Charter Oak Fire & Marine Ins. Co.*, 24 N. Y. Super. Ct. (1 Rob.) 55, 62, 1 Abb. Prac. (N. S.) 349, 358.

The execution of a mortgage on the insured premises has been held in the case of *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582, not to be a transfer or change of title prohibited by a clause in a policy. *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213, 220.

Although a policy of insurance contained a clause prohibiting any transfer of the interest of insured, by sale or otherwise, without the consent of the insurer, yet a deed made by the insured, conveying the goods to the assignee in trust for creditors, will not render the policy void; the insured retaining the actual possession of the goods. *Phoenix Ins. Co. v. Lawrence*, 61 Ky. (4 Metc.) 9, 15, 81 Am. Dec. 521.

Under an insurance policy providing that if the insured property should be alienated by sale or otherwise, or if it should be transferred by any contract or change of ownership, the policy should be void, it was held that a contract for the sale of the property, under which no deed was made, and only a part of the purchase money paid, was not an alienation or change of ownership within the meaning of the policy. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474, 477.

Within the meaning of the provision of an insurance policy issued to a partnership, that, "in case of any transfer or change of title in the property insured by this company, such insurance shall be void and cease," the dissolution of the partnership and a division of the goods so that each partner owned distinct portions was a change of title, and avoided the policy, though there was no sale from one to the other. *Dreher v. Aetna Ins. Co.*, 18 Mo. 128, 134.

A policy of insurance, one of the conditions of which is that in case of any "sale, transfer, or change of title in the insured property the insurance shall be void," is avoided by a conveyance which is absolute in form, though given as security for a debt, merely; the words "transfer or exchange of title" being more comprehensive than the word "sale." *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279, 281.

An insurance policy provided for an immediate termination of the risk if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance. It was held that the words "sold, transferred, or alienated," do not ordinarily include a sale upon execution, and the words "change in the title or possession" do not extend the meaning, and this would be the meaning were it not for the words "by legal process or judicial decree." But where, under a sale on execution, the owner of the land has full rights of possession and occupancy for 15 months after the sale, and for 12 months of that time he has an absolute right to redeem, so that neither possession nor title passes before the end of 15 months, sale on execution does not violate the provisions of the policy. *Hammel v. Queen's Ins. Co.*, 11 N. W. 349, 355, 54 Wis. 72, 41 Am. Rep. 1.

The word "transfer," in a pencil memorandum on the back of an insurance policy, which provided that a transfer without the consent of the company indorsed thereon would be a violation thereof, was an important word, having a distinct meaning, and must be regarded as conveying notice that the property had been transferred. *Batchelor v. People's Fire Ins. Co.*, 40 Conn. 56, 61.

Of mortgaged property.

Under the title, "An act to prevent the fraudulent transfer of personal property," a provision which makes it criminal to remove mortgaged property out of the county within which property was at the time of the execution of the mortgage is unconstitutional; it not being expressed in the title of the act. The title of the act is limited to the single purpose of preventing "the fraudulent transfer of personal property," and the word "transfer" is evidently used in its le-

gal sense, and with reference to its legal meaning. In *Bouv. Law Dict.*, the word is defined to be "the act by which the owner of a thing delivers it to another person with intent of passing the right he had in it to the latter." See, also, *Winfield, Adjudged Words & Phrases*. This being the meaning of the word, it cannot be said that the title expresses the subject of the act, for it cannot be successfully maintained that the removal of property from one county to another is a transfer of the property thus removed. *Ex parte Thomason*, 20 N. W. 312, 313, 16 Neb. 288.

The conveyance of a vessel, accompanied by a reconveyance by way of mortgage, does not work a transfer or termination of the mortgagee's interest, within the meaning of a marine policy providing it should be void if the insured transferred or terminated his interest without the consent of the insurer. *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68, 69.

Of negotiable paper.

The word "transfer," in the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507], providing that no court shall have cognizance of any suit on a promissory note by an assignee thereof unless such suit might have been prosecuted in such courts if no assignment or transfer had been made, enlarges the scope of the word "assignment," and makes it cover every case in which title to negotiable papers, whose contents might be the subject of a suit, shall have become vested in a third party, whether by the acts of the parties or operation of law. *United States Nat. Bank v. McNair* (U. S.) 56 Fed. 323, 326.

The term "transfer," when applied to negotiable paper, is a general term, showing that the beneficial interest in the paper has passed to another, but not indicating in what manner the transfer has been made. It may be transferred either by indorsement, which has the technical meaning of writing on the back, or by delivery, or by independent writing, as a deed, etc.; the first mode passing to the transferee the legal title, and the last two the equitable interest in the paper. An averment that a note has been transferred by the payee to another without designation as to the mode of the transfer does not import that the legal title was transferred, and does not prevent the holder from showing that he is a holder by delivery. *Montague v. King*, 37 Miss. 441, 443.

Where a promissory note is transferred, and the collection of it is guaranteed by the payee in the following form, to wit, "This note is transferred and the collection of the same guaranteed to the holder hereof," the

term "transferred and its collection guaranteed" should be construed as an assignment only of the note, and not as a commercial indorsement; and hence the makers can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due, and without knowledge of any infirmity in the note. *Omaha Nat. Bank v. Walker* (U. S.) 5 Fed. 399, 402.

A general authority in a stock note to "use, transfer, or hypothecate" the pledged property does not authorize a sale by the pledgee before maturity of the note. *Ogden v. Lathrop*, 31 N. Y. Super. Ct. (1 Sweeny) 643, 651.

Of stock.

In *Sands v. Hill*, 55 N. Y. 18, 22, Folger, J., says: "There is no meaning of the word 'transfer' which carries the idea of an act of extinction, or any other idea than that of the bearing over of a right or title in a thing from one to another." And where the articles of a joint-stock association provide that the death of a stockholder or the transfer of the stock shall work a dissolution, the word is not used in the technical sense of changing the name of the owner on the books of the company, but in a sense of a change of ownership in the property. *Lane v. Albertson*, 79 N. Y. Supp. 947, 954, 78 App. Div. 607.

Where the act incorporating a corporation authorizes the corporation to establish such by-laws as should appear necessary for the government of the corporation or the regulation of its concerns, and the by-laws provided that no transfer of any share should be valid until received for record by the clerk, who should enter on the transfer the time he received it, which should bear date accordingly, a sale or pledge of a share, accompanied by a letter of attorney to make the transfer, is of no avail to convey a title until the transfer is received for record by the clerk. *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552, 558.

The word "transfer," in Companies' Consolidation Act 1845, § 14, providing that any shareholder may sell and "transfer" all or any of the shares, and that such transfer shall be by deed duly stamped, etc., includes a conveyance by deed of the shares of a corporation included within the purview of the act, made in consideration of 10 shillings and natural love and affection, though such transaction is not a sale. *Copeland v. Northeastern Ry. Co.*, 6 Bl. & Bl. 277, 281.

Of vessel.

The giving by the owner of a stipulation for the value of his interest in a vessel and her freight, under admiralty rule 54, without a judicial determination of such value after

a hearing of the persons interested, is equivalent to a transfer of his interest in the vessel and her freight to a trustee for the benefit of claimants, under Rev. St. § 4285 [U. S. Comp. St. 1901, p. 2944]. *Morrison v. District Court of United States*, 13 Sup. Ct. 246, 247, 254, 147 U. S. 14, 37 L. Ed. 60.

TRANSFER BY INDORSEMENT.

The term, "transfer by indorsement," when used in reference to bills of exchange or promissory notes, means not only the making of the written indorsement on the instrument, but also includes the delivery of the instrument. *Clark v. Sigourney*, 17 Conn. 511, 523.

TRANSFER IN CONTEMPLATION OF INSOLVENCY.

See "Contemplation of Insolvency."

TRANSFER SERVICE.

The test of distinction between "transportation service," relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates and "switching or transfer service," for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another, for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. *Dixon v. Central of Georgia Ry. Co.*, 35 S. E. 369, 371, 110 Ga. 173.

TRANSFERABLE.

See "Not Transferable."

TRANSFERABLE AT THE BANK.

Where a banking corporation issued a certificate that a certain person had standing to his credit on the books of the bank 10 shares of the capital stock thereof, "which are transferable at the bank in person or by attorney," the words "transferable at the bank" meant "transferable only at the bank," and also implied that an act of transfer was to be done at the bank under the cognizance of the officers of the bank. *Williams v. Mechanics' Bank* (U. S.) 29 Fed. Cas. 1376, 1377.

TRANSFERABLE BY DELIVERY.

The words "transferable by delivery," as used in Act June 4, 1879, making it em-

bezzlement for any banker to receive on deposit, while insolvent, "any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery," qualify the words "other valuable thing" only, and it follows that the receiving on deposit of any check, draft, or bill of exchange, whether transferable by delivery or by indorsement, is within the meaning of the statute. *American Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co.*, 37 N. E. 227, 229, 150 Ill. 336.

TRANSGRESSIVE TRUST.

Trusts which transgress the rule against perpetuities are called "transgressive trusts." *Pulitzer v. Livingston*, 36 Atl. 635, 637, 89 Me. 359 (citing *Fearne*, Rem. 538, note).

TRANSIENT.

The Century Dictionary defines the word "transient" to mean (1) passing across, as from one thing or person to another; (2) passing with time; of short duration; not lasting; temporary; one who or that which is temporary; a transient guest. *Commonwealth v. Townley*, 7 Pa. Dist. R. 413, 415.

Webster defines the word "transient," "Not lasting; not permanent; of short duration." A doctor renting an office by the year, and keeping regular office hours at certain times, at a certain place, on three days of the week, is not indictable for keeping a transient office. *Com. v. Townley*, 7 Pa. Dist. R. 413, 416.

In poor laws.

"Transient persons," within the statute relating to paupers, means such persons in a town who have not come to reside, and who intend to return to a former residence at some future time. *Town of Jamaica v. Town of Townshend*, 19 Vt. 287, 271.

The phrase "transient person," in the statute relative to paupers, was not to be taken as literal, but as contradistinguished from those who "come to reside in the town." *Danville v. Putney*, 6 Vt. 512, 518.

"Transient," as the term is used in a statute relating to the cost of supporting transient persons in distress, means visitors, travelers, etc. The term cannot strictly be said to denote transition from place to place, and therefore apply merely to persons in an intermediate stage of a journey between two termini, though the word "transeo," from which "transient" is derived, means literally to go over—the participle of the verb "transiens" (going over)—not stationary, but by no means implies, by strict inference, that there are no termini in the transit. "Transeo" but seems to be the opposite of "resi-

deo," which is to remain, to dwell, to continue; and therefore a "transient person" does not exactly mean a person on a journey from one known place to another, but, rather, a wanderer ever on the tramp. *Middlebury v. Whaltham*, 6 Vt. 200, 202; *Rockingham v. Springfield*, 9 Atl. 241, 243, 59 Vt. 521.

A transient person in a town, so as not to be a charge upon that town if he comes to want therein, is one who is on his passage from the place where his operations and plans center, through the town in which the misfortune befalls him, with an abiding purpose of presently returning to such place. An unmarried man engaged in peddling, who has no home, is not a transient in a town where he is taken sick and comes to want, but resides therein. *Town of Londonderry v. Town of Landgrove*, 29 Atl. 256, 66 Vt. 284.

A woman whose husband is poor, who has resided in a town for 10 years or more, and is living therein in a house that such husband has hired, and who is taken sick in said town at the house of another, who is the husband of such woman's aunt, and who is so sick that she cannot be removed without endangering her life, and the husband, who is also soon after taken sick and confined at the same house, and who are both relieved and supported by the husband of such woman's aunt, are "transient persons," within the meaning of Gen. St. c. 20, § 13, making the town liable for the support of such persons suddenly taken sick, etc. The liability of the town depends not on the person's settlement, nor on his transiency, as distinguished from the permanency of having come to reside, but only on his being confined by disability at some house that is not his home. *Goodell v. Town of Mt. Holly*, 51 Vt. 423, 427.

The word "transient" is the opposite of "resident." The latter describes a person at rest in a town, while the former describes him in his passage through or across it. As used in Rev. Laws, § 2818, relating to the recovery for the support of a "transient pauper," it does not include one who has bought a house and lot in a town, and supported his family there for a time before he becomes indigent. *Town of New Haven v. Town of Middlebury*, 21 Atl. 608, 610, 63 Vt. 399.

"Transient person," as used in Act 1797, relating to the legal settlement of a pauper who is a transient person, is not to be understood in a strict, literal sense. It includes all who do not have a legal settlement in a town, and those who have come into a town to reside, but have not gained a settlement therein. It has become settled by repeated decisions that a person confined in jail is a transient person. A person who goes into a town other than that in which his family re-

sides, to work, and does actually work on a contract for labor, is a transient person. *Town of Bristol v. Town of Rutland*, 10 Vt. 574, 576.

A transient person, within the statute relating to paupers, is one abiding in a place, having the right to return to some other place when the term of service is completed, and having also the present and continuing intention to do so. *Town of Berlin v. Town of Worcester*, 50 Vt. 23, 26.

A person who went to a town in May for the purpose and with the intention of hiring out in the vicinity for the season, and to leave the state in the fall, and which purpose and intention were not changed so long as he remained in such town, is not a transient person, within the meaning of Gen. St. c. 20, § 13, making the town liable for the support of transient persons, etc. *Town of Pittsford v. Town of Chittenden*, 44 Vt. 382, 385.

A transient person, within the meaning of the poor laws, is one who does not come to a town to reside or dwell there, and does not include a person who comes into a town and resides in a family a few days as a servant, hired for no definite time, and who is taken sick, such person being a resident. *Middlebury v. Waltham*, 6 Vt. 200, 203.

TRANSIENT MERCHANT.

The occupation of the itinerant or transient merchant, or the mode of conducting it, closely resembles the business of hawkers and peddlers, and the methods generally practiced by them in disposing of their goods and wares. The transient merchant has no office or place of business, but migrates from town to town, remaining only long enough to dispose of his stock of goods. He is usually a stranger in the community where he offers his goods and makes his sales, and is often wholly irresponsible. *Levy v. State*, 68 N. E. 172, 175, 161 Ind. 251.

In construing an ordinance licensing transient merchants, it is held the term "transient merchant" does not refer to the residence of the individual. It more properly relates to the character of business carried on by him. *City of Ottumwa v. Zekind*, 64 N. W. 646, 95 Iowa, 622, 29 L. R. A. 734, 58 Am. St. Rep. 447.

A person who, as agent, merely solicits orders for goods for his principal, whether by sample or otherwise, is not a transient merchant, trader, or dealer. *City of Wausau v. Heideman*, 96 N. W. 549, 550, 119 Wis. 244.

The ordinary meaning of the term "transient dealer," or "trader" is one who goes from place to place carrying goods for the purpose of selling, trading, or dealing in the same, as distinct from one who does the same kind of business without traveling

about. *City of Wausau v. Heideman*, 96 N. W. 549, 550, 119 Wis. 244.

The terms "itinerant merchant" or "transient vendor of merchandise," in a municipal ordinance requiring itinerant merchants and transient vendors of merchandise to take out a license, do not include an employé of a foreign firm, who solicits and takes orders for the sale of coffee, tea, and spices to be delivered on a future day to householders for their own consumption, although the orders are taken and the goods delivered and paid for within the limits of the city. *City of Waterloo v. Heely*, 81 Ill. App. 310, 315.

The term "transient vendor," within the meaning of the Elgin City ordinance prohibiting such merchants from pursuing their vocation within the city limits without a license, and defining itinerant merchants or transient vendors as including every person who goes from one city or village to another, stopping only a limited time in each, for the purpose of selling goods, wares, or merchandise, does not include a person who goes from place to place soliciting orders for the enlargement and framing of pictures, to be paid for on delivery if satisfactory. *Twining v. City of Elgin*, 38 Ill. App. 356, 357.

TRANSIT.

See "In Transit"; "Stoppage in Transitu."

"Transit," as used in Acts N. D. 1890, c. 188, § 32, providing that the charge for the inspection of grain shall be and constitute a lien on the grain so inspected, and when such grain is in transit the charges shall be treated as advance charges to be paid by the common carrier in whose possession the same is at the time of inspection, means the transit which must occur in getting the grain into the public warehouses of the state, and has reference solely to the intrastate and not to interstate transit. *Great Northern R. Co. v. Walsh* (U. S.) 47 Fed. 406, 408.

"Transit," as the term is used with reference to the right of stoppage in transitu, is not confined in its meaning to the passage of the goods through the country, but includes their situations in every stage, from the time of passing out of the control and possession of the vendor into that of the vendee. The accident of place is not a material circumstance, but the immediate relation of the parties to the goods is rather to be considered. *Sutro v. Hoile*, 2 Neb. 186, 195.

TRANSITORY ACTION.

"Transitory actions" are personal actions brought for the recovery of money or personal chattels, whether they sound in tort

or in contract. 1 Chit. Pl. 273. All actions *ex delicto* to the person or to personal property, in which a mere personality is recoverable, are, as a general rule, by the common law, transitory in their nature. Such actions have their foundation in the supposed violations of rights which, in contemplation of law, have no locality, and for which the right to compensation is recognized by the laws of all countries, and rest upon the rule of international comity, that every nation may rightfully exercise jurisdiction over all persons within its limits in respect to matters purely personal. Story, *Conf. Laws*, § 542. Personal injuries are transitory in their nature. The test as to whether an action is transitory or local is not, as a general proposition, the subject causing the injury, but the object suffering the injury. *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 733, 734, 6 Atl. 648.

A transitory action is defined by Black as one founded upon a cause of action not necessarily referring to or arising in any particular locality, and hence an action for damages from an explosion of nitroglycerin while in the hands of a carrier, claimed to have been caused by the negligence of defendant, who shipped it, in failing to notify the carrier of the nature of the package in which it was shipped, is an action in its nature personal and transitory, and may be brought wherever the defendant can be found and served with process—the gravamen of the action being the negligence of the defendant—and is not affected by the fact that there is a claimed injury to real estate, it being only one element of the damages. *Barney v. Burnstenbinder* (N. Y.) 64 Barb. 212, 215.

Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights which in contemplation of law have no locality. Judge Gould, in his work on Pleadings, c. 3, § 112, says it will be found, as a general proposition, that actions *ex delicto*, in which a mere personality is recoverable, are by common law transitory. An action for personal injuries is transitory. *Ackerson v. Erie R. Co.*, 81 N. J. Law (2 Vroom) 309, 312.

Personal actions, whether sounding in tort or in contract, are, in general, transitory actions, and the matter may be laid to have taken place in the county where the action is to be tried, without any reference to the place where the thing really happened. Accordingly, under a declaration in slander, which alleged the words to have been spoken at G., in the county of M., the plaintiff was allowed to prove, as a substantive cause of action, that the words were spoken at D. in C. There is an exception to this rule where

the place is matter of description. *Lister v. Wright* (N. Y.) 2 Hill, 320, 321.

When the action of covenant is founded on contract between the parties and their executors or administrators, it is transitory, and may be sued as such. *Lienow v. Ellis*, 6 Mass. 331, 332.

An action on the case against a railroad company for killing stock on its track, by reason of the company's failure to keep the adjoining fence in repair, is transitory, and not local, either by the common law or the statute. *Illinois Cent. R. Co. v. Swearingen*, 33 Ill. 289.

An action for a foreign injury is to be regarded as transitory. *Smith v. Bull* (N. Y.) 17 Wend. 323, 326.

An action of debt for escape is a transitory action. *Jones v. Pemberton*, 7 N. J. Law (2 Halst.) 350, 351.

Transitory actions are actions of a transitory character. They follow the party wherever he is to be found. *McIntire v. McIntire* (D. C.) 5 Mackey, 344, 350.

At common law, transitory actions might be brought in any county, and are those personal actions which might have arisen in any county—actions in *assumpsit* or contract, which seek nothing more than the recovery of money or personal chattels. *Educational Soc. of Denomination Called Christians v. Varney*, 54 N. H. 376, 377.

When a cause of action could only have arisen in a particular place or county, it is local, and the venue should be laid therein, as in real actions, mixed actions, waste, or ejectment. *Worster v. Winnipiseogee Lake Co.*, 25 N. H. (5 Fost.) 525, 530.

Actions may be maintained in the courts of New Jersey by a Pennsylvanian to recover a debt or damage for personal injury. A Pennsylvania plaintiff may sustain an action in the court in New Jersey against a corporation chartered by the latter state for consequential injuries done to plaintiff's real property lying in Pennsylvania, caused by a canal located in New Jersey; the action being transitory. *Rundle v. Delaware & R. Canal* (U. S.) 21 Fed. Cas. 6, 11.

Trover is a transitory action, and an action for the conversion of timber is not made local by being brought against the original trespasser who cut the trees, notwithstanding the fact that the statute makes actions for trespass on land and the injury to land local. *Greeley v. Stilson*, 27 Mich. 153, 155.

Actions against railroad companies for personal injuries are transitory in their nature. *South Florida R. Co. v. Weese*, 13 South. 436, 440, 32 Fla. 212.

Local action distinguished.

Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, and local where their cause is in its nature necessarily local. *Livingston v. Jefferson* (U. S.) 15 Fed. Cas. 660, 664; *Condon v. Leipsiger*, 55 Pac. 82, 17 Utah, 498; *McGonigle v. Atchison*, 7 Pac. 550, 552, 33 Kan. 726. Thus actions for injury to real estate are generally local, and can be brought only where the real estate is situated, while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found. *McGonigle v. Atchison*, 7 Pac. 550, 552, 33 Kan. 726.

An action is transitory where the transactions on which the action is founded might have taken place anywhere, and the test of whether an action is local or transitory depends on the subject-matter which sustained the injury, and not on the subject causing the injury. *Mason v. Warner*, 31 Mo. 508, 510.

TRANSLATE—TRANSLATION.

To translate is to give the sense or equivalent of, as a word, expression, or an entire work, in another language or dialect. *Stand. Dict.* 1917. Hence to explain by clearer terms, or to express in a different form or style of language. *Id.* Generally speaking, a translation need not consist of transferring from one language into another. It may apply to the expression of the same thoughts in other words of the same language. As applied to a state Constitution, a translation into a foreign language, is not a copy thereof. *Rasmussen v. Baker*, 7 Wyo. 117, 140, 50 Pac. 819, 825, 38 L. R. A. 773.

TRANSMIT—TRANSMISSION.

"Transmit," as used in a will giving land to the decedent's brother and other land to his niece, providing that they should hold their respective shares independently of all others—he independently of his wife, and she of her future husband when she should marry—and "transmit" that share, respectively, to their children, if they should have such, free from all incumbrances and debts, is not to be given its literal meaning, so that the will vests merely a life estate in the niece, remainder in her children. *Shannon v. Bonham*, 60 N. E. 951, 953, 27 Ind. App. 369.

The word "transmit," as used in the provision that illegitimate children shall be capable of transmitting inheritance on the part of the mother in like manner, etc., implies, in connection with "inheritance," the transmission of an estate by descent either

from the illegitimate child or through him. *Garland v. Harrison* (Va.) 8 Leigh, 368, 394.

The term "transmitting estates," as used in a statute providing that bastards shall be capable of inheriting from and through their mother, and of transmitting estates, must be construed so as to exclude the father and pass the entire estate to the mother, since the brothers and sisters could only inherit through the father. The language is not clear, but the general purpose of all such statutes changing the common law in this respect is to give the reciprocal right of inheritance to both the bastard and his mother, and the statute of this state seems to intend to make the blood of the bastard heritable only on the part of the mother, but fully so in that respect. *Ford v. Boone* (Tex.) 75 S. W. 353, 354.

Of letter.

A letter deposited in an office is, in every reasonable sense, transmitted, whether the person addressed resides in the same place or at a different one. The parties in both cases avail themselves of the services of the same public agent, acting under the same official responsibility. The only difference is that in one case the letter is put into a mail bag, and in the other into a box for delivery. *Stanton v. Kline*, 11 N. Y. (1 Kern) 196, 199.

Of telegram.

To "transmit" means to send from one person to another; to communicate. The undertaking of a telegraph company, when it receives a dispatch for transmission, is not only to transmit it over the wires, but, when it arrives at the place of destination, there to write it out and deliver it to the person addressed, for, under Rev. St. 1899, § 4160, providing that words and phrases shall be taken in the plain or ordinary and usual sense, the court must give to the word "transmit" its ordinary meaning. *Parker v. Western Union Tel. Co.*, 87 Mo. App. 553, 559 (quoting Cent. Dict.; *Webst. Dict.*; *Worcest. Dict.*).

"Transmission of message" means its transmission from the telegraph office or station at which it is received to the one to which it is sent. *Stamey v. Western Union Tel. Co.*, 18 S. E. 1008, 1010, 92 Ga. 613, 44 Am. St. Rep. 95.

The transmission of a telegram includes its delivery, and failure to deliver a telegram, under Rev. St. 1881, § 4176, penalizing a failure to transmit a message, means a failure to transmit it. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176, 179.

TRANSMUTATION.

"Transmutation," while it is sometimes defined as the change from one species into

another—the change from one nature, form, or substance into another—could not have misled the jury when used in an instruction that a sale, in law, is the transmutation of personal property from one person to another for a price; it having been used in the sense of “change” or “exchange.” *State v. Smith*, 32 Pac. 927, 928, 51 Kan. 120.

TRANSPORT—TRANSPORTATION.

Transported in same direction, see “Same Direction.”

Webster defines “transport” as to carry or convey from one place to another; again, to remove from one place to another; and throughout all the deviations of the word “transport” we find the same part of the definition—to remove. *Columbia Conduit Co. v. Commonwealth*, 90 Pa. 307, 309.

“Transported,” as used in a waybill describing merchandise as transported from one place to another, is equivalent to “carried,” but is distinct from the idea of forwarding. *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. (22 Wall.) 123, 133, 22 L. Ed. 827.

“Transport,” as used in Act July 6, 1812, § 2, providing that if any citizen of the United States, or person inhabiting the same, shall transport or attempt to transport, over land or otherwise, in any wagon, cart, sleigh, boat, or otherwise, naval or military stores, arms or munitions of war, or any articles of provision, from the United States to Canada, the thing by which the articles are transported, with the articles themselves, shall be forfeited, and the person so transporting shall forfeit a certain sum and be guilty of a misdemeanor, means, in its ordinary acceptance, to carry, to convey, in some one of the enumerated vehicles. Hence the driving of living fat oxen on foot is not a transportation thereof, within the meaning of the statute. *United States v. Sheldon*, 15 U. S. (2 Wheat.) 119, 120, 4 L. Ed. 199.

“Transportation,” in the sense of Acts 1888, c. 875, entitled “an act to prevent the transportation of people of color upon railroads or in steamboats,” means asportation; a taking out of the possession of the owner, without his privity and consent without the animus revertendi. *Wilson v. State*, 21 Md. 1, 9.

The term “transportation” includes all instrumentalities of shipment or carriage. *Cobbeys Ann. St. Neb.* 1903, § 10047; *Code Iowa* 1897, § 2122; *Gen. St. Minn.* 1894, § 379b; *U. S. Comp. St.* 1801, pp. 3154, 3206; *Rev. Codes N. D.* 1899, § 3012; *Interstate Commerce Commission v. Brimson*, 14 Sup. Ct. 1125, 154 U. S. 447, 38 L. Ed. 1047.

Tugs engaged in towing freight or passenger vessels through the canal, or passing

through the canal on their return trip, are not used for the transportation of freight and passengers, within a statute authorizing a canal company to charge tolls upon all boats, vessels, steamboats, and other craft used for the transportation of freight or passengers. *Sturgeon Bay & L. M. Ship Canal & Harbor Co. v. Leathem*, 45 N. E. 422, 423, 164 Ill. 239.

“Transportation” implies the taking up of persons or property at some point, and putting them down at another. A tax, therefore, fixed by the state upon such receiving and landing of passengers and freight, is a tax upon their transportation—that is, upon the commerce between the states involved in such transportation—so that such tax is an encroachment upon the powers of Congress. *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 828, 114 U. S. 196, 29 L. Ed. 158.

The word “Transportation,” in the name of a company, does neither bind nor expressly authorize it to run trains on its road. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. (7 O. E. Green) 130, 411.

Where a company was incorporated for the purpose of establishing and conducting lines of steamboats, vessels, and stages between certain points for the conveyance of passengers and transportation of merchandise, the language of the charter did not include the making by such company of a contract for the breaking of ice and towing vessels through the track thus broken. *Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge (Md.)* 8 Gill & J. 248, 319, 29 Am. Dec. 543.

Extradition and deportation distinguished.

Strictly speaking, “transportation, extradition, and deportation,” although each has the effect of removing a person from a country, are different things and for different purposes. Transportation is by way of punishment of one convicted of offense against the laws of the country. Extradition is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. Deportation is the removing of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken. *Fong Yue Ting v. United States*, 13 Sup. Ct. 1016, 1020, 149 U. S. 698, 37 L. Ed. 905.

Handle distinguished.

Within the meaning of Dispensary Act 1895, forbidding the transportation of alcoholic liquors, and providing a penalty for handling and transporting liquors in the

nighttime, the terms "transporting" and "handling" are not equivalent words, and do not mean the same thing. "Transporting" means to carry, bear, or convey from one place or country to another, while handling is the act of touching, moving, or managing with the hand. It is clear that there may be a handling of alcoholic liquors, which could not with any appropriateness be described as the transportation thereof. For example, pouring liquor from a blind-tiger jug at night might be punished under section 37, as a handling of contraband liquors in the nighttime, but that could hardly be called a transportation of liquor, however transporting the effect might be. *State v. Pickett*, 25 S. E. 46, 47, 47 S. C. 101.

As trade.

See "Trade."

TRANSPORTATION COMPANY.

A corporation engaged in the business of transporting petroleum by means of pipes is a transportation company, within Act April 24, 1874, § 4, providing a certain tax on every railroad company, transportation company, etc. *Columbia Conduit Co. v. Commonwealth*, 90 Pa. 307, 309.

TRANSPORTATION SERVICE.

The test of distinction between transportation service, relatively to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and switching or transfer service, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line, or that of another, for there may be a transportation service over one or more spur tracks of the same company if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. *Dixon v. Central of Georgia Ry. Co.*, 35 S. E. 369, 371, 110 Ga. 173.

TRAP.

The word "trap," within the meaning of the rule that a landowner will be liable for injuries sustained by a trespasser because of a trap placed by the landowner on his land, would include any very dangerous construction or condition designedly arranged to do injury, but a particular danger resulting from a lack of care will not be understood as a trap where it is not easily discoverable. *Moffatt v. Kenny*, 54 N. E. 850, 851, 174 Mass. 811.

TRAVAIL

"Travail," as used in Pub. St. c. 85, § 16, providing that, on prosecutions for bastardy, accusations made in time of travail by the mother of the child as to its father may be received in evidence, embraces the time from when the pains of labor commence, up to and including the time of delivery. *Scott v. Donovan*, 26 N. E. 871, 153 Mass. 378.

TRAVEL—TRAVELER—TRAVELING.

See "Sue Labor and Travel."

"Traveling," in a large sense, means going from one place to another. *White v. Beazley*, 1 Barn. & Ald. 166, 171.

"Travel" has no precise or technical meaning, when used without limitation; but its primary and general import is to pass from one place to another, whether for pleasure, instruction, business, or health. *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619, 623, 105 Ga. 358 (citing *Lockett v. State*, 47 Ala. 42, 45).

Persons belonging to the army and navy, who have no permanent residence they can call home, are regarded as "travelers or wayfarers," when stopping at public inns or hotels; and to make them chargeable as mere boarders it must be shown that an explicit contract had been made which deprived them of the privileges and rights which their vocation confers upon them as passengers or travelers. *Hancock v. Rand*, 94 N. Y. 1, 6, 46 Am. Rep. 112.

"Person traveling," as used in Code, art. 319, punishing the offense of carrying weapons, but exempting persons traveling, would not include one who had stopped in a town and engaged in a game of cards. He was not then traveling, and was not engaged in any business connected with his journey. *Stilly v. State*, 11 S. W. 458, 27 Tex. App. 445, 11 Am. St. Rep. 201.

The privilege of carrying concealed weapons, given by Code, § 4109, to a person traveling, commences when he sets out on a journey, and continues until he reaches home on his return. *Coker v. State*, 63 Ala. 95, 96.

A fugitive from justice is not a "person traveling," within Code, art. 319, punishing the carrying of weapons, except by a person traveling. *Shelton v. State*, 11 S. W. 457, 27 Tex. App. 443, 11 Am. St. Rep. 200.

As determined by distance.

A traveler is one who travels in any way; the distance not being material. *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619, 623, 105 Ga. 358.

The term "traveling," in a statute prohibiting the carrying of concealed weapons,

but making an exception in favor of persons traveling, does not include the return to his home after night from his place of business of a person who resides in the country contiguous to the city and town in which he has the place of business, and to which he is in the habit of going and returning daily. *Eslava v. State*, 49 Ala. 355, 357.

"Traveling," as used in the statute providing that a person traveling or setting out on a journey may carry concealed weapons, etc., means something more than the mere passing from place to place. The traveling must be, as is the setting out on a journey, such as is without the ordinary habits, business, or duty of the person, to a distance from his home and beyond the circle of his acquaintances. The original signification of "travel" was a day's travel. It is now applied to a travel by land from place to place without restriction of time. The terms "traveling" or "setting out on a journey," do not include the return of a person in a wagon from the county seat of one county to his home in another; the two points being about 20 miles apart. *Gholson v. State*, 53 Ala. 519, 521, 25 Am. Rep. 652.

The words "traveling or setting out on a journey," in Code Ala. 1876, § 4109, are used in their popular sense, and it is impossible to lay down any independent rule or determined distance which will unerringly characterize the act as a journey or the actor as a traveler. Much must depend on the circumstances of each particular case. Leaving the neighborhood of one's immediate friends and going among strangers, and possibly the purpose and object had in view, are circumstances to be weighed and considered in determining whether the person was traveling or setting out on a journey, so as to excuse the carrying of weapons concealed about the person. While there may be cases so plain that the presiding judge might as a matter of law instruct the jury that the defendant was or was not traveling or setting out on a journey, the fact that defendant was setting out by railroad to go to a place in another county, distant by railroad 40 miles and by dirt road 20 miles, is not sufficient to authorize the court to instruct the jury that it was not a setting out on a journey within the meaning of the statute. *Wilson v. State*, 68 Ala. 41, 42.

A person in Texas, en route with a herd of cattle to a market in Kansas, is a "traveler," within Pen. Code, art. 319, permitting travelers to carry firearms. *Rice v. State*, 10 Tex. App. 288, 289.

The phrase "persons traveling" includes a person going from the place where he has been temporarily residing to his home in another county. *Campbell v. State*, 28 Tex. App. 44, 11 S. W. 832.

Where defendant went to a city 60 miles distant, taking with him his pistol, and was arrested on the train which he had boarded for home, he was a "person traveling," within the exception of Pen. Code, art. 319, prescribing punishment for the carrying of arms. *Impson v. State (Tex.)* 19 S. W. 677.

A person leaving home at 4 o'clock in the morning to go 17 miles on a trading expedition, returning in the evening of the same day, cannot be regarded as traveling, so as to entitle him to carry a pistol. *Goss v. State (Tex.)* 40 S. W. 725.

A traveler is one who travels in any way—one who makes a journey or who goes from place to place; so that a person going a distance of 35 miles and return, occupying parts of two days, is a traveler, within the statute allowing travelers to carry weapons. *Bain v. State*, 44 S. W. 518, 38 Tex. Cr. R. 635.

Within the meaning of a statute providing that "every person, not being a traveler, who shall wear or carry any pistol, etc., or any other dangerous or deadly weapon concealed," shall be fined, one who was extensively engaged in the stave business, having stave yards at various places in the county in which he resided and an adjoining county, and traveled from his residence in a buggy to and from these several places in attending to his business, and was so engaged three-fourths of the time, was a traveler. The word "traveler" has no very precise or technical meaning when it is used without any limitation. Its primary and general import is to pass from place to place, whether for pleasure, instruction, business, or health. The length of the journey or its continuance does not destroy the character of the occupation. *Burst v. State*, 89 Ind. 133, 135.

A person going from his home by rail to a town 15 miles distant in an adjoining county to attend a political meeting, having no other business, and returning home from such meeting, is not engaged in travel outside ordinary habits, business, or duties, and at such a distance from home as takes him beyond the circle of his acquaintance among strangers with whose habits and character he is not familiar, and hence is not a "traveler," so as to be entitled to carry a deadly weapon, under Burns' Rev. St. 1901, § 2069, punishing the carrying of such weapons by others than travelers. The word "traveler," when used in a broad sense, designates one who travels in any way; distance not being material. It is clear that the Legislature did not use the word in this sense, for such signification would destroy the very purpose for which the section was enacted, by licensing, rather than suppressing, the practice of carrying concealed weapons. *State v. Smith*, 61 N. E. 506, 157 Ind. 241, 87 Am. St. Rep.

205 (citing Bishop, *St. Crimes*, § 788a; Bouv. Law Dict. [Rawle's Rev. Ed.] p. 1134; 5 Am. & Eng. Enc. of Law [2d Ed.] 743; Gholson v. State, 53 Ala. 519, 25 Am. Rep. 652; McGuirk v. State, 64 Miss. 209, 1 South. 103; Hathcote v. State, 55 Ark. 181, 183, 185, 17 S. W. 721; Davis v. State, 45 Ark. 359).

"Traveling," as used in the English statute, making horses let to hire for traveling liable to post duty, applies to a horse which was hired in London to go to Richmond and back, to return the same day, the distance being 20 miles, but does not apply to one used to go 10 or 12 miles into the country and back the same evening, or where it is to be used for an hour or two for an airing, or where it is to be used in riding many miles into the country and back the same day. *Ramdeen v. Gibbs*, 1 Barn. & C. 319, 326.

"Traveler," as used in St. 18 & 19 Vict. c. 118, § 2, requiring houses for the sale of fermented liquor to be closed from 3 to 5 o'clock on Sunday afternoons, except that refreshments may be furnished to "travelers," does not apply to one who goes to a place a short distance from his home merely for the purpose of taking refreshment; but one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, is a "traveler," within the meaning of the statute. *Taylor v. Humphreys*, 10 C. B. (N. S.) 429, 435.

"Webster defines a traveler as one who travels in any way. Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country." *Walling v. Potter*, 35 Conn. 183, 185.

Dwellers and inhabitants of a city no larger than St. Paul in 1872, who changed their dwelling places from one part of the city to another, are not "travelers," within the meaning of the rule as to an innkeeper's liability to travelers. *Lusk v. Belote*, 22 Minn. 468, 470.

A traveler "is one who travels in any way. Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country. If he resides at an inn, his relation to the innkeeper is that of boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, he should be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, any one away from home, receiving accommodation of an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such." *Pullman Palace Car Co. v. Lowe*, 44 N. W. 226, 227, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325.

The term "traveling," when used in its ordinary sense, does not have reference to moving about from street to street or house to house in the city or its suburbs. The word, in a contract for the employment of a traveling salesman, was construed not to have such meaning. *Kochmann v. Baumeister*, 63 N. Y. Supp. 503, 504, 49 App. Div. 369.

One who walks a little over a mile on Sunday, partly for exercise and partly to make a social call, is not a "traveler" within Pub. St. c. 98, § 8, providing that "whoever travels on the Lord's day, except from necessity or charity, shall be punished." *Barker v. City of Worcester*, 29 N. E. 474, 139 Mass. 74.

As determined by purpose.

"Traveling," as used in Rev. Code Ala. § 3555, means to pass from place to place, whether for pleasure, instruction, business, or health, and the length of the journey does not destroy the character of the occupation. A person who is a passenger on a railway train for a distance of 28 miles to seek employment is traveling in the sense of the statute. *Lockett v. State*, 47 Ala. 42, 45.

A mail carrier, who had two routes, while going from one to the other was a "traveler," within the meaning of Rev. St. 1881, § 1985, exempting travelers from the provisions making it a criminal offense to carry concealed weapons. *Lott v. State*, 24 N. E. 156, 122 Ind. 393.

"Traveler," as used in St. 18 & 19 Vict. c. 18, § 2, prohibiting the sale of intoxicating liquors between the hours of 3 and 5 on Sunday afternoon, except to travelers, is not confined to those traveling for the purpose of business, but includes those traveling for pleasure as well. *Atkinson v. Sellers*, 5 C. B. (N. S.) 442, 448.

Every one passing on a highway, which constitutes "traveling" as used in Rev. St. c. 18, giving an action to travelers injured by defective highways, does not necessarily constitute traveling within chapter 124, prohibiting traveling or the doing of any work, labor, or business, etc., on Sunday. A person who walks on the highway simply for exercise in the open air is not traveling, in violation of chapter 124. *O'Connell v. City of Lewiston*, 65 Me. 34, 37, 20 Am. Rep. 673.

The general term "traveler" means one who travels in any way, one who makes a journey, one who goes from place to place. Going on a train every day some 150 miles would, in common parlance, constitute a traveler. *Bain v. State*, 44 S. W. 518, 38 Tex. Cr. R. 635. A railroad porter is a traveler, within the exemption of a statute authorizing travelers to carry weapons. *Williams v. State*, 72 S. W. 880, 381, 44 Tex. Cr. R. 494.

As determined by time occupied.

A "traveler" is not necessarily one who is merely on the move for a day. *Davis v. State*, 45 Ark. 359, 361.

"Traveling," as used in Rev. Code, § 3555, providing that persons traveling or setting out on a journey may carry concealed weapons, etc., includes a person who was traveling to a certain place on a raft in a certain river; it taking two days to complete the journey. *Baker v. State*, 49 Ala. 350, 353.

TRAVEL TO SERVE.

As used in Rev. St. 1898, § 731, subd. 27, providing that a sheriff should have a certain sum per mile for "travel to serve" a criminal warrant, means travel on the trip to serve which is successful. It means travel when it results in a service. *Northern Trust Co. v. Snyder*, 89 N. W. 460, 469, 113 Wis. 516, 70 Am. St. Rep. 367.

TRAVELED PART.

The "traveled part" of a turnpike or road means, when the wrought path is not obscured from the eye, that part which is usually wrought for traveling. Where from the quantity of snow on the ground the wrought path is obscured from the eye, and the traveled and beaten path is on the right of the center of the wrought path, the path then beaten and traveled by those passing and repassing with their sleds is the traveled part, to which the law of the road is restricted, and not the wrought part. The law is as well applicable to the path as actually traveled on the snow as it is to the wrought part in different seasons of the year. *Jaquith v. Richardson*, 49 Mass. (8 Metc.) 213, 215.

By the "traveled part" of a road, in a statute which requires persons traveling with any vehicle, meeting each other on the road, to turn to the right of the traveled part of the road, is meant that part which is usually wrought for traveling, and not any track which may happen to be made in the road by the passing of vehicles. *Clark v. Commonwealth*, 21 Mass. (4 Pick.) 125, 126; *Winter v. Harris*, 49 Atl. 398, 399, 23 R. I. 47, 54 L. R. A. 643.

The "traveled part of the road," within Comp. Laws, § 2002, relating to the conduct of parties driving along the highway, is that part which is wrought for traveling, and is not confined simply to the most traveled track. *Daniels v. Clegg*, 28 Mich. 32, 42.

TRAVELED PLACE.

"Traveled place," as used in St. 1849, c. 222, § 2, requiring a railroad to maintain a signboard at the place where the railroad

crosses a "traveled place," should be construed to include an open and traveled street in a city, though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein. *Whittaker v. Boston & M. R. R.*, 73 Mass. (7 Gray) 98, 100.

Where a railroad company has not been requested in writing by the selectmen or required by the county commissioners to erect and maintain warning boards at the crossing of its road with a discontinued town way, such town way, though still used by abutting owners, is not a "traveled place," within the meaning of Pub. St. c. 112, § 163, which renders a railroad company liable for accidents caused by its failure to signal, etc., where the road crosses any highway or traveled place. *Coakley v. Boston & M. R. R. Co.*, 33 N. E. 930, 932, 159 Mass. 32.

"Traveled place," as used in Gen. St. § 1483, requiring locomotive engineers and firemen on trains, when approaching any public highway or traveled place, to signal, etc., means a place where the public have a legal right to cross the track, and not a place where people are accustomed to cross to reach a store and post office, where such crossing was not a public one, and the railroad company did not know of or acquiesce in such crossing. *Barber v. Richmond R. Co.*, 13 S. E. 630, 632, 34 S. C. 444.

"Traveled place," as used in Gen. St. § 1483, does not include a place where the right is one of mere sufferance. *Hankinson v. Charlotte, C. & A. R. Co.*, 19 S. E. 206, 214, 41 S. C. 1.

Under Rev. St. § 1892, the use of a road crossing a railroad track for 20 years gives the public a prescriptive right therein, and makes the crossing a "traveled place" within such statute. *Strother v. South Carolina & G. R. Co.*, 25 S. E. 272, 274, 47 S. C. 375.

"Traveled place," as used in Rev. St. 1893, § 1635, means not only a place where persons are accustomed to travel, but it must also be a place where persons have in some way acquired the right to travel, and an open space, which people have traveled for years, in going from the streets of a town to a depot, is a traveled place. *Risinger v. Southern Ry. Co.*, 38 S. E. 1, 2, 59 S. C. 429 (citing *Hale v. Columbia & G. R. Co.*, 34 S. C. 292, 299, 13 S. E. 537).

A "traveled place" is a place where a person has a legal right to be. Thus, where the right of the public to use a road has been established by proof of 20 years' use, the place where such road crosses a railway track is a traveled place, within Rev. St. § 1635, requiring signals to be given by railroads at such places. *Kirby v. Southern Ry.*, 41 S. E. 765, 767, 63 S. C. 494.

TRAVELED PUBLIC ROAD.

A highway laid out across a railroad track, but which has not been actually opened for public travel, and no notice of which has been served upon the officers of the railroad company, is not a traveled public road, within the meaning of the statute which requires the ringing of a bell or sounding a whistle upon a train approaching the crossing of a railroad by a traveled public road. *Cordell v. New York Cent. & H. R. R. Co.*, 64 N. Y. 535, 540.

To bring a case within the provisions of the General Railroad Act, Laws 1865, c. 82, § 7, requiring that a bell shall be rung or whistle sounded upon the engine of a train "approaching the place where the railroad shall cross any traveled public road or street," it is not sufficient that the locus in quo has been so dedicated to the public by the owners as to constitute it a public street, but it must be both traveled and public; and it was held that it was not negligence upon the part of the railroad company to fail to blow a whistle or ring a bell before crossing an alley which was not traveled or capable of being traveled. *Bryne v. New York Cent. & H. R. R. Co.*, 94 N. Y. 12, 15.

To constitute a "publicly traveled road," it need not be a public road, but need only be publicly traveled. *Morgan v. Wabash R. Co.*, 60 S. W. 195, 199, 159 Mo. 262.

"Traveled public road or street," as used in *Wag. St.* p. 310, §§ 38, 39, requiring a locomotive bell to be rung within a certain distance of a railroad crossing of a traveled public road or street and the erection of signs at such crossing, cannot be construed to include a way provided by a railway company across its own grounds for ingress to and egress from its depot. *Bauer v. Kansas Pac. Ry. Co.*, 69 Mo. 219, 222.

The term "traveled public road," in *Wag. St.* § 3110, requiring trains approaching a regular traveled road to give certain signals, does not include a switch crossing provided by the railroad company across its own ground for ingress to and egress from its depot. *Hodges v. St. Louis, K. C. & N. Ry. Co.*, 71 Mo. 50, 51.

A traveled public road, within a statute requiring signals by railroads at public crossings, is sufficiently shown by evidence that the road has been traveled and worked for 10 or 15 years. *State v. St. Joseph, St. L. & S. F. Ry. Co.*, 46 Mo. App. 466, 470.

"Traveled road," as used in the statute requiring a bell to be rung or a whistle to be sounded at least 80 rods from where a railway crosses a traveled road or street, applies to highway or public highway, without regard to whether they have been legally laid out or dedicated as such, but does not include private farm crossings. *Czech v. Great Northern Ry. Co.*, 70 N. W. 791, 792,

68 Minn. 85, 38 L. R. A. 302, 64 Am. St. Rep. 452.

TRAVELED WAY.

The "traveled way" which it is the duty of borough authorities to keep in a reasonable condition is the part of the road that the borough has laid out and provided for public travel. *Nudd v. Borough of Lansdowne*, 42 Atl. 474, 190 Pa. 89.

Evidence that persons had been accustomed to pass over a railroad bridge, at each end of which there was a notice to keep off, showed that such bridge was not a "traveled way," within the statute providing that failure to give signals at such a place is negligence per se. *Ringstaff v. Lancaster & C. Ry. Co.*, 43 S. E. 22, 24, 64 S. C. 546.

TRAVELER ON HIGHWAY.

One who received an injury while crossing planking placed over a gutter within the located limits of a public street, but outside of the wrought portion thereof, put there to facilitate access from the street and private way or court, is not a traveler upon the street, within the meaning of *Rev. St. c. 18, §§ 40, 65*, giving travelers injured upon highways, etc., an action against the town for failure to keep it in repair. *Philbrick v. Inhabitants of Pittston*, 63 Me. 477, 478.

"Traveler," as used in the Maine act giving a right of action to travelers injured on a defective highway, does not include one going from his dwelling to his water-closet by passing into the highway around the end of a drain in process of excavation. *Leslie v. City of Lewiston*, 62 Me. 468, 470.

A trespasser who reaches the middle of a street crossing from ties, either up or down the railroad, is in no sense of the word a "traveler" from the street, approaching danger, and about to exercise a right common to the public, that of crossing the railroad, so as to have the question of his contributory negligence affected by the fact that the gates at the side of the crossing are up and the watchman gives no signal. *Matthews v. Philadelphia & R. R. Co.*, 28 Atl. 936, 937, 161 Pa. 28.

"Traveler," as used in *Rev. St. c. 25, § 1*, providing that towns shall keep all highways, etc., safe and convenient for travelers passing along and upon them with their horses, teams, and carriages, should not be construed to mean only persons with horses, teams, and carriages, but may include a person with an elephant. *Gregory v. Inhabitants of Adams*, 80 Mass. (14 Gray) 242, 247.

As affected by temporary stop.

A person lawfully passing on the street does not cease to be a traveler, so as to be

come an intruder, by stopping on the door-sill of a house fronting on the street for the purpose of adjusting his shoe, his head being within the lines of the street, and receiving an injury on his head while thus occupied; and hence he may recover where the injury was caused by a nuisance. *Murray v. McShane*, 52 Md. 217, 226, 36 Am. Rep. 367.

A person journeying on a highway does not necessarily forfeit his rights as a traveler, within the meaning of Gen. St. c. 44, § 22, giving a right of action to travelers on a highway, by stopping to pick berries by the wayside. *Britton v. Inhabitants of Cummington*, 107 Mass. 347, 352.

The word "travelers," in the Massachusetts statute imposing a duty upon municipal corporations of keeping all highways within their limits in such state of repair that they may at all times be safe and convenient for travelers passing along or upon them, was construed in *Blodgett v. City of Boston*, 90 Mass. (8 Allen) 237, to include every one who had occasion to pass over the highway for any purpose of business, convenience, or pleasure. A person was still a traveler on a street, though he had stopped a moment for a drink from a hydrant situated just within a lot. *Duffy v. City of Dubuque*, 18 N. W. 900, 902, 63 Iowa, 171, 50 Am. Rep. 743.

"Traveling," as used in a statute giving an action in favor of persons injured while traveling upon the highway, implies the use of the highway for the purposes for which highways are constructed, and only applies to persons thereon while they are so using the highway; but a person does not cease to be traveling merely by lingering or stopping a moment on the way. *Hardy v. Town of Keene*, 52 N. H. 870, 377.

A person is "traveling upon the highway," within the meaning of Gen. St. c. 69, § 1, giving an action against the town in favor of persons injured while upon the highway, when he is making a reasonable use of the highway as a way; and such use does not cease because of a short stop on the street. *Varney v. City of Manchester*, 58 N. H. 430, 431, 40 Am. Rep. 592.

The person who fastens his horse and wagon at the side of the highway is not "traveling," within the meaning of a statute giving an action for injuries to persons traveling on a highway from negligence of the town, etc. *Cummings v. Town of Center Harbor*, 57 N. H. 17, 19.

The passage of a traveler along the highway is not, as a rule, continuous between the extreme points of his journey. The demands of his business oftentimes compel him to withdraw temporarily from the limits of the road. The dwelling house, the post office, the store, the gristmill, the blacksmith's

shop, the inn, and the watering trough quite often stand a little aside, and accessible from the highway. To visit one or the other of these is the occasion for the passage upon it. Those who maintain it expect the traveler to draw aside for business or pleasure at these several places and return to it. Indeed, these temporary, perhaps momentary, withdrawals from and stoppages outside of its limits, with the intent to return to it and pursue the journey, are so absolutely necessary to the beneficial and convenient use of it by the public, that they should be considered as necessary incidents to a passage over the road. And the court held that, though the statute requiring towns obliged to maintain any bridge to erect and maintain a good and sufficient railing or fence on the side thereof, and providing that, if any person shall suffer any damage in his property by reason of the want of such railing, or fence, such town shall pay to him just damages, was intended to promote the comfort and convenience and insure the safety of travelers, the town was not exempt from liability or damage to a runaway team resulting from a neglect to maintain a sufficient railing along a bridge, because the team started to run away from a point on the owner's premises and outside the limits of the highway. *Ward v. Town of North Haven*, 43 Conn. 148, 154.

As determined by purpose.

A person using a highway simply for the purpose of play is not a "traveler," within the statute giving travelers an action for injuries received on defective highways. *Blodgett v. City of Boston*, 90 Mass. (8 Allen) 237, 238; *Tighe v. City of Lowell*, 119 Mass. 472.

A girl passing on a sidewalk on her return from school is a "traveler," within the meaning of a statute giving an action to travelers injured on a defective highway. *Stinson v. City of Gardiner*, 42 Me. 248, 255, 66 Am. Dec. 281.

"Traveler," as used in a statute giving an action to travelers injured on a defective highway, includes every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. *Higginson v. Inhabitants of Town of Nahant*, 93 Mass. (11 Allen) 530, 535.

A person passing from place to place on a sidewalk is a "traveler" thereon, whether going for business or pleasure. The following and guiding of a rolling hoop by a little girl on a sidewalk did not make her any the less a traveler. *Reed v. City of Madison*, 53 N. W. 547, 549, 83 Wis. 171, 17 L. R. A. 733.

"Traveler," as used in determining the liability of a city for negligence or for injuries on its streets to travelers, will not be

given a narrow and restricted meaning, but embraces all those who are making an appropriate and legitimate use of the street, and one which was within the contemplation of the city when the right to use such street was granted. *City of Kansas City v. Orr*, 61 Pac. 397, 398, 62 Kan. 61, 50 L. R. A. 783.

"Travelers," as used in the statute requiring that a public highway shall be safe and convenient for travelers with horses, teams, and carriages, means those traveling for some purpose or other for which streets are required to be constructed and kept in repair. A person may be a traveler, and not such within the contemplation of the statute. He may be within or without the protection of the statute, and still a traveler, depending on whether his use of the highway or street is a legitimate one or not. Hence one using the highway for the purpose of racing was not a traveler within the meaning of the statute, not because racing horses is an unlawful thing, but because it was a purpose for which the street was not designed to be used. If the person had been on his way to his business house or home, or had been out riding for pleasure or recreation, and while so doing had speeded his horse to keep up with or pass other teams on the road, he might still have been a traveler within the protection of the statute, for in such case the racing might have been an incidental or casual thing; but where a person used a highway solely for the purpose of horse racing in the same manner he would have used it if a race course, fitted and designed for the purpose, he is not a traveler. *McCarthy v. City of Portland*, 67 Me. 167, 168, 24 Am. Rep. 23.

A person walking a short distance in the public highway simply for exercise on a Sunday evening, with no purpose of going to or stopping at any place but his own house, or of passing from one city or town to another, is not a traveler within the meaning of a statute forbidding traveling on Sunday, but is a traveler within the meaning of a word used in a statute giving an action to travelers injured by defective highways. *Hamilton v. City of Boston*, 96 Mass. (14 Allen) 475, 484.

TRAVELING AGENT.

As operative, see "Operative."

TRAVELING FROM PLACE TO PLACE.

"Traveling from place to place," as used in Rev. St. 1895, art. 5049, requiring specialists travelling from place to place in the practice of their profession to pay a certain tax in each county in which they practice, does not include one having two places of business, and dividing his time between the two, and attending professional calls in other counties. *Hairston v. State*, 37 S. W. 858, 36 Tex. Cr. R. 470.

TRAVELING IN CONVEYANCE.

An accident policy, which provided that the insurer should be liable for all injuries received by the insured while "traveling in a public or private conveyance," meant, not only while actually in some conveyance, but while passing from one conveyance to another on a journey. *Northrup v. Railway Pass. Assur. Co.*, 43 N. Y. 516, 519, 3 Am. Rep. 724.

TRAVELING MERCHANT.

The term "traveling merchant," as used in Act March 27, 1848, forbidding any person from selling goods as a traveling merchant, means one who goes about with goods making sales, and it is not a violation of the act to travel from farm to farm, exchanging the goods of a merchant for farm produce; but taking orders for goods while traveling through the country, and afterwards delivering the goods and taking pay, is a violation of the statute. *Commonwealth v. Edison*, 2 Pa. Co. Ct. R. 377, 379.

TRAVELING PEDDLER.

In an ordinance of a town, passed pursuant to Elliott's Supp. § 826, to prohibit peddling within the corporate limits without a license, the term "traveling peddler," applies to all who travel from house to house in the town for the purpose of vending merchandise, without regard to their place of residence. *Martin v. Town of Rosedale*, 29 N. E. 410, 411, 130 Ind. 109.

TRAVELING SALESMEN.

See, also, "Commercial Traveler"; "Drummer."

As engaged in interstate commerce, see "Interstate Commerce."

One employed by wholesale dealers in dry goods, paying his own expenses and receiving house and road commissions, his compensation being entirely by commissions on approved sales, whether made upon the road or at the house, by him or any one to customers whom he had secured, is a traveling salesman. *Mulholland v. Wood*, 31 Atl. 248, 249, 166 Pa. 486.

A traveling salesman is one who exhibits samples of, and takes orders from purchasers for, his employer's goods, and is not in a popular sense a broker or factor, though he may be compensated for his services by commissions on the sales so effected by him. *Appeal of Corr*, 27 Atl. 681, 682, 157 Pa. 133.

An agent of a firm, who goes from town to town in the state exhibiting samples of goods and taking orders on his employer for such goods from consumers, is a "traveling salesman," within Act Dec. 14, 1896, prohibiting town authorities from collecting a li-

cense from any traveling salesman. *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619, 623, 105 Ga. 353.

As clerk, laborer, etc.

See "Clerk"; "Employe"; "Laborer"; "Operative"; "Servant"; "Trader—Tradesman"; "Workman."

TRAVELING VENDORS.

A traveling vendor is one who carries about with him the articles of merchandise which he sells; that is to say, he has with him the identical merchandise he sells, and delivers the same at the time of sale—his vocation differing in this respect from that of the commercial drummer, who carries only samples of his wares, which he exhibits, and takes orders for future delivery. *Pegues v. Ray*, 23 South. 904, 905, 50 La. Ann. 574.

Where a statute in relation to hawkers and peddlers taxed "traveling vendors," the statute included vendors traveling from place to place within the limits of the same town, and was not limited to vendors traveling from one town or place to another. *Andrews v. White*, 32 Me. 388, 389.

TRAVERSE.

See "Special Traverse."

A "traverse" is a denial by a party of facts alleged in an adverse pleading, if they be presumptively within his knowledge, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge. Code, § 113; *Dickinson v. Gray* (Ky.) 9 S. W. 281, 282.

TREASON.

"Treason" is defined in the United States Constitution as only consisting in levying war against the United States, or adhering to their enemies, giving them aid and comfort. "No other acts can be declared to constitute the offense. Congress can neither extend nor restrict nor define the crime." *United States v. Greathouse* (U. S.) 26 Fed. Cas. 18, 21.

"Treason" is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary. *Young v. United States*, 97 U. S. 39, 62, 24 L. Ed. 992, 998 (citing *United States v. Wiltberger*, 18 U. S. [5 Wheat.] 76, 96, 5 L. Ed. 37).

Treason against the United States, consisting of levying war against them, requires an assemblage of men ready to act and with an intent to do some treasonable act, and

armed in warlike manner, or else assembled in such numbers as to supersede the necessity of arms. *United States v. Bollman* (U. S.) 24 Fed. Cas. 1189, 1193.

Chief Justice Marshall, in defining "treason" on the trial of Burr, said: "It is not enough to be leagued in the conspiracy and that war be levied, but it is also necessary to perform a part. That part is the act of levying war. That part, it is true, may be minute. It may not be the actual appearance in arms, and it may be remote from the scene of action; that is, from the place where the army is assembled. But it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act, of which alone the person who performs it can be convicted." *United States v. Greathouse* (U. S.) 26 Fed. Cas. 18, 21.

Treason against the United States is defined by the Constitution itself. Congress has no power to enlarge, restrain, construe, or define the offense. The construction is intrusted to the court alone. By this instrument it is declared that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." What constitutes levying war against the government is a question which has been the subject of much discussion, whenever an indictment has been tried under this article of the Constitution. The levying of war is not necessarily to be judged of alone by the number or array of troops, but there must be a conspiracy to resist by force, and an actual resistance by force of arms, or intimidation by numbers. The conspiracy and insurrection connected with it must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States and totally to hinder its execution or compel its repeal. A conspiracy to resist by force the execution of a law in particular instances only, a conspiracy for a personal or private, as distinguished from a public and national, purpose, is not treason, however great the violence or force or numbers of the conspirators may be. So where a number of citizens in a free state collected together to prevent the enforcement of the fugitive slave law and the return of the escaped slave to his master in a slave state, the question whether such individuals were levying war against the United States was submitted to the jury, who found for the defendants. *United States v. Hanway* (U. S.) 26 Fed. Cas. 105, 126.

A levying of war, without having recourse to rules of construction or artificial reasoning, would seem to be nothing short of the employment, or at least of the embodying, of a military force, armed and arrayed

in a warlike manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of Congress. These troops should be so armed and so directed as to leave no doubt that the United States or their government were the immediate object of the attack. The act of resisting the embargo law by taking away from the United States officers and soldiers a raft of timber which had been seized by the collector, though done by a considerable force and by the firing of guns, and thereby intimidating the collector and troops, does not constitute a levying of war, or the offense of treason. *United States v. Hoxie* (U. S.) 28 Fed. Cas. 397, 398.

On an indictment for treason in adhering to the enemy, charging the defendant with going from the British squadron to the state of Delaware, with intention to procure provisions for the squadron, the going from the British squadron to the shore for the purpose of procuring peaceable provisions for the enemy did not amount to treason, as this conduct rested in intention, which is not punishable. *United States v. Pryor* (U. S.) 27 Fed. Cas. 628, 629.

"Treason, felony, or other crime," as used in Const. U. S. art. 4, cl. 2, declaring that if a person, charged in any state with treason, felony, or other crime, shall flee from justice and shall be found in another state, he shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime, means every offense forbidden and made punishable by law in the state where the offense was committed. *Commonwealth of Kentucky v. Dennison*, 65 U. S. (24 How.) 60, 99, 16 L. Ed. 717; *People v. Donohue*, 84 N. Y. 438, 441; *Barranger v. Baum*, 30 S. E. 524, 528, 103 Ga. 465, 68 Am. St. Rep. 113; *In re Hughes*, 61 N. C. 57, 64; *Hyatt v. People*, 23 Sup. Ct. 456, 461, 188 U. S. 691, 47 L. Ed. 657 (citing *Kentucky v. Dennison*, 65 U. S. [24 How.] 60, 16 L. Ed. 717).

TREASURE.

A treasure is a thing hidden or buried in the earth, on which no one can prove his property, and which is discovered by chance. Civ. Code La. 1900, art. 3423.

TREASURE TROVE.

"Treasure trove" is where any money is found hid in the earth, but not lying on the ground, and no man knows to whom it belongs. *Sovern v. Yoran*, 20 Pac. 100, 103, 16 Or. 269; *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600.

It is not treasure trove if the owner can be known, nor though he be dead, for his

executor or administrator shall have it. *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600.

"Treasure trove," which is commonly defined as gold or silver hidden in the ground, may in our commercial day be taken to include paper representations, especially when they are found hidden with both of these precious metals; and it is not necessary that the hiding should be in the ground. *Huthmacher v. Harris' Adm'rs*, 38 Pa. (2 Wright) 491, 499, 80 Am. Dec. 502.

TREASURER.

See "Deputy Treasurer"; "Town Treasurer."

Worcester defines the word "treasurer" as "one having charge of the money, funds, or revenue of a society, corporation, state, or nation." Abbott, in his *Law Dictionary*, more pointedly defines it as "the style or title of an officer to whom funds are committed to be kept or disbursed. The function is much the same in all cases—to take charge of the funds or revenues as they come in, keep them safely, and make payments from them as required from time to time." As used in an indictment charging an officer with the embezzlement of moneys intrusted to him as treasurer, it is equivalent to a charge that the funds were intrusted to him for safe-keeping or disbursement, as required by Rev. St. § 903. *State v. Eames*, 3 South. 93, 95, 39 La. Ann. 986.

A public treasurer is one who receives public moneys, keeps them in his charge, and disburses them upon proper orders. *Mutual Life Ins. Co. of New York v. Martien*, 71 Pac. 470, 471, 27 Mont. 437.

"Treasurer," as used in Const. Cal. art. 11, § 16, providing that all moneys of any municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer or other legal depositary to the credit of such corporation, means the custodian of public money; and he is a public officer. *Yarnell v. City of Los Angeles*, 25 Pac. 767, 768, 87 Cal. 603.

Where a few persons assemble and form a voluntary society to raise money to be appropriated to some specific object, and choose one of their members to be their treasurer, the meaning of the word "treasurer" would imply that he held their funds for their use, to be appropriated according to their order. He would be a trustee for them, and accountable to them. *Weid v. May*, 63 Mass. (9 Cush.) 181, 189.

The treasurer of a corporation is the one who holds or keeps the treasury. His duty is to receive and guard its funds, to expend them, not at his own whim, or upon his own judgment, but as directed by those vested with the authority under its law; and while

it is possible that a check drawn fraudulently by a treasurer alone, where counter signature of another officer was required, on the faith of which some innocent third person may have acted to his detriment, might be binding on the corporation, such a recognition of the power of a treasurer is the extreme limit to which this power would be carried by implication. In re Millward-Cliff Cracker Co.'s Estate, 28 Atl. 1072, 1074, 161 Pa. 157.

The term "treasurer," as used in the title relating to private corporations, shall mean the officer who has the care and custody of the funds of the corporation, by whatever name he is designated. V. S. 1894, 3676.

TREASURY.

"Treasury," as used throughout the Arkansas Constitution, means the state treasury, and not a county treasury. Straub v. Gordon, 27 Ark. 625, 628.

The word "treasury," as used in Comp. Laws, § 5771, which provides for the punishment of any officer, clerk, or other person employed in the "treasury" of the state who shall commit any fraud or embezzlement therein, "is not to be understood as descriptive of the particular building within which the treasurer keeps his principal office or place of official business; but moneys are to be considered as in the state treasury whenever and wherever they are in the official custody of the treasurer, or subject to his direction or control." People v. McKinney, 10 Mich. 54, 86.

TREASURY NOTE.

As cash, see "Cash."

As money, see "Money."

As promissory note, see "Promissory Note."

A "treasury note" is a bill circulating as money by authority of the general government; and this is also a sufficient designation of the species of money to constitute a valid description of the property in an indictment for robbery. Brown v. State, 25 South. 182, 184, 120 Ala. 342.

TREAT.

Gen. St. p. 332, § 16, providing that if any party obtaining a verdict in his favor shall, during the term of court in which such verdict is obtained, give to one of the jurors in such case, knowing him to be such, any victuals or drink "by way of treat," etc., means something distinct from the ordinary exercise of friendly hospitality, and does not forbid such acts of hospitality in the intercourse of friends as would be usual and ordinary, but was designed to apply to some-

thing of a different character, to an entertainment or treat which suggests the idea of convivial enjoyment and fellowship, rather than the customary hospitalities of daily life. Carlisle v. Town of Sheldon, 38 Vt. 440, 445.

TREATMENT.

See "Inhuman Treatment"; "Medical Treatment."

Treatment endangering life, see "Endanger."

TREATY.

A treaty is a contract between nations. Goetze v. United States (U. S.) 103 Fed. 72, 79.

A treaty implies political relations. Marks v. United States, 16 Sup. Ct. 476, 478, 161 U. S. 297, 40 L. Ed. 706.

"Treaty," in the law of nations, "is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme powers of the respective parties." Cherokee Nation v. Georgia, 30 U. S. (5 Pet.) 1, 60, 8 L. Ed. 25.

A treaty is a compact formed between two nations or communities having the right of self-government. The only requisite is that each of the contracting parties shall possess the right of self-government and the power to perform the stipulations of the treaty. Worcester v. Georgia, 31 U. S. (6 Pet.) 515, 581, 8 L. Ed. 483.

A treaty "is a contract between independent nations, depending for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infractions become the subject of international negotiations and reclamations, so far as the injured chooses to seek redress, which may in the end be enforced by actual war." Edye v. Robertson, 5 Sup. Ct. 247, 254, 112 U. S. 580, 28 L. Ed. 798.

A treaty is a contract, and hence is to be construed on principles similar to those applied to other articles. Anything necessarily implied is as though inserted. Adriance v. Lagrave, 59 N. Y. 110, 115, 17 Am. Rep. 317.

A treaty is usually a contract between the parties. It may, however, be so framed as to accomplish this purpose without any further act, if the language used be suitable, and the purpose be such as may be thus accomplished. In the United States a treaty is to be regarded as the supreme law, and operative as such when the stipulations do not

import a contract to be performed. *Little v. Watson*, 32 Me. 214, 223, 224.

The terms "treaty" and "convention," as used in Rev. St. U. S. § 2116, providing that no purchase, grant, lease, or other conveyance of lands from an Indian nation shall be valid, unless made by treaty or convention pursuant to the Constitution, are employed in the sense of compacts between states and organized communities or their representatives. This is the ordinary signification of those words; the first meaning which is suggested by their use. This is not doubted as to the word "treaty," and scarcely admissible of doubt as to the word "convention," when used in connection with the word "treaty." *United States v. Hunter* (U. S.) 21 Fed. 615, 616.

The term "treaties," in the clause of the Constitution providing that the Constitution and the laws of the United States made in pursuance thereof and all treaties made shall be the supreme law of the land, includes treaties with the Indians, adopted prior to the adoption of the Constitution. *Langford v. Monteith*, 1 Idaho, 612, 616.

A treaty—in Latin, "foedus"—is a compact, made with a view to the public welfare by the superior power, either for perpetuity or for a considerable time. The compacts which have temporary matter for their objects are called "agreements," "conventions," and "pactions." They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all. Treaties receive a successive execution, whose duration equals that of the treaty. Public treaties can only be made by the supreme power, by sovereigns who contract in the name of the state. Thus conventions made between sovereigns affecting their own private affairs, and those between sovereigns and a private person, are not public treaties. The public compacts called "conventions," "articles of agreement," etc., when they are made between sovereigns, differ from treaties only in their object. *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 571, 10 L. Ed. 579, 618 (quoting *Vattel*, §§ 152–154, 218).

A treaty is a written contract between sovereigns. Its terms are agreed on, and it is signed, by plenipotentiaries or commissioners, who are the authorized agents of the contracting powers; but after such agreement and signatures it must be ratified by the governments, and the ratifications constitute the delivery. Up to that time it is inchoate, and may never take effect. *Ex parte Ortiz* (U. S.) 100 Fed. 955, 962.

As between contracting sovereigns, a treaty, when ratified, relates back to the time of signing, as the stipulations it makes have reference to the then existing conditions. *Ex parte Ortiz* (U. S.) 100 Fed. 955, 962.

As a law of the land.

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Edye v. Robertson*, 5 Sup. Ct. 247, 254, 112 U. S. 580, 28 L. Ed. 798 (cited in *Ex parte McCabe* [U. S.] 46 Fed. 363, 12 L. R. A. 589).

In *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 254, 28 L. Ed. 798, the court said: "A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. A treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *La Ninfa* (U. S.) 75 Fed. 513, 518, 21 C. C. A. 434 (citing *Chew Heong v. United States*, 112 U. S. 536, 540, 565, 5 Sup. Ct. 255, 28 L. Ed. 770).

A treaty is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of a private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. *Ex parte McCabe* (U. S.) 46 Fed. 363, 373.

As equivalent to a legislative act.

A treaty is primarily a contract between two or more independent nations. For the infraction of its provisions a remedy must be

sought by the injured party through reclamations upon the other. By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. *Whitney v. Robertson*, 8 Sup. Ct. 456, 458, 124 U. S. 190, 31 L. Ed. 386.

A treaty is in its nature a contract between two nations, and not a legislative act. It does not of itself generally effect the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. This is the view taken of a treaty in Great Britain, but in the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision; but when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the Legislature must execute the contract before it can become a rule of the court. *United States v. Rauscher*, 7 Sup. Ct. 234, 239, 240, 119 U. S. 407, 30 L. Ed. 425; *Same v. Watts* (U. S.) 14 Fed. 180, 131 (citing *Foster v. Neilson*, 27 U. S. [2 Pet.] 253, 7 L. Ed. 415); *In re Ah Lung* (U. S.) 18 Fed. 28, 29; *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702, 26 Am. Rep. 242.

TREBLE COSTS.

"Treble costs," are thrice the amount of single costs. *Crane v. Dod*, 2 N. J. Law (1 Penning.) 340, 342.

Where "treble costs" are allowed, the costs should be taxed and multiplied by three. *Mairs v. Sparks*, 5 N. J. Law (2 Southard) 513, 516.

According to the English practice, double or treble costs are not understood to mean twice or thrice the amount of single costs, but double costs consist of single costs and half the single costs, and treble costs consist of the single costs, half the single costs, and half of that half. But this is not in practice in Pennsylvania. *Welsh v. Anthony*, 16 Pa. (4 Harris) 254, 256.

The English rule of taxation of treble costs is to give single, half single, and quarter single costs. It has not been adopted, and its insolvency with the manifest intention of the Legislature is a decisive objection to it. But the fees of officers are not to be trebled where they are not regularly and usually payable by the defendant. With this exception he is entitled to treble the amount of such costs as he is entitled to charge in his bill. *Shoemaker v. Nesbitt* (Pa.) 2 Rawle, 201, 203.

If a statute authorizes "treble costs," they are to be calculated thus: First, the common costs; second, half the common costs; and then half of the latter. *Van Aulen v. Decker*, 2 N. J. Law (1 Penning.) 108, 112.

Where judgment is rendered for treble costs, it is not necessary to state the first amount of the single costs and then the trebled sum. It is sufficient to state it thus: "\$40 being treble the costs and charges of" plaintiff. *Davidson v. Schooley*, 10 N. J. Law (5 Halst.) 145, 148.

TREBUCKET.

"Trebucket" was a name used to designate the "ducking stool," and it is spoken of by such name in St. 51 Hen. III. It was said by Lord Coke to "signify a stool that falls into a pit of water," whereas the last instrument that was seen in England, as Morgan, the last editor of Jacob's Dictionary, mentions, consisted of a beam or rafter moving on a fulcrum and extending to the center of a large pond, on which end the stool used to be placed. On the other hand, Daines Barrington, a learned antiquarian, in his observations on the statute, says: "It is a machine anciently used in the siege of towns, and the etymology is from the Celtic 'tre'—that is, ville—and our own 'bucket,' and signifies a town bucket." It was an ancient method of punishing minor offenses, such as common scolds, etc., effected by temporarily submerging the offender into water. *James v. Commonwealth* (Pa.) 12 Serg. & R. 220, 227. See, also, *United States v. Royall* (U. S.) 27 Fed. Cas. 907.

TREE.

See "Bee Tree"; "Timber Trees."
As included in term land, see "Land."

The word "tree," without expression, means a standing tree, and an accusation that plaintiff stole "my bee tree" refers to the tree, and not to the bees or honey, and is not actionable per se for slander. *Idol v. Jones*, 13 N. C. 162, 164.

A tree, strictly speaking, is that which is growing or standing in the ground, whether dead or alive. There are dead and live trees, both standing; but, when the trunk is severed from the root and felled to the earth, it is no longer, properly speaking, a tree. It becomes timber or lumber, according to the use to which it can be applied. *United States v. Schuler* (U. S.) 27 Fed. Cas. 978, 982.

"A tree is a woody plant, whose branches spring from and are supported upon a trunk or body, and the tree may be young or old, small or great," and cannot be designated as a "shrub" or "undergrowth";

for a shrub is a low, small plant, whose branches grow directly from the earth, without any supporting trunk or stem, while "undergrowth" is a term applicable to plants growing under or below other greater plants. *Clay v. Postal Tel. Cable Co.*, 11 South. 658, 859, 70 Miss. 406.

Orchard trees.

The word "trees," generally speaking, means wood suitable to building, and does not include orchard trees. *Bullen v. Denning*, 5 Barn. & C. 842.

A grant of "timber trees and other trees" will not pass fruit trees, nor will a grant of "all timber trees, but not the annual fruit thereof," pass apple trees. *Bullen v. Denning*, 5 Barn. & C. 842.

A deed conveying an estate, excepting all "trees, woods, coppice, wood grounds, of what kind soever," does not convey apple trees. *Wynham v. Way*, 4 Taunt. 316, 318.

TRESPASS.

See "Forcible Trespass"; "Joint Trespass"; "Malicious Trespass."

Willful trespass, see "Willful—Willfully."

"Trespass" signifies a passing over or beyond our right; i. e., a transgression or wrongful act. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 125, 70 Conn. 159, 43 L. R. A. 305.

The term "trespass," in its most extensive signification, includes every description of wrong. *Gunn v. Fellows*, 41 Hun. 257, 259 (citing 1 Chit. Pl. 166).

"Trespass" is any transgression against the laws of nature or society, whether it relates to person or property. *Grunson v. State*, 89 Ind. 533, 536, 47 Am. Rep. 178.

"Trespass," even in law, has a broad and comprehensive meaning. It is defined by Blackstone as follows: "Trespass in the most extensive sense signifies any transgression or offense against the law of nature or society, or of the country in which we live, whether it relates to a man's person or his property." In its more restricted sense it is defined as an unlawful act committed with violence, or injury committed with violence to the person of the other. *Dave v. Morgan's L. & T. R. & S. S. Co.*, 14 South. 911, 46 La. Ann. 273.

"Trespass" is any misfeasance or act of one man whereby another is injuriously treated or damaged; any unlawful acts committed with violence, actual or implied, to the person, property, or rights of another; any unauthorized entry on the realty of another to the damage thereof. 1 Bouv. Law Dict 747. While different authors use dif-

ferent terms in defining the word, they all give to it the same meaning. But the definition given by Mr. Bouvier is probably as clear as any that can be found. *Casey v. Mason*, 59 Pac. 252, 253, 8 Okl. 635.

"Trespass" is defined as any misfeasance or act of one man whereby another is injuriously treated or damaged. Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another, or any unauthorized entry upon the realty of another, to the damage thereof, is a trespass. *Louisville & N. R. Co. v. McCombs (Ky.)* 55 S. W. 921, 922.

The word "trespass," as used in the statute of limitations, is used, not in technical sense, but broadly, and means any act violative of the right of another, through which injury is done to his estate or property. Mr. Anderson, in his Law Dictionary, in defining the word "trespass," both in its restrictive and enlarged meaning, and in its application to the different common-law actions of that name, says: "In its widest scope trespass on property is any injury to the property. Its synonym in law Latin was 'transgressio,' any infraction of a legal right. In this sense it comprehends, not only forcible wrong, where the damages are direct and immediate, but also acts which are tortious in their consequences." While it is true that in one sense a cause of action against a common carrier for injury to stock in transit may be for the breach of a particular contract, yet, in so far as it seeks a recovery of damages for a violation by the carrier of the duty which it owes to the public, it also sounds in tort, so as to bring an action for the injury within the meaning of the word "trespass" as used in the statute of limitations. *Ft. Worth & D. C. Ry. Co. v. McAnulty*, 26 S. W. 414, 417, 7 Tex. Civ. App. 321.

The word "trespass" embraces only that class of torts which involves a final, unlawful, physical invasion of one's right of person or property, and this classification necessarily includes those acts of one person resulting in injury to another which arise from a mere omission to perform a duty imposed on the party bound to perform by the terms of a contract entered into between them. *Southern Ry. Co. v. Harden*, 28 S. E. 847, 849, 101 Ga. 263.

One who participates in a conspiracy to cheat and defraud another, and in the conversion of his property, commits a "trespass," within Rev. St. 1879, art. 1198, authorizing a defendant to be sued out of the county of his residence when the cause of action is a trespass committed in the county where the suit is brought. *Rotan v. Maedgen*, 59 S. W. 585, 586, 24 Tex. Civ. App. 558.

The word "trespass," in the Criminal Code, providing that in all cases of prosecution for assault and battery or other tres-

pass, where the indictment shall be made on the knowledge of two or more of the grand jury, or on the information of any public officer, or on the information of any other person than he, she, or they against whom it has been committed, has a technical and definite meaning, and is descriptive of offenses of a lower grade only, such as misdemeanors, and not of offenses of deeper dye, such as horse stealing, etc., in which no prosecutor is necessary. *United States v. Flanakin* (U. S.) 25 Fed. Cas. 1105.

"Trespass," as used in St. 1783, c. 42, giving jurisdiction to a justice of the peace of all manner of debts, trespass, and certain other matters, and providing that the issue of the title to real estate shall not be raised in such actions of trespass, is construed not to be limited to a trespass *quare clausum fregit*, but to include all trespasses. *Blood v. Kemp*, 21 Mass. (4 Pick.) 169, 173.

Where the ground of a motion in arrest of judgment was that the action was in trespass, and the declaration purported to be in trespass, but the count was in trespass on the case, the court said: "The term 'trespass,' as here used, may be taken, without doing violence to language, in its most extensive signification, as meaning a wrong done generally, and not as denoting the particular species of action of 'trespass vi et armis,' rather than that of 'trespass on the case.'" *Toledo, W. & W. Ry. Co. v. McLaughlin*, 63 Ill. 389, 391.

Trespass to personal property is a substantial and real interfering with rightful possession. It is an active aggression on a right of property, and involves active, affirmative, and personal interference and participation. *Weller v. Hanaur* (U. S.) 95 Fed. 236, 243.

Every laying on of hands on the person of another, and every blow or push, constitutes a trespass, unless the action can be justified or excused. *Clayton v. Keeler*, 42 N. Y. Supp. 1051, 1053, 18 Misc. Rep. 488.

Blackstone says: "Every unwarrantable entry on one's soil the law entitles a trespass; for every man's land is in the eye of the law inclosed and set apart." *Bileu v. Paisley*, 21 Pac. 934, 935, 18 Or. 47, 4 L. R. A. 840 (quoting 3 Bl. Comm. 209).

"Trespass" is an entry on another's grounds without lawful authority, and doing some damage, however inconsiderable, to his real property. *Hulick v. Scovill*, 9 Ill. (4 Gilman) 159, 170 (citing 3 Chit. Bl. 209).

A trespass on realty in general may be defined to be an injury to or use of the land of another by one who has no right or authority whatever. *Brown v. Solary*, 19 South. 161, 164, 37 Fla. 102.

In the case of *Norvell v. Gray's Lessee*, 31 Tenn. (1 Swan) 96, 101, it was said:

"Trespass is in law every entry upon the soil of another, in the absence of lawful authority, without the owner's license." *Hornsbey v. Davis* (Tenn.) 36 S. W. 159, 164.

Every unauthorized intrusion upon the real property of another is a "trespass," and, whether actual injury is sustained or not by such intrusion, the party whose possession has been interfered with is entitled at least to nominal damages. *McCarthy v. Miller* (Tex.) 57 S. W. 973.

Every wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass, for which the owner may maintain an action for damages; and if the entry be made by animals belonging to the wrongdoer he is responsible for their trespass, and the right of the owner to maintain an action of trespass is not taken away by St. Feb. 4, 1874, giving a remedy by process in rem against the cattle themselves. *Triscony v. Brandenstein*, 6 Pac. 384, 385, 66 Cal. 514.

A forcible entry on the land of another with strong hand and against the will of the owner constitutes a trespass. *Westcott v. Arbuckle*, 12 Ill. App. (12 Bradw.) 577, 580.

"What is a trespass? Every entry on the land of another without lawful authority is a trespass, though it be only trodden, and whether the land be inclosed or not, and no matter whether any damage be done or not. The gist of the action is the wrongful entry. Whatever is done after that is but an aggravation of damages. If a man's land be not inclosed, the law encircles it with an imaginary inclosure, to pass which is to break and enter. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property." *Agnew v. Jones*, 23 South. 25, 26, 74 Miss. 347.

To disturb a peaceable possession by force is a "trespass," irrespective of ownership. *Newcombe v. Irwin*, 22 N. W. 66, 55 Mich. 620.

"Trespass," in the ordinary sense, is an unlawful entry made by a person upon the land of another; but it is defined by the Indiana statute to be either an unlawful entry, having been previously forbidden to another, or when one, being lawfully upon the land, is notified to depart, but refuses or neglects so to do. *Manning v. State*, 6 Ind. App. 259, 262, 33 N. E. 253.

The common-law rule that every man's land is inclosed either by a material fence or by an invisible boundary, and that every unwarrantable entry thereon is a trespass, is in force in all places where the right of private domain over things real is recognized. *Bileu v. Paisley*, 21 Pac. 934, 935, 18 Or. 47, 4 L. R. A. 840.

Any act of the landlord, transitory and fleeting in character, and not performed with intent to oust the tenant, must be regarded as a "trespass," for which damages will lie, and not as an eviction. As was said by the court in *Avery v. Dougherty*, 102 Ind. 447, 2 N. E. 125, 52 Am. Rep. 680: "It is quite well settled that it is not every entry of the landlord, though wrongful, that constitutes a breach of covenant. A landlord may be a trespasser, without breaking the covenant." A late author says: "Trespass embraces every unlawful entry upon the land of another. While such act in law constitutes trespass, it does not follow that it amounts to an eviction, which is something of a grave and permanent character done by the landlord with the intention to deprive the tenant of the enjoyment of the demised premises." *Talbott v. English*, 59 N. E. 857, 860, 156 Ind. 299 (citing *McAdam*, Landl. & T. § 418).

As requiring force.

Trespass is defined to be an unlawful act committed with violence *vi et armis*. *St. Julien v. Morgan's L. & T. R. & S. S. Co.*, 3 South. 280, 39 La. Am. 1063.

Under a statute providing that in all cases where any corporation shall commit trespass it shall be liable to be sued in the parish where such damage is done or trespass committed, it is held that the word "trespass" is employed in its broadest sense, so as to comprehend a variety of wrongs having a common element of the use of force, whether direct or indirect, and that a wrong not having any element of force is not a trespass. *Caldwell v. Vicksburg, S. & P. R. Co.*, 5 South. 17, 40 La. Ann. 753.

"Trespass" is an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another. It means a hurtful use of violence, which is wrongful. It excludes all varieties of wrongs in which force can neither be perceived nor implied, such as negligence. *Castille v. Cafery Central Refinery & R. Co.*, 19 South. 332, 333, 48 La. Ann. 322.

"Trespass" signifies going beyond what is right. Trespasses may be committed either with or without actual force, and the remedy for trespasses committed without force is an action of trespass on the case. Other trespasses are accompanied with force, either actual or implied. If a trespass accompanied with actual force has been injurious to the property, the proper method of proceeding against the wrongdoer is by indictment or information. If a trespass accompanied with actual force has only been injurious to one or a few persons, the wrongdoer may in some cases be proceeded against by indictment, although the injury was done only to one or a few persons; yet, as every trespass accompanied with actual force

amounts to a breach of the peace, it is an offense against the public. *Ft. Dearborn Lodge, I. O. O. F., v. Klein*, 3 N. E. 272, 277, 115 Ill. 177, 56 Am. Rep. 133.

"Trespass" is a direct and forcible invasion of one's property, producing a direct and immediate result, and consisting usually of a single act. *Durfee v. Granite Mountain Min. Co.*, 33 Pac. 3, 4, 13 Mont. 181.

Trespass in its principal signification embraces every infraction of a legal right. In this sense it comprehends, not only forcible wrongs, where the damages are direct and immediate, but also the consequences of which made them tortious. *Cooper v. Shore Electric Co.*, 44 Atl. 633, 634, 63 N. J. Law, 558.

Where a petition alleged that plaintiff's wife was *enciente*, and that, knowing that fact and that excitement was likely to injure a woman in that condition, plaintiff's landlord violently assaulted two negroes on the tenant's premises, and in his wife's presence, whereby she sustained a fright which eventually produced a miscarriage and otherwise injured her health, it was held the defendant landlord's action constituted a trespass, within the meaning of Rev. St. art. 1198, declaring that no inhabitant of the state shall be sued out of the county of his domicile, except for some crime or offense or trespass for which a civil action lies, in which case he may be sued in the county where it was committed or where defendant is domiciled. In this case the court says: "Trespass, in its widest signification, means any violation of law. In its more restricted sense, it signifies an injury intentionally inflicted by force, either upon the person or property of another. But it still has a signification in law much more narrow than the first, and more enlarged than the second, meaning given, and embraces all cases where injury is done to the person or to property, and is the indirect result of wrongful force. *Abb. Law Dict. 'Trespass.'* In this last sense the word would include injuries to persons or property which are the result of the negligence of the wrongdoer, and it seems to us more in consonance with the purpose and spirit of the exception to hold that it was in this sense that it intended that the word should be understood. We presume the exception was made in the interest of the injured party, and not of the wrongdoer; and we see no good reason why a distinction should be made between an injury resulting from intentional violence and one resulting from negligence. It occurs to us the consideration which induced the exception was that one who had been injured in his person or his property by the willful or negligent conduct of another should not be driven to a distant forum to get a redress of his wrongs. In the case of *Ten Eyck v.*

Runk, 81 N. J. Law (2 Vroom) 428, the Supreme Court of New Jersey construed the word 'trespass,' as used in a statute of that state, as descriptive of a class of actions, and held that it was not used in its most restricted sense, but applied, also, to all actions of trespass on the case. See, also, Cook v. Hertman, 2 White & W. Civ. Cas. Ct. App. 770. If, as we think, the word 'trespass,' in our statute, was intended to embrace, not only actions of trespass proper, as known to the common law, but also actions of trespass on the case, it is clear that the action in this case was properly brought in Freestone county, and that the court had jurisdiction over the person of the defendant." Hill v. Kimball, 13 S. W. 59, 60, 76 Tex. 210, 7 L. R. A. 618.

As an intentional act.

"Trespass," within the meaning of the statute relating to venue in civil cases, is any intentional wrong or injury to the person or property of another. London v. Miller, 47 S. W. 734, 737, 19 Tex. Civ. App. 446.

The word "trespass" is not confined to the restricted sense of an injury intentionally inflicted by force, but will embrace a tort negligently committed. Rotan v. Maedgen, 59 S. W. 585, 586, 24 Tex. Civ. App. 558 (citing Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618).

The word "trespass," as used in Rev. St. art. 1198, subd. 8, providing that where the foundation of the proceeding is some crime, offense, or trespass in which a civil action for damages will lie, etc., does not include an action for injury which resulted from a mere omission to do a duty. Ricker v. Shoemaker, 16 S. W. 645, 81 Tex. 22.

To constitute "trespass," within Rev. St. art. 1198, permitting an action to be brought in the county where the trespass was committed, something more than mere negligence must be shown. The act must be committed willfully, or the injury inflicted intentionally, though the intent to injure may be presumed from the inflicting of the injury by a wrongful "act committed," as contradistinguished from an act carelessly done, or omitted to be done. The act committed must be illegal, though it need not amount to a crime or an offense; nor need the intent to injure be directed toward the plaintiff. Connor v. Saunders, 17 S. W. 236, 237, 81 Tex. 633.

A tort resulting from an act committed without any intention of injuring the plaintiff, and which, through the negligence of the defendant, resulted in an injury to the former, constitutes a trespass, within Rev. St. art. 11, § 94, subd. 9, providing that no person shall be sued out of the county where

he resides, except where the foundation of the suit is some crime, offense, or trespass for which a civil action in damages may lie. Wettermark v. Campbell, 56 S. W. 331, 333, 93 Tex. 517.

As either a joint or several act.

A trespass is at law regarded as the joint and several acts of those committing it, and the injured person has his remedy against all or any of them, and if he has sued them all he may dismiss his suit as to any one or more of them, and proceed against the others. Gusdorff v. Duncan, 50 Atl. 574, 576, 94 Md. 160.

Continual acts of ownership.

A "trespass," in the ordinary sense, is a mere fugitive and temporary intrusion on another's rights; and the term does not ordinarily extend to the exercise of acts of ownership which are continuous. Southern Pac. R. Co. v. City of Oakland (U. S.) 58 Fed. 50, 52.

Encroaching wall.

"Trespass" is defined to be an unauthorized entry upon the realty of another, to the damage thereof, and where plaintiff was in actual possession of his property including the land and the building erected thereon, if the building of an adjoining landowner encroached upon plaintiff's land, so as to injure his property, the one maintaining the encroaching wall was guilty of trespass. Hofferberth v. Myers, 59 N. Y. Supp. 88, 92, 42 App. Div. 183.

Intrusion distinguished.

"Trespass" is an entering on another's land without lawful authority and doing some damage, however inconsiderable, to his real property; while "intrusion" is one of the modes of ouster of the freehold, and is defined in 3 Chit. Bl. 169, as an entry by a stranger after a particular estate in freehold is determined before him in reversion or remainder, as when a tenant for life died seised of certain lands and tenements, and a stranger cometh thereon after such death of the tenant, and before any entry of him in reversion or remainder. This distinction between intrusion and trespass does not exist under the statutes of Illinois, and the only distinction between them, apparently, is that intrusion implies an unlawful possession of land, while trespass may amount to a mere entry upon lands without retaining possession, but doing some damage. Hullick v. Scovil, 9 Ill. (4 Gilman) 159, 170.

Petit larceny.

Petit larceny is a trespass, within Rev. St. 1835, p. 451, concerning practice and proceedings in criminal cases, and providing that no indictment for any trespass against

the person or property of another not amounting to felony shall be preferred unless the name of the prosecutor be inserted therein. *State v. Hurt*, 7 Mo. 321.

Seizure as prize.

A seizure as prize is no trespass, though it may be wrongful. The authority and intention with which it is done deprive the act of the character that would otherwise be impressed upon it. The tort is merged in the capture as prize. *Juando v. Taylor* (U. S.) 13 Fed. Cas. 1179, 1187.

Tort synonymous.

The word "trespass," as used in Act March 17, 1885, providing that executors and administrators may have an action for any "trespass" done to the person or property of their testator or intestate, is synonymous with "tort." The description "torts to the person" and "torts to the property" is sufficiently comprehensive to embrace every possible injury that does not arise under contract. *Noice v. Brown*, 39 N. J. Law (10 Vroom) 569, 571.

Rev. St. p. 396, provides that, if any testator or intestate shall in his lifetime have committed any trespass on the person or property of another, such person or his executors may maintain an action against the executors or administrators of the intestate. The word "trespass," so used, signifies a tort or wrong, which is one of its meanings. The language of the act is comprehensive enough for this purpose, and it is hardly premissible to impute a lesser design in the Legislature. *Tichenor v. Hayes*, 41 N. J. Law (12 Vroom) 193, 198, 32 Am. Rep. 186.

Trover distinguished.

See "Trover."

Unlawful taking of water.

A taking by a water company of water in an unlawful manner is a trespass, as much as the taking of land. *Lord v. Meadville Water Co.*, 135 Pa. 122, 131, 19 Atl. 1007, 1008, 8 L. R. A. 202, 20 Am. St. Rep. 864.

Waste distinguished.

"Waste" and "trespass" are easily distinguishable. Briefly stated, "waste" is the permanent or lasting injury to the estate by one who has not an absolute or unqualified title thereto. "Trespass" is an injury to the estate or the use thereof by one who is a stranger to the title. *Price v. Ward*, 58 Pac. 849, 25 Nev. 203, 46 L. R. A. 459.

Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between "waste" and "trespass." *Williamson v. Jones*, 27 S. E. 411,

413, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891.

TRESPASS (Action of).

An action in trespass is that which is instituted for the recovery of damages for a wrong committed against the plaintiff with immediate force. *St. Julian v. Morgan's L. & T. R. & S. S. Co.*, 3 South. 230, 231, 39 La. Ann. 1063.

The words "actions of trespass," in Rev. Code, § 2660, permitting such actions to be triable at the first term after a certain date, etc., was used in its largest signification, as embracing as well the action on the case as the technical action of trespass *vi et armis*. *Kelly v. Moore*, 51 Ala. 364, 366.

The action of trespass, both as to real and personal property, is a possessory action. A party in possession is *prima facie* the owner, and that possession will entitle him to recover to the extent of an injury done, unless defendant shows something in mitigation of the damages. *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525, 538.

Rev. St. § 3202, requiring actions for trespass to be commenced within two years after the cause of action shall have accrued, includes an action for seizure under an attachment wrongfully and maliciously sued out; for it is evident that the actions of trespass here spoken of do not mean such actions as are technically so known, for in this state there is no such distinction or form of action as is known at the common law. The word "trespass," as here used, is used, not in a technical sense, but broadly, and means any act violative of the right of another, though the injury is done to his estate or property. *Bear Bros. & Hirsch v. Marx & Kempner*, 63 Tex. 298, 301.

In *Leame v. Bray*, 3 East, 593, *Le Blanc, J.*, says that the distinction between "trespass" and "case," as gathered from all the authorities, is that where the injury is immediate on the act done trespass lies, but where it is not immediate, but consequential, then the remedy is in case. *Percival v. Hickey* (N. Y.) 18 Johns. 257, 285, 9 Am. Dec. 210.

"Trespass" is the proper remedy for a tort which is committed with force and intentionally, and the immediate consequence of which is injury; but if the injury proceeds from mere negligence, or is not the immediate consequence of the tort, the appropriate remedy is "case"; and hence an action against a sheriff for damages for failure to permit plaintiff to obtain bail is in case. *Taylor v. Smith*, 16 South. 629, 631, 104 Ala. 537.

In actions in the nature of trespass or case, for misfeasance, the plaintiff recovers

only the damages which he has suffered by reason of the wrongful acts of the defendant; but in actions in the nature of trover the general rule for damages is the value of the property at the time of the conversion, diminished, when the property has been returned and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident, or by act of God. Another distinction is that a judgment for a breach of contract or injury to property, though followed by payment, does not transfer title to the subject-matter involved, while a judgment in trover for conversion will, after payment, effect a complete change of ownership by operation of law. *May v. Georger*, 47 N. Y. Supp. 1057, 1060, 21 Misc. Rep. 622.

TRESPASS DE BONIS ASPORTATIS.

"Trespass de bonis asportatis" is the name of an action at common law, the foundation of which was the unlawful taking or carrying from lands of another of wood, timber, etc., thereon. *Loewenberg v. Rosenthal*, 22 Pac. 601, 608, 18 Or. 178.

To maintain trespass de bonis asportatis it has been frequently decided that it is not necessary to prove actual, forcible dispossession of the property, but that evidence of any unlawful interference with, or exercise of ownership over, property, to the exclusion of the owner, would sustain the action. *Gibbs v. Chase*, 10 Mass. 125, 128; *Miller v. Baker*, 42 Mass. (1 Metc.) 27; *Phillips v. Hall*, 8 Wend. 610, 24 Am. Dec. 108. Nor is it necessary to prove that the act was done with a wrongful intent. It is sufficient if it was without a justifiable cause or purpose, though it was done accidentally or by mistake. *Dexter v. Cole*, 6 Wis. 319, 321, 70 Am. Dec. 465.

TRESPASS ON THE CASE.

The action of "trespass on the case" is defined in general terms to be an action to recover damages for wrongs not committed with force, actual or implied, or, having been occasioned by force, when the injury is consequential; that is, where the injury to the plaintiff is the consequence or the result of an act of the defendant. *Christian v. Mills* (Pa.) 2 Walk. 130, 131.

Distinguishable from trespass vi et armis, was "trespass on the case," which was applicable to those injuries which were done without force directly applied. *Munal v. Brown* (U. S.) 70 Fed. 967, 968.

Trespass on the case signifies a form of action designed to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 127, 70 Conn. 159, 43 L. R. A. 305.

The action of trespass on the case, which warrants an arrest under Pub. St. c. 206, § 9, is an action ex delicto and in tort, and not assumpsit. *Malone v. Ryan*, 14 R. I. 614, 618.

Trespass on the case in its most comprehensive signification includes assumpsit, as well as an action in form ex delicto. *Albert's Ex'x v. Blue*, 49 Ky. (10 B. Mon.) 92.

"Trespass on the case" is generally used as comprehending three classes of actions—case, trover and conversion, and assumpsit. *Robinson v. Welty*, 22 S. E. 73, 75, 40 W. Va. 385.

An action in which the declaration is in form ex delicto and embraces counts upon a false warranty and upon a false representation respecting a horse is a trespass on the case, within the meaning of Gen. St. tit. 1, c. 12, § 152, providing that in all actions of trespass and trespass on the case tried in the county or superior court, if the damages found by a verdict of the jury or otherwise shall not exceed \$35, the plaintiff shall recover no more costs than damages, etc. *Humiston v. Smith*, 22 Conn. 19, 23.

TRESPASS QUARE CLAUSUM.

As civil case, see "Civil Action—Case—Suit, etc."

The issues in "trespass quare clausum" and in real actions are vitally distinct. In trespass quare clausum it is rightful possession. The action lies for an injury to possession. It is called a possessory action. *Lawry v. Lawry*, 88 Me. 482, 34 Atl. 273. The gist of the action is the breaking and entering; that is, the invasion of a rightful possession. *Hunnewell v. Hobart*, 42 Me. 565. As the law writers say: "If a man's land is not surrounded by an actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. It is a violation of the right of possession." To sustain trespass quare clausum, proof of possession is essential. *Kimball v. Hilton*, 42 Atl. 394, 396, 92 Me. 214.

"Trespass quare clausum" being a possessory action, it is necessary to show possession in the plaintiff and the injury committed. The exception to the rule is where it may be maintained by the owner of land for an injury to the freehold, when it is in the occupation of a tenant at will. A remainderman who is not entitled to possession cannot maintain such action. *Lawry v. Lawry*, 34 Atl. 273, 88 Me. 482.

TRESPASS TO TRY TITLE.

An action of trespass to try title, upon whatever character of title it may be based, as well as the nature and character of judgment to be rendered, is essentially legal. *New York & T. Land Co. v. Hyland*, 28 S. W. 206, 211, 8 Tex. Civ. App. 601.

TRESPASS VI ET ARMIS.

The action of "trespass vi et armis" is the action for an injury which is the immediate result of an unlawful act. *Legaux v. Feasor* (Pa.) 1 Yeates, 586, 587.

One kind of action for trespass was "trespass vi et armis," which was for an injury committed by direct or immediate force or violence against the plaintiff or his property. *Munal v. Brown* (U. S.) 70 Fed. 967, 968.

An action for "trespass vi et armis" is the remedy for injuries resulting as the immediate consequence of a wrongful act, and is distinguished from "case," in that the latter is the proper action where the injury results by consequence of and collaterally from the wrongful act. *Taylor v. Rainbow* (Va.) 2 Hen. & M. 423, 438.

TRESPASSER.

"A trespasser" is defined to be one who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. *Little v. State*, 8 South. 82, 83, 89 Ala. 99.

A person not sui juris cannot be a "trespasser," in the legal signification of the word. *Barre v. Reading City Pass. Ry.*, 26 Atl. 99, 100, 155 Pa. 170.

A trespasser is not an outlaw, and it is within bounds to state that it is actionable to willfully injure such a one. *Brooks v. Pittsburgh, O., C. & St. L. Ry. Co.*, 62 N. E. 694, 696, 158 Ind. 62.

A trespasser is a wrongdoer, and it is a general principle of jurisprudence that the court will not aid a wrongdoer. The fact that the trespasser is a wrongdoer does not, however, justify malicious, wanton, or willful maltreatment of him, and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of willfulness or wantonness. *Smalley v. Southern Ry. Co.*, 35 S. E. 489, 492, 57 S. C. 243 (citing 3 Elliott, R. R. § 1263).

A tenant who has failed to accept the terms demanded, and holds over after the expiration of the lease, may be treated by the landlord as a trespasser. *Dietrich v. Ely* (U. S.) 63 Fed. 413, 11 C. C. A. 266.

Persons who designedly enter railroad cars, not provided with either a ticket, pass,

or money, and with the improper intent to ride thereupon, when not authorized either by law or the regulations of the company, may be justly treated as trespassers. *Texas & P. R. Co. v. Casey*, 52 Tex. 112, 123.

A tenant at will is not a trespasser. *Bray v. McShane*, 13 N. J. Law (1 J. S. Green) 35, 38.

TRESPASSER AB INITIO.

There is some confusion of the cases touching the proper application of the rule that a subsequent abuse of an authority given by the law makes the abuser a trespasser ab initio. In *Ellis v. Cleveland*, 54 Vt. 437, it is said that, if an officer to whom returnable process is directed would justify under it, he must show its return, else he is a trespasser ab initio, for he is commanded to return the writ, and he shall not be protected by it unless he shows that he has paid due and full obedience to its command. See, also, *Briggs v. Mason*, 31 Vt. 433; *Munroe v. Merrill*, 72 Mass. (6 Gray) 236, 238; *Williams v. Babbitt*, 81 Mass. (14 Gray) 141, 74 Am. Dec. 670; *Russ v. Butterfield*, 60 Mass. (6 Cush.) 242. In *Shorland v. Govett*, 5 Barn. & C. 485, Bayley, J., says: "When it is said that a sheriff is made a trespasser ab initio by the neglect to return a writ, the expression is inaccurate. There, for want of the return, no complete justification was ever shown. The distinction is this: Where there are facts alleged on the record making out a good defense, but something added in the replication destroys that defense, the party is made a trespasser ab initio. But, if the sheriff seizes goods under a writ, it is his duty to make a return. He never has a justification unless he discharges that duty." And *Holroyd, J.*, said: "Instead of saying that the want of the return made the sheriff a trespasser ab initio, it would be more correct to say that the presence of the return was necessary to make his act lawful ab initio." But, whatever be the correct mode of reasoning, all the authorities agree that the failure to return the process is fatal to the justification, and in such case it is the same thing as if the officer had no process at all. *Wright v. Marvin*, 9 Atl. 601, 603, 59 Vt. 437.

It is held that, if one acting under authority of a warrant omits to do the act which the warrant justified after entering upon the premises, he thereby becomes a trespasser ab initio. *Boston & M. R. R. v. Small*, 27 Atl. 349, 350, 85 Me. 462, 35 Am. St. Rep. 379.

TRESPASSING STOCK.

As used in the chapter relating to domestic animals, the term "trespassing stock or animals" means those unlawfully upon

land, or running at large contrary to law or police regulations. Code Iowa 1897, § 2311.

TRIABLE.

The statement that a cause is triable in a certain court means that the court has jurisdiction thereof. *Jackson v. State*, 15 South. 250, 251, 33 Fla. 620.

The phrase "county where the action is triable," as used in the Code in reference to the place of trial, means nothing more or less than the place of trial. *Chubbuck v. Morrison* (N. Y.) 6 How. Prac. 367, 368.

The words "or triable therein," as used in Rev. St. § 3477, providing that every court of record shall have power to punish any neglect or violation of duty or any misconduct by which the rights or remedies of the party in an action or proceeding depending in such court or triable therein may be defeated, impeded, or prejudiced, etc., are clearly intended to cover cases not covered by the words "depending in such court," and must be interpreted, not as limiting, but extending, the statute to cases not covered by the word "pending." *Heymann v. Cunningham*, 8 N. W. 401, 403, 51 Wis. 506.

TRIAL

See "During Trial"; "Fair Trial"; "Final Hearing or Trial"; "Former Trial"; "Judicial Trial"; "Jury Trial"; "New Trial"; "On the Trial"; "On Trial"; "Public Trial"; "Set for Trial."

Appeal as part of, see "Appeal."

Arising on the trial, see "Arise—Arising."

As proceeding, see "Proceeding."

Before trial, see "Before."

Hearing distinguished, see "Hearing"; "Final Hearing or Trial."

A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. *Finn v. Spagnoli*, 7 Pac. 746, 67 Cal. 330 (citing *Tregambo v. Comanche Mill. & Min. Co.*, 57 Cal. 501); *United States v. Curtis* (U. S.) 25 Fed. Cas. 726, 727; *Lewis v. Smythe* (U. S.) 15 Fed. Cas. 499, 500; *Crossland v. Admire*, 24 S. W. 154, 118 Mo. 87; *Gibbs v. Gibbs*, 73 Pac. 641, 643, 26 Utah, 382; *In re Chauncey* (N. Y.) 32 Hun, 429, 431; *Darden v. Lines*, 2 Fla. 569, 673; *Anderson v. Pennie*, 82 Cal. 265, 267; *Tregambo v. Comanche Mill. & Min. Co.*, 57 Cal. 501, 505; *Second Nat. Bank v. First Nat. Bank*, 76 N. W. 504, 507, 8 N. D. 50.

A trial is examination of a cause before a judge who has jurisdiction of it according to the laws of the land. *Bullard v. Kuhl*, 54

Wis. 544, 545, 11 N. W. 801 (citing *Jacob's Law Dict.* tit. "Trial").

A trial is a judicial examination of the issues. *Stewart v. Stewart*, 62 N. E. 1023, 1024, 28 Ind. App. 378; *Miller v. King*, 52 N. Y. Supp. 1041, 1042, 32 App. Div. 349; *Sweet v. Chapman* (N. Y.) 53 How. Prac. 253, 254; *Miller v. King*, 32 App. Div. 349, 351, 62 N. Y. Supp. 1041.

A trial is a judicial examination of the issues in a case. *Tingley v. Dolby*, 14 N. W. 146, 148, 13 Neb. 371.

A trial is the judicial examination of the issues between the parties. *North Hudson Building & Loan Ass'n v. Ohlids*, 82 Wis. 460, 486, 52 N. W. 600, 33 Am. St. Rep. 57; *Third Nat. Bank v. McKinstry* (N. Y.) 2 Hun, 443, 444.

A trial is the judicial examination of the issues in an action. *Spencer v. Thistle*, 13 Neb. 227, 229, 13 N. W. 214; *Trustees of Swan Tp. v. McClannahan*, 42 N. E. 34, 36, 53 Ohio St. 403.

A trial is the examination of the matters of fact in issue. *State v. Starling* (S. C.) 15 Rich. Law, 120, 131.

"Trial" is used to describe the process of determining the issues in an action at law. *Doughty v. West, Bradley & Carey Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972.

A trial is the judicial examination of the issues between the parties, whether they be of law or fact. *State v. Brown*, 63 Mo. 439, 444; *Brookover v. Esterly*, 12 Kan. 149, 152; *State v. Clifton*, 57 Kan. 448, 449, 46 Pac. 715; *J. F. Hart Lumber Co. v. Rucker*, 50 Pac. 484, 485, 17 Wash. 600; *Pach v. Gilbert*, 9 N. Y. Supp. 546, 547; *Mora v. Great Western Ins. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 622, 623; *Ward v. Davis* (N. Y.) 6 How. Prac. 274; *Meetze v. Charlotte, C. & A. R. Co.*, 23 S. C. 1, 13; *Monticello Nat. Bank v. Bryant*, 76 Ky. (13 Bush) 419, 423; *Vertrees' Adm'r v. Newport News & M. V. R. Co.*, 95 Ky. 314, 317, 25 S. W. 1, 2; *Ann. Codes & St. Or.* 1901, § 118; *Rev. Codes N. D.* 1899, § 5419; *Code Civ. Proc. S. D.* 1903, § 243; *Ann. St. Ind. T.* 1899, § 3309; *Cobbey's Ann. St. Neb.* 1903, § 1262; *Gen. St. Minn.* 1894, § 5358; *Rev. St. Mo.* 1899, § 690; *Bates' Ann. St. Ohio* 1904, § 5127; *Clark's Code N. C.* 1900, § 397; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4965; *Code Civ. Proc. S. C.* 1902, § 273; *Rev. St. Wyo.* 1899, § 3601; *Rev. St. Wis.* 1898, § 2842; *Rev. St. Okl.* 1903, § 4452.

The words "the trial," as used in the statute providing that objections to depositions must be filed before the commencement of the trial, meant the trial in which it is sought to use the depositions, and not a prior trial of the cause in another court.

Collier v. Gavin, 95 N. W. 842, 844, 1 Neb. (Unof.) 712.

Blackstone defines a "trial" to be "the examination of the matter of fact in issue in a cause." 3 Bl. Comm. 380. "The decision of the issue of fact is called the trial." Steph. Pl. 77. "By the common law," said Shipman, J., "at the date of the adoption of the Constitution, the trial of all issues of fact must be by jury. By issues of fact are meant questions of fact as distinguished from questions of law, which the result of the pleadings in each case shows to be in dispute or controversy between the parties; and a trial must be by jury in issues of fact for the right of a litigant." *Raymond v. Danbury & N. R. Co.*, 43 Conn. 596, 20 Fed. Cas. 322. The common law required that the parties should form an issue of their pleadings before the case could be tried by jury. It is when the parties by their pleadings come to an issue that there is a case to be tried by a jury. When the matter alleged as the foundation of the cause of action stands confessed, there is no matter of fact in issue for the examination of the jury. It results, then, that there could be no trial by jury, where there is no matter of fact in issue for their examination. *Deane v. Wilamette Bridge Co.*, 29 Pac. 440, 442, 22 Or. 167, 15 L. R. A. 614.

A judicial examination of the issues between the parties arising upon the demurrer to the complaint is a "trial," within the statutory definition. *Pratt v. Lincoln Co.*, 20 N. W. 726, 727, 61 Wis. 62.

A demurrer involves an examination and decision of the issues, and where it is followed by a judgment, which disposes of the case, the argument must be regarded as a trial. *Small v. Ludlow* (N. Y.) 1 Hilt. 307, 308.

The submission of a case on demurrer involves the trial of issues of law, and constitutes a trial, within the meaning of a letter from a railroad to an attorney, inclosing passes, to be full compensation for legal services in a certain county for one year, except for assisting in trials of cases other than stock cases. *Louisville, N. A. & C. Ry. Co. v. Reynolds*, 118 Ind. 170, 173, 20 N. E. 711.

The term "trial" is applied to the determination of issues of fact, not issues of law. Consequently the provision of Code, § 2732, that a party, after trial on matter of abatement, shall not be allowed to answer or reply matter in bar, does not forbid further answer after a plea in abatement has been held bad on demurrer. *Winet v. Berryhill*, 7 N. W. 681, 683, 55 Iowa, 411.

"Trial of an action," as used in Code Civ. Proc. § 829, providing that on the trial of an action a party or person interested

shall not be examined in his own behalf against the administrator of a deceased person, includes the trial of a feigned issue out of chancery as to the amount due on a land contract. *Parks v. Andrews*, 10 N. Y. Supp. 344, 346, 56 Hun, 391.

The taking of proofs before a master in order to dispose of a motion for an injunction pendente lite is not a trial. *Doughty v. West, Bradley & Cary Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972.

A trial is a judicial examination of the issues, whether of law or fact, and not a review of such examination upon an appeal from the decision. The appellate court corrects any errors of the trial court. It has no original jurisdiction to try issues, or jurisdiction to examine them, other than to see that the judgment under review is correct. The only trial, therefore, is at the special term, before the court, with or without a jury. *Eldridge v. Strenz*, 39 N. Y. Super. Ct. (7 Jones & S.) 295, 300.

A trial is a judicial examination of the issues. The granting of an allowance in a suit for divorce is not an examination of the issues involved—is not a trial. *Stewart v. Stewart*, 62 N. E. 1023, 1024, 28 Ind. App. 378.

A hearing before the mayor of New Haven for the removal of a city official is not a "trial," as there are no adverse parties nor a judge. It is rather an investigation by the executive as a necessary precedent to the performance of an official duty. The refusal of the mayor, therefore, to allow representation by counsel at the hearing, is not alone sufficient to invalidate the proceedings. *Avery v. Studley*, 50 Atl. 752, 757, 74 Conn. 272.

A question which arises as to the taxation of the marshal's poundage on money collected on an execution issuing out of a District Court of the United States is not a matter arising at the trial of the cause, so as to give the Supreme Court jurisdiction on a certificate of division from the Circuit Court. *United States Bank v. Green*, 31 U. S. (6 Pet.) 26, 28, 8 L. Ed. 307.

An inquest is a "trial," as the term is used in speaking of proceedings in the cause at circuit, which is but a trial of an issue of fact, where the plaintiff alone introduces testimony. *Haines v. Davis* (N. Y.) 6 How. Prac. 118, 119.

"Trial" as defined, by section 265 of the Code, as a judicial examination of the issues, whether of law or fact, in an action. The presentation and determination of a motion for a new trial was not a trial within such definition, but a hearing. *McDermott v. Halleck*, 69 Pac. 335, 336, 65 Kan. 403.

It cannot be claimed that there was no trial on an issue of fact because the court,

after the evidence was in, directed the jury to find for the defendant. *Fisher v. Nubian Iron Enamel Co.*, 45 N. E. 249, 250, 163 Ill. 387.

Where, in an action on two causes of action, separate verdicts were rendered, one in favor of defendant and the other against him, and the latter verdict was set aside and a new trial was granted as to such cause of action, the whole cause must be retried. The simple entry of judgment on the other verdict would not be a trial. A trial in the general sense and meaning of the law, which authorizes the Supreme Court by mandamus to require the district court to try a cause, embraces not only the rendition of judgment, but includes a hearing of some sort agreeably to the principles and usages of law, and embraces presenting the issues by pleading and a hearing in a forum with jurisdiction. *Schintz v. Morris*, 35 S. W. 516, 520, 13 Tex. Civ. App. 580.

The word "trial," as used in Civ. Code, § 5884, declaring that all applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had, and when the term continues longer than 30 days the application shall be filed within 30 days from the trial, etc., is to be given only its restricted meaning—that is, the sense in which it is used by Sir William Blackstone when he says a trial is the examination of the matter of fact in issue—and is not used in its comprehensive sense, meaning the investigation and decision of a matter in issue between parties before tribunals, including all the steps in the case from the submission to the jury to rendition of judgment. *Castellaw v. Blanchard*, 31 S. E. 801, 803, 106 Ga. 97.

In Code, § 252, "trial" is defined as a judicial examination of the issues between the parties. Such an examination may be had without being followed by a conclusion or verdict, such as when a jury disagrees, or a juror is withdrawn, or the complaint is dismissed. But when the court refuses to examine the issues, and of its own motion sends the case to a referee, it will be a stretch of common sense and law to hold that there had been a trial. *Third Nat. Bank v. McKinstry* (N. Y.) 5 Thomp. & C. 52, 53.

"The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee on written points and arguments after the evidence is closed, are parts of the trial of an issue of fact. Such trial is not completed until finally submitted to the court, referee, or jury." *Mygatt v. Willcox* (N. Y.) 35 How. Prac. 410, 412.

Under Code Civ. Proc. § 632, providing that, on the trial of a question of fact by the court, its decision must be in writing

and filed with the clerk, and section 633, providing that in giving the decision the facts found and the conclusions of law must be separately stated, and judgment entered accordingly, the trial of a cause by the court is not concluded until the decision is filed with the clerk, and when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon. *Connolly v. Ashworth*, 33 Pac. 60, 98 Cal. 205.

As used in Comp. Laws, § 7401, providing that if, before the conclusion of a trial, a juror becomes sick, the court may discharge him and a new juror may be sworn, "and the trial begin anew," the word "trial" is restricted in its significance to the investigation of facts commencing after the jury is sworn and ending with the charge of the court. *State v. Hazledahl*, 52 N. W. 315, 316, 2 N. D. 521, 16 L. R. A. 150.

Where testimony was taken in investigation of an issue of fact by a competent court, and so far as defendant was concerned it would appear that the examination of the witness was exhausted, it was a "trial," within Code Civ. Proc. § 830, enabling resort to be had to the testimony of a deceased witness at a former trial. *Taft v. Little*, 79 N. Y. Supp. 507, 508, 78 App. Div. 74.

A default judgment in an action for the recovery of real estate and damages for its detention is not a "trial"; hence defendant is not entitled to "another trial," as a matter of right, under Code, § 599, which provides that in an action for the recovery of real property the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated and the action shall stand for trial at the next term. *Hall v. Sanders*, 25 Kan. 538, 549.

Until a decision of the court has been entered in the minutes, or reduced to writing by the judge and signed by him, and filed by the clerk, the cause has not been tried. *Hastings v. Hastings*, 31 Cal. 95, 96.

A trial is not a game of skill, in which the object is to catch the judge (or the other side) "out on first base" by an inadvertence or error. *State v. Holder*, 45 S. E. 862, 863, 133 N. C. 709.

In statutes relating to appeal or error.

The word "trial," as used in the statute requiring a bill of exceptions in a criminal case to be presented to the judge at the time of the trial, is not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in a criminal ac-

tion, from the submission of the cause to the jury to the rendition of the judgment. *Jenks v. State*, 39 Ind. 1, 8; *Herron v. State*, 46 N. E. 540, 542, 17 Ind. App. 161 (citing *Sturgeon v. Gray*, 96 Ind. 166); *Hunter v. State*, 101 Ind. 406, 407; *Hotsenpiller v. State*, 43 N. E. 234, 144 Ind. 9. It does not include any proceedings after the rendition of the judgment, and therefore exceptions cannot be taken on the overruling of a motion for a new trial. *Nichols v. State*, 63 N. E. 783, 786, 28 Ind. App. 674.

The word "trial," as used in Code Civ. Proc. § 850, providing that, when a party desires to have exceptions taken at the trial filed in a bill of exceptions, he may within 10 days after the entry of the judgment, etc., means a trial of an issue of law, as well as the trial of an issue of fact. *Redington v. Cornwell*, 27 Pac. 40, 43, 90 Cal. 49.

Pleading is not strictly a part of the trial. Trial does not commence until an issue of fact is joined. An alleged error in overruling a demurrer to a petition is not an error in law occurring at the trial, and therefore cannot be reviewed by the Supreme Court, unless the petition for error is filed within one year from the decision of the judgment. *Mechanics' Sav. Bank v. Harding*, 70 Pac. 655, 656, 65 Kan. 655.

Under *Burns' Rev. St. 1894*, § 1712, providing that a person convicted in a justice's court may appeal to the criminal court within 10 days after trial, no appeal lies from a judgment on conviction of one on a plea of guilty. *Orear v. State*, 53 N. E. 249, 250, 22 Ind. App. 553.

Under a statute providing that in the Supreme Court only errors at law occurring at the trial can be reviewed, it is held that the term "trial" has reference to the trial upon a plea in bar, and does not extend to a motion to quash, or to trial upon a plea in abatement. It commences, at least, when the jury is sworn in, embraces questions as to the admissibility of evidence or refusal to charge, and the charge given, and the like, and ends with the rendition of the verdict. *Columbus, H. V. & T. Ry. Co. v. Thurstin*, 9 N. E. 232, 234, 44 Ohio St. 525.

The term "trial," in *Rev. St. § 7356*, as amended in 1883, providing that in criminal cases in the Supreme Court only errors of law occurring on the trial or appearing in the pleadings or judgment can be reviewed, relates to the trial on the merits upon a plea in bar, and does not extend to a trial on a plea in abatement, or errors occurring on the trial of a plea in abatement, or hearing on motion to quash. The trial, in the sense of the provision, commences at least immediately after the jury is sworn, and embraces questions as to the admissibility of evidence, as to the refusal to charge and the charge given, and the like, and ends with the rendition of

the verdict. *Wagner v. State*, 42 Ohio St. 537, 540.

The word "trial" in its general sense means the investigation and decision of a matter in issue between parties before a competent tribunal. *Jenks v. State*, 39 Ind. 1. Where defendant, on being arraigned, pleaded not guilty, but subsequently consented that the court should find him guilty without hearing any evidence, there was a trial sufficient to authorize an appeal under the statute providing that any defendant against whom any punishment is adjudged may appeal within 10 days after the trial. *State v. Gardner*, 35 N. E. 915, 916, 8 Ind. App. 440.

"A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding." *Rev. St. § 2514*. "Issues arising on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds: First, of law; second, of fact." Section 2515. Under such definitions the action of a court in hearing and determining a motion to discharge an attachment is not in a strictly legal sense a trial, and therefore the action of the court may be reviewed in error, if the entire record, including the final judgment in the cause, is brought up, although a motion for a new trial was not made below. *First Nat. Bank v. Swan*, 23 Pac. 743, 749, 3 Wyo. 356.

The word "trial," as used in *Rev. St. § 7356*, declaring that the Supreme Court can only review errors in law occurring at the trial, includes the impaneling of a jury. *Holmes v. State*, 42 Ohio St. 596, 601.

In statutes relating to costs.

Where no issue is joined on the pleadings, a proceeding to determine the amount of plaintiff's recovery is not a "trial," within Code, § 308, relating to the granting of an extra allowance. *Randolph v. Foster* (N. Y.) 3 E. D. Smith, 643, 649.

Where a plaintiff voluntarily submits to a nonsuit after evidence has been given on both sides, and while defendant's counsel is summing up, a trial has been had entitling defendant to an allowance authorized by Code Civ. Proc. § 308, declaring that, where a trial has been had, the court may in difficult and extraordinary cases make an allowance in addition to the allowances specified by the statutes. *Allaire v. Lee*, 11 N. Y. Super. Ct. (4 Duer) 609.

A trial is defined to be the judicial examination of the issue. An argument takes place prior to a judicial decision of the issues in a case. There had been an argument and decision. Costs were allowable, and properly taxed and paid. They were paid for argument of the appeal. The judgment was affirmed, the costs paid, and, of course, the plaintiff satisfied. But upon defendant's ap-

plication a reargument was ordered. He it was who imposed the labor of a reargument that took place; and the court thereupon reversed the judgment, and ordered a new trial, with costs to abide the event. The court expressly ordered the costs to abide. That, of course, covered statutory costs to the successful party. By subdivision 1 of section 306 of the Code, the costs of an appeal are in the discretion of the court when a new trial is ordered. The discretion was therefore properly exercised by the General Term when it reversed the judgment and ordered a new trial. The plaintiff would have no compensation for the reargument, if this item of costs for a new trial was not allowed. *Miller v. King*, 52 N. Y. Supp. 1041, 1042, 32 App. Div. 349 (citing *Slocum v. Lansing* [N. Y.] 3 Denio, 259, and note; *Day v. Beach* [N. Y.] 1 How. Prac. 236; *Koon v. Thurman* [N. Y.] 2 Hill, 357).

The provision authorizing the successful party to tax a certain sum as costs for the trial contemplates compensation for services rendered in the actual conduct of the trial. Where a cause was placed on a short-cause calendar, and after the trial had proceeded for an hour, without being concluded, was sent back to the general calendar and tried in general course, the successful party was entitled to two trial fees. *Gilroy v. Badger*, 58 N. Y. Supp. 1106, 1107, 28 Misc. Rep. 143.

In a certain sense there is but one "trial" of an action, for a trial that is so infected with error as to be reversed upon appeal is in effect no trial at all. As the result of the appeal both verdict and judgment are set aside, and a new trial is granted, which requires a retrial of the action the same as if it had never been tried. An executor, under Code Civ. Proc. §§ 1822, 1835, 1836, 3243, is entitled to one lawful trial and to exemption from costs, saving the excepted cases, until he has had one lawful trial. *Benjamin v. Ver Nooy*, 61 N. E. 971, 972, 168 N. Y. 578.

In a statute relating to seizure and search of property, providing that the property taken shall be safely kept so long as necessary for the purpose of being produced or used as evidence on the "trial," and that if, on the hearing, it appears that the warrant was issued without probable cause, the complainant may be required to pay the costs, the words "trial" and "hearing" are generally understood as meaning a judicial examination of the issue between the parties, whether of law or of fact. *Glennon v. Britton*, 155 Ill. 232, 243, 40 N. E. 594, 598.

The "trial of the action," in the meaning of the statute providing that in civil actions in justice's court, where defendant tenders plaintiff judgment for a specified amount, plaintiff shall not recover attorney fees or other costs subsequent to such tender, unless he shall recover on the trial of the action a

greater sum than that tendered, applies to a trial in the circuit court on appeal from the justice's court. *Pepper v. O'Dowd*, 89 Wis. 538, 547.

In criminal law.

See, also, "Preliminary Examination."

In a criminal cause the term "trial" does not include the arraignment, or any other merely preparatory proceeding which may be taken prior to the time of administering the requisite oath to the jury. *Hunnel v. State*, 86 Ind. 431, 434; *McCall v. United States*, 46 N. W. 608, 611, 1 Dak. 320; *United States v. Curtis* (U. S.) 25 Fed. Cas. 726, 727; *Commonwealth v. Soderquest*, 68 N. E. 801, 802, 183 Mass. 199; *Byers v. State*, 16 South. 716, 717, 105 Ala. 31.

The word "trial," when used in connection with criminal proceedings, means proceedings in open court after the pleadings are finished and the case is otherwise ready, down to and including the rendition of the verdict. It includes all those steps in the trial during which defendant may be of assistance to his counsel in conducting the proceedings. It does not include the preliminary steps wherein the court is passing upon questions of law and preliminary motions with a view of settling the issues. *State v. Spotted Hawk*, 55 Pac. 1026, 1028, 22 Mont. 33.

The word "trial" means the judicial hearing upon the issues in the cause, for the purpose of determining it, and cannot be applied to a preliminary examination before a magistrate to ascertain if the evidence is such that the accused ought to be put upon trial for the offense charged. *State v. Bergman*, 37 Minn. 407, 408, 34 N. W. 737.

Within the meaning of section 55 of the Criminal Code, providing that if from the trial it appears that defendant is guilty of a public offense other than that charged in the warrant, he shall be held in the custody of the officer and tried for such offense, the term "trial" will be construed as meaning preliminary examination, and not trial in the ordinary sense of the term. *State v. Goetz*, 69 Pac. 187, 189, 65 Kan. 125 (citing *Redmond v. State*, 12 Kan. 172).

The word "trial," as used in Act Feb. 7, 1850, enacting that hereafter, on the trial of any person indicted for trading with a slave, it shall not be necessary for the state to aver, etc., is used in its comprehensive sense, and embraces all the proceedings down to the acquittal or conviction of the party. *Hirschfelder v. State*, 19 Ala. 534, 539.

Code 1892, § 933, provides that "when the trial of any case, civil or criminal, has been commenced and is in progress," and the time for the expiration of the term as fixed by law arrives, the court may proceed with

"such trial or hearing," and bring it to a conclusion in the same manner and with the like effect as if the stated term had not expired. Section 1522 provides that words and phrases are used in statutes in their ordinary meaning, and technical words and phrases in their technical meaning. Held that, as used in section 933, the "trial" of a criminal case commenced, not at the later stage, when jeopardy attaches, but at the instant the court enters on the impaneling of a jury for an investigation of the matters of fact presented by the pleadings. *Lipscomb v. State*, 25 South. 153, 164, 76 Miss. 223.

An "examination" is not a "trial," so that accused is not entitled to have a jury called at the time of his examination. The "holding to bail" upon an examination is not even an accusation. It is merely a finding that, before the defendant is formally accused of the crime, the question of his guilt or innocence ought to be investigated by a competent tribunal, namely, the grand jury. 1 Chit. Cr. Law, 89. It adds nothing to the weight of the complainant's charge. *State v. Gerry*, 38 Atl. 272, 279, 68 N. H. 495, 38 L. R. A. 228.

A demurrer is a trial upon the issues of law, and it is only upon the determination of that trial that an order can be made. Therefore, when the defendant in a prosecution for bribery demurred to the indictment, there was no power in the grand jury, in the absence of an order by the court, to again investigate the same charge or find a second indictment. *People v. Bissert*, 75 N. Y. Supp. 630, 633, 71 App. Div. 118.

The word "trial," as used in Bill of Rights, § 13, securing to an accused the right to a public trial, does not extend to the act of pronouncing of sentence. *Reed v. State*, 46 N. E. 135, 136, 147 Ind. 41.

Same—Attachment of jeopardy.

Jeopardy of life is when one is put upon his trial upon a valid indictment for a capital offense. It may result in his condemnation. Hence he is in jeopardy. But a prisoner is never on his trial unless there is a good indictment, and therefore no judgment can be pronounced on a verdict of conviction if the indictment is not good. From the time the trial commences it is a mere form that cannot result in his condemnation, and if the indictment is not good the prisoner is not in jeopardy. *State v. Ray* (S. C.) Rice, 1, 5, 33 Am. Dec. 90.

"At what particular period in the progress of the arraignment and other formalities usual, and perhaps necessary, preparatory to a trial, the trial may be said to be entered into, or at which it may be said the prisoner is put on his trial, may be a question of some nicety, and it appears to me to be wholly unnecessary to consider it here; for

it must appear evident that a prisoner cannot be put on trial unless he is before a court in every respect competent to try the offense with which he is charged. One of the members of the court indispensably necessary to a trial for a felony is a jury. To constitute a jury, every lawyer knows that 12 lawful men are necessary, and that without this number no jury can exist. Where only 8 have been sworn, although they constitute so many constituent parts, they are not a jury, and therefore are incompetent to pronounce a verdict, and when it is impossible to supply the deficiency, so as to form a complete jury, the trial has not commenced, and those sworn may be discharged, and the prisoner remanded to jail, and tried at another time." *State v. Burket* (S. C.) 2 Mill, Const. 155, 156, 12 Am. Dec. 662.

After the names of 49 jurors had been drawn from the box, which had contained 60, and 8 jurors had been separately sworn, it appeared that 11 of the paper pellets had been clandestinely removed, whereupon the court directed the clerk to prepare 11 pellets in place of those which had been removed, and again put all the pellets in the box, and that the drawing of the jury be commenced *de novo*. The defendant complains that the tendency of that order was to put him twice in jeopardy, and that the court had no power to make it. He was not in jeopardy at the time of making the order. The trial begins when the jury is charged with the defendant, and that is at the moment a full jury is impaneled and sworn. He is not in jeopardy before. Up to that point the court may postpone the trial as lawfully at one stage of the proceedings as another. A man is not in peril from the verdict of a jury until the full number are qualified to hearken unto the evidence and make deliverance. *Alexander v. Commonwealth*, 105 Pa. 1, 9.

Same—Presence of accused.

The absence of a defendant convicted of murder during the motion for a new trial is no ground for reversal, inasmuch as such motion is no part of the trial. *State v. Brown*, 63 Mo. 439, 444.

The provision of the Constitution of North Carolina providing that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by a unanimous verdict of a jury of good and lawful men in open court, defines the trial of an accused, and implies that he shall have the right to be present, but his presence is not required in the Supreme Court considering his case on his appeal. *State v. Overton*, 77 N. C. 485, 486.

The word "trial," as used in St. Okl. § 5147, declaring that, if the indictment is

for felony, the defendant must be personally present at the trial, only means that the defendant shall be present in court from the beginning of the impaneling of the jury until the reception of the verdict, the recording of the same, and the discharge of the jury, and has no reference to a hearing on a motion for a new trial or a hearing on a motion in arrest of judgment. *Ward v. Territory*, 56 Pac. 704, 707, 8 Okl. 12.

In statutes relating to official fees.

The words "trial" and "final hearing" have well-known, definite meanings in the law, and they are used in that well-known sense in the statute authorizing a docket fee of \$20 in a trial before a jury in civil or criminal cases, or before referees, or on a final hearing in equity or admiralty. "Trial" is used to describe the process of determining the issues in an action at law, and "final hearing" the submission of the case for determination thereof upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of. The statute does not authorize a docket fee on a reference to a master in a suit in equity under an interlocutory order of final hearing. *Doughty v. West, Bradley & Cary Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972.

Rev. St. § 24, allowing a specified fee for United States district attorneys for each case tried before a jury, includes cases which are tried before a jury, although there is a new trial and no verdict is rendered. *Weed v. United States* (U. S.) 82 Fed. 414, 418.

The word "trial," as used in Act Feb. 28, 1853, providing for compensation for attorneys, solicitors, and proctors of the United States courts in a trial before a jury in civil and criminal causes, or before a referee, or for a final hearing in equity or admiralty, and specified docket fees, means a trial by jury. *Gordon v. Scott* (Pa.) 3 Pittsb. R. 109, 111, 10 Fed. Cas. 816.

"Trial," within the statute allowing justices of the peace a certain fee for the trial of a cause, is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. *Anderson v. Pennie*, 32 Cal. 265, 268.

Under the statute defining a "trial" as a judicial examination of the issues, whether of law or of fact, in an action, the hearing of a motion to dissolve an attachment is a trial of the issues of law or fact, or both, in an action or cause, within the meaning of the term as used in the statute relating to the fees of justices of the peace. *Gibson v. Sidney*, 69 N. W. 314, 50 Neb. 12.

A day spent in the office in hunting up witnesses is not a day spent in the trial of

a case, within Rev. St. 1898, § 4713, providing that whenever, in a criminal action or proceeding, any attorney shall defend the accused by order of the court on the ground that the accused is destitute, the county or town in which such criminal action or proceeding may arise shall only be liable to pay such attorney such sum as the court shall certify to be reasonable, and which shall in no case exceed \$15 per day for each day actually occupied in such trial or proceeding. *Green Lake County v. Waupaca County*, 89 N. W. 549, 552, 113 Wis. 425.

A trial is an examination before a competent tribunal, according to the laws of the land, of the facts appertaining to the cause, for the purpose of determining such issue; and it is held that the dismissal of a suit is not the trial thereof, within the Code of Criminal Procedure, authorizing the county judge to receive the sum of \$3 for each criminal action tried and finally disposed of before him. *Brackenridge v. State*, 11 S. W. 630, 632, 27 Tex. App. 513, 4 L. R. A. 360.

Mansf. Dig. § 4068, provides that in cases before a justice of the peace, where plaintiff's claim is not founded on a written instrument signed by defendant, and the latter fails to appear, the justice shall hear the allegations and proof of the plaintiff, and render judgment for the amount to which plaintiff is entitled. Held, that the proceeding in such a case is a "trial," within the meaning of section 3259, allowing justices a certain fee "for each trial in a civil case." *Reigler v. Quinn*, 14 S. W. 1103, 1104, 54 Ark. 37.

A "trial" is a judicial examination of the issues between the parties; but, when the court refuses to examine the issues, it would be a stretch of common sense and of law to hold that there had been a trial. Where no jury was ever impaneled, and, on the action coming on for trial, an order was made, on plaintiff's motion, allowing him to discontinue the action on the payment of defendant's costs, there was no trial, within Code, § 3251, subd. 3, providing that a trial fee of \$30 may be taxed "for the trial of an issue of fact." *Studwell v. Baxter* (N. Y.) 83 Hun, 331, 332.

There is no "trial," within Code, § 8804, providing that justices of the peace are entitled to one dollar for the trial of all causes, civil or criminal, for each six hours or fraction thereof, where there is a plea of guilty and judgment thereon, and no evidence is introduced. *Wheeler v. Clinton County*, 60 N. W. 207, 208, 92 Iowa, 44.

Rev. St. c. 116, § 2, provides that a trial justice shall be entitled to a fee of 80 cents for the trial of an issue. Held, that the words "trial of an issue" applied to the main trial of a civil case, and had no reference

to and did not include criminal prosecutions. *Knowlton v. Commissioners of Waldo County*, 8 Atl. 683, 684, 79 Me. 164.

In removal statutes.

"Trial," as used in an act of Congress providing that any suits between citizens of different states instituted in a state court may be removed to a federal court on petition filed at any time before final hearing or trial of a suit, means final trial. "The qualifying adjective 'final' must be taken distributively, and apply as well to the word 'trial' as to the term 'hearing,' and to both alike. The test is whether the hearing or the trial is the final one in the cause. It was intended to permit the removal at any time before a hearing or trial, final in the cause as it stood when the application for the transfer was made. Where a judgment has been set aside and a new trial granted, the trial already had is not a trial within the meaning of the statute, so as to prevent a subsequent application for removal to the federal court." *Home Life Ins. Co. v. Dunn*, 86 U. S. (19 Wall.) 214, 224, 22 L. Ed. 68; *Minnett v. Railway Co.* (U. S.) 17 Fed. Cas. 449, 450; *Fisk v. Henarie* (U. S.) 32 Fed. 417, 425, 427; *Whelam v. New York, L. E. & W. R. Co.* (U. S.) 35 Fed. 849, 858; *Brayley v. Hedges*, 5 N. W. 748, 749, 53 Iowa, 582.

The words "any time before the trial," as used in Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507], providing for the removal of a suit between the citizens of different states, commenced in a state court, into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear that from prejudice or local influence defendant will not be able to obtain justice in such state court, should be construed in their ordinary meaning; that is, at any time before the first trial thereof and up to the time of such first trial, whether that occur at one term or another, the right of removal under the local prejudice clause remains. *City of Detroit v. Detroit City R. Co.* (U. S.) 54 Fed. 1, 4.

Rev. St. U. S. § 639, subd. 3, providing that suit between a citizen of the state in which it is brought and a citizen of another state may be removed to the federal court on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, means before any trial of an action at law; and hence an application for the removal of a cause to a federal court will not be granted after one or more trials thereof in the state. "Had it been the intention of Congress to qualify the word 'trial' by the word 'final,' they would have preceded the word 'trial' by the word 'final.'" *Jones v. Foster*, 20 N. W. 785, 786, 61 Wis. 25.

"Trial" is a common-law term, to denote that step in the case by which the facts are ascertained, and is always final, unless the matter is set aside for cause. "Hearing" is an equity term, and may denote the argument and consideration of a case at more than one stage of its progress; but when it results in an absolute disposition of the case it is called "final." But the term "trial," as used in Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 507], relating to removals to the federal courts, comprehends that step or proceeding in a cause at law or in equity which results in a final judgment or decree, whether the trial be of an issue or question of law or fact. *Miller v. Tobin* (U. S.) 18 Fed. 609, 616.

A hearing before an auditor is not a "trial," within the meaning of Rev. St. U. S. § 639, cl. 3, giving the right to remove a cause before trial from a state court to a Circuit Court of the United States. *Stone v. Sargent*, 129 Mass. 503, 511.

The trial of a demurrer in a state court is the trial of a cause, within the meaning of the words "before the trial thereof" in Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 507], authorizing a removal of the action in certain instances. *Alley v. Nott*, 4 Sup. Ct. 495, 496, 111 U. S. 472, 28 L. Ed. 491; *Lookout Mountain R. Co. v. Houston* (U. S.) 32 Fed. 711; *Boyd v. Gill* (U. S.) 19 Fed. 145, 150.

The word "trial," in 14 Stat. 306, authorizing the removal of a suit in a state court to the federal court at any time before the trial or final hearing of the cause, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, a hearing of the cause upon its merits by a judge sitting in equity. *Galpin v. Critchlow*, 112 Mass. 339, 343, 17 Am. Rep. 176 (quoted in *Chandler v. Coe*, 56 N. H. 184, 186, 22 Am. Rep. 437).

In construing the federal removal act of 1866, requiring applications to remove a case from the state to the federal courts to be made before the "trial or final hearing," it was said that "it is well known to every lawyer, and must have been understood in Congress, that according to general usage by the bench and bar the term 'trial' is uniformly, though perhaps not universally, applied to the actual litigation of the merits in an action at law, as contradistinguished from the debate on the merits in a case in equity, and that 'hearing' is a term more precisely applied to equity cases, and others savoring of civil-law forms, as contradistinguished from those proceedings which are either grounded on the common law, or are shaped by analogy to its forms and methods. It is, then, reasonable to suppose that, in using

the term 'trial,' Congress referred to proceedings of a common-law nature, and in using the term 'hearing' had in contemplation cases of equitable cognizance, and any others of a civil-law nature within the reason of the enactment, and that in using both terms they intended to mark and preserve the distinction which exists between them, and prescribe and confine their application to their respective subjects." *Crane v. Reeder*, 28 Mich. 527, 535, 15 Am. Rép. 223.

In statutes relating to voluntary nonsuits.

The trial of an issue presented by a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of suit is a "trial" of the cause, within the statute relating to voluntary nonsuits. *Hume v. Woodruff*, 38 Pac. 191, 26 Or. 373.

Code Civ. Proc. § 581, provides that an action may be dismissed or nonsuit entered by the plaintiff by written request to the clerk at any time before trial, provided a counterclaim has not been filed or affirmative relief sought by cross-complaint or answer. Section 588 declares that issues on the pleadings are of law and of fact, and section 591 provides that issues of law shall be tried by the court unless referred by consent. Held, that where a complaint contains three alleged causes of action, and defendant demurs thereto, and the demurrer is sustained as to two of the cases and overruled as to the third, and defendant answers the third cause of action, and plaintiff dismisses as to it, and does not amend his complaint, there is a "trial," and he cannot afterwards dismiss the entire action, but judgment may be rendered for defendants as to the issues raised by the demurrer. *Goldtree v. Spreckels*, 67 Pac. 1091, 1092, 135 Cal. 666.

TRIAL ANEW

"Trial anew," as used in 1 Wag. St. p. 578, §§ 92, 93, providing for an appeal in a contested election case and the giving of a bond therein conditioned that the applicant will prosecute his appeal with true diligence to a decision, and that if on such appeal the judgment or decision of the county court be affirmed, or if upon a trial anew in the circuit court judgment will be given against him, he will pay all costs, should be construed to mean that a new trial may be had in the circuit court. *Boggs v. Brooks*, 45 Mo. 232, 233.

A trial anew on appeal is a trial de novo, but under Rev. St. art. 1294, giving on appeal from inferior courts a trial de novo, does not carry with it the right to plead new defenses in the superior court. *Ostrom v. Tarver* (Tex.) 29 S. W. 69, 70.

TRIAL BEFORE A JURY.

"Trial before a jury," as used in Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], fixing the amount of attorney fees on a trial before a jury in civil or criminal cases or before referees, means a trial which is terminated by a verdict of a jury and a judgment thereon. A trial in which a jury disagrees, resulting in a subsequent trial, cannot be construed to be a jury trial within the meaning of such act. *Strafer v. Carr* (U. S.) 6 Fed. 466, 467.

The term "trial before a jury" does not necessarily mean the same as a trial by a jury, and a case which is tried before a jury, although there is a mistrial and no verdict is rendered, is a trial before a jury within Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], allowing a specified fee to the United States district attorneys for each case "tried before a jury." *Weed v. United States* (U. S.) 82 Fed. 414, 418.

TRIAL BY INSPECTION.

"An examination of 3 Black. Comm. 381, will show that 'trial by inspection' was a trial by the judges, not by a jury, of some single matter obvious to sight." *Roberts v. Ogdensburgh & L. C. R. Co.* (N. Y.) 29 Hun, 154, 156.

TRIAL BY JURY.

See, also, "Jury."

As a privilege or immunity, see "Privileges and Immunities."

The right of trial by jury, as secured by the Constitution, is simply a right to a trial by a jury constituted substantially as juries were constituted when the Constitution was adopted. *Gunn v. Union R. Co.*, 49 Atl. 999, 1003, 23 R. I. 289; *State v. Almy*, 28 Atl. 372, 374, 67 N. H. 274, 22 L. R. A. 744; *Copp v. Henniker*, 55 N. H. 179, 193, 20 Am. Rep. 194; *Stilwell v. Kellogg*, 14 Wis. 461, 465; *Whallon v. Bancroft*, 4 Minn. 109, 113 (Gil. 70, 74); *State v. Kingsley*, 88 N. W. 742, 743, 85 Minn. 215; *Carroll v. Byers* (Ariz.) 36 Pac. 499, 500; *State v. Williams*, 19 S. E. 5, 6, 40 S. C. 373; *Hickman v. Baltimore & O. R. Co.*, 30 W. Va. 296, 299, 4 S. E. 654; *Neely v. State*, 63 Tenn. (4 Baxt.) 174, 179; *State v. McClear*, 11 Nev. 89, 46.

The provision that "trial by jury shall remain inviolate," in the Constitution, looks to the preservation, not the extension, of the right. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent. It was a right the title to which is founded upon usage, and its measure is to be determined by the usages which prevailed at the time it was as-

serted. *Byers v. Commonwealth*, 42 Pa. (6 Wright) 89, 94.

The "trial by jury," guaranteed by the Constitutional provision providing that, when any issue of fact proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, means the right of trial by jury according to the course of the common law in cases proper for the cognizance of a jury. *Plimpton v. Town of Somerset*, 83 Vt. 283, 289.

Section 28 of the Bill of Rights, declaring "that the right of trial by jury as heretofore enjoyed shall remain inviolate," means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law. *State v. Withrow*, 86 S. W. 43, 48, 133 Mo. 500.

A statute which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of such bail, be committed to jail, is not unconstitutional, as impairing the right of trial by jury. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 341.

Assessment of punishment by jury.

The requisites of a "trial by jury" at common law seem to have been: First. That the jury must be 12 men, indifferent between the prisoner and the commonwealth. To secure this, challenges must be allowed. Second. The jury must be summoned from the vicinage where the crime is supposed to have been committed. This gives the accused on the trial the benefit of his own good character and standing with his neighbors. Third. The jury must unanimously concur in the verdict. Fourth. The jurors must be left free to act in accordance with the dictates of their own judgment. The assessing of the punishment of an accused person found guilty was at common law no part of the duty of the jury, and hence a statute vesting the power of assessing punishment in the court is not a violation of a constitutional provision that persons accused of crime shall have a right to trial by jury as heretofore enjoyed. *State v. Hamey*, 67 S. W. 620, 623, 168 Mo. 167, 57 L. R. A. 846.

Presence and superintendence of a judge.

"Trial by jury," in the primary and usual sense of the term, at the common law and in the American Constitutions, is not merely a trial by jury of 12 men before an officer vested with authority to cause them to be

summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict, but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the facts and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 585, 174 U. S. 1, 43 L. Ed. 873; *Howe v. Raymond*, 49 Atl. 854, 855, 74 Conn. 68; *Hodges v. Kimball*, 104 Fed. 745, 749, 44 C. C. A. 193; *In re Brenner*, 70 N. Y. Supp. 744, 748, 85 Misc. Rep. 212.

A trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence and to instruct upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the evidence, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination. *Kerr v. Modern Woodmen of America* (U. S.) 117 Fed. 593, 596, 54 C. C. A. 655 (citing *United States v. Philadelphia & R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138).

Conviction on plea of guilty.

The "trial by jury," the right of which is secured to the accused in all criminal prosecutions by the sixth amendment of the Constitution, is a trial according to the course of common law as it existed when such amendment was adopted; and as by that law the court might proceed to judgment on a plea of guilty, and a trial by jury was necessary only when the accused by plea of not guilty had made an issue to be tried, a judgment of conviction rendered on a plea of guilty is not a violation of the constitutional provision. *West v. Gammon* (U. S.) 98 Fed. 426, 428, 89 C. C. A. 271.

Method of selection.

A "trial by jury," which the Minnesota Constitution guarantees by declaring that the right of trial by jury shall remain inviolate, has reference to a jury trial as known at common law and as it existed in the territory of Minnesota at the time of the adoption of the Constitution. The essential and substantive attributes or elements of a jury trial are, and always have been, number, impartiality, and unanimity. The jury must consist of 12, they must be impartial between the parties, and their verdict must be unanimous. The mode of selecting the jury is only a means to an end, and only goes to the question of impartiality. It has always been held that the method of selection of a jury is entirely within the control of the

Legislature, provided only that the fundamental requisite of impartiality is not violated. Gen. Laws 1896, c. 328, providing for struck juries, is not in conflict with the constitutional provision guarantying a trial by jury. *Lommen v. Minneapolis Gaslight Co.*, 68 N. W. 53, 54, 65 Minn. 196, 33 L. R. A. 437, 60 Am. St. Rep. 450.

Jury of 12.

The term "trial by jury," in the Constitution, providing that a trial by jury in all cases in which it is heretofore used shall remain inviolate forever, means a common-law jury of 12 men. *People v. Brady*, 74 N. Y. Supp. 973, 974, 37 Misc. Rep. 126; *People v. Kennedy* (N. Y.) 2 Parker, Cr. R. 812, 817; *People v. Dutcher*, 83 N. Y. 240, 242, 85 App. Div. 570; *People v. Justices of Court of Special Sessions*, 74 N. Y. 406, 407; *Lincoln v. Smith*, 27 Vt. 328, 358; *Cairo & Fulton R. R. Co. v. Trout*, 32 Ark. 17, 18.

A trial by jury "is a trial by 12 competent, impartial men of the body of the county." *State v. Wilson*, 48 N. H. 398.

"Trial by jury" may be defined to be finding out the truth of the facts in issue by the verdict of 12 men. *Cregier v. Bunton* (S. C.) 2 Stroob. 487, 491.

The term "trial by jury," as used in the federal Constitution, guarantying trial by jury, "had at the time of its adoption a fixed legal signification, and from time immemorial has been a trial by a jury of 12 men acting only upon a unanimous determination. The origin of this mode of trial is lost in the dimness of the past, but from the earliest period down to the time of the adoption of the Constitution the unanimity of 12 jurors alone has constituted a legal verdict." *Kleinschmidt v. Dunphy*, 1 Mont. 118, 131.

The term "trial by jury" was well known and understood at the common law, and in that sense it was adopted in our Bill of Rights providing that jury trial shall not be denied. "Of course, the nonessentials of that institution, such as concern the qualification of jurors, the mode of summoning them, and many others of such nature, were left to the regulation of law. The Constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we have derived it. This subject has undergone an examination in other tribunals, and we find them concurring in those views. They unite in declaring that where there is a constitutional guaranty of the right to trial by jury 12 is the number of which the jury must be composed." *Vaughn v. Scade*, 80 Mo. 600, 604.

"Trial by jury," as used in the constitutional provision securing trial by jury, means a trial by 12 competent men, disinterested

and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled and sworn to render a true verdict according to the law and the evidence. *State v. McMahon*, 30 Pac. 1000, 1001, 17 Nev. 365 (citing *State v. McClear*, 11 Nev. 39).

The terms "jury" and "trial by jury" are and for ages have been well known in the meaning of the law. They were used at the adoption of the Constitution, and always it is believed before that time, and almost always since, in a single sense. A jury for the trial of a cause is a body of 12 men, described as being upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their home within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who after hearing the parties and their evidence, and receiving the instruction of the court relative to the law involved in the trial, and deliberating when necessary apart from all extraneous influences, must return their unanimous verdict on the issues submitted to them. Whenever the right of trial by jury is preserved and guarantied by the Constitution, a common-law jury is meant, and a common-law jury is always composed of 12 men, no more and no less. *Dennie v. McCoy* (Ind. T.) 69 S. W. 858, 860.

Unanimous verdict.

The provision in the Constitution that the right of "trial by jury" shall remain inviolate means a trial by a jury of 12 men impartially selected, who must unanimously concur in the guilt of the accused. *Brown v. State*, 42 Atl. 811, 814, 62 N. J. Law, 666 (citing *Thompson v. Utah*, 170 U. S. 843, 849, 18 Sup. Ct. 620, 42 L. Ed. 1061).

"Trial by jury," as used in Const. U. S. Amend. 7, providing that in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, does not mean that in a civil case there shall be no verdict without the unanimous action of 12 of its members; and hence Laws 1892, c. 44, providing that in all civil actions a verdict may be rendered by a concurrence therein of 9 or more of the jury, is not unconstitutional. *Hess v. White*, 33 Pac. 243, 244, 9 Utah, 61, 24 L. R. A. 277.

The "trial by jury" guarantied by Const. art. 1, § 9, declaring that the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts

not of record may consist of less than 12, as may be prescribed by law, is the common-law jury, composed of 12 men who are impartial between the parties, and whose verdict must be unanimous. Rev. St. 1899, § 3651, providing that in all civil cases which shall be tried by jury three-fourths of the jurors may return a verdict, which shall have the same effect as if returned by all the jurors, is therefore unconstitutional, as violating one of the essential elements of a jury at common law; that is, unanimity of verdict. *First Nat. Bank of Rock Springs v. Foster*, 61 Pac. 466, 9 Wyo. 157, 54 L. R. A. 549.

Jury of the vicinage.

"Trial by jury, it is said, means a trial by a jury of the vicinage." *Taylor v. Gardner*, 11 R. I. 182, 184.

Waiver by defendant.

A constitutional guaranty of right of trial by jury in felony cases is held not to prohibit the waiver of a jury trial in misdemeanor cases; it being said that the constitutional provision merely amounted to a declaration that a jury trial should not be withheld from an accused person, and not that a jury trial is in any case a necessity. *Moore v. State*, 2 S. W. 634, 635, 22 Tex. App. 117.

Act Conn. 1874, providing that in criminal causes the party may, if he shall so elect, be tried by the court instead of the jury, is not a violation of the constitutional provision that the right of trial by jury shall remain inviolate, as the accused is not deprived of such right, but voluntarily relinquishes it. *State v. Worden*, 46 Conn. 349, 364, 33 Am. Rep. 27.

"Trial by jury" is the only method provided by the state for the ascertainment of guilt. To allow one accused of felony a trial by 11 jurors is to grant him the right to waive a trial by any number less than 12, or to waive a trial by jury altogether and submit his case to the judge. The continued existence of the institution of trial by jury in such class of cases can be thus placed within the power of individuals. *State v. Simons*, 60 Pac. 1052, 1053, 61 Kan. 752.

Right of juror to weigh evidence.

The very essence of "trial by jury" is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties determine whether or not the facts involved in the issue are proved. Therefore statutes declaring certain circumstantial evidence, as, for example, the payment of the United States special tax as a liquor seller, or the possession of certain fish or game during the closed season, to be prima facie or presumptive evidence of the guilt of the defendant of those acts which such evidence goes to prove, does not require

that the jury in such cases shall find the defendant guilty, whether they believe him so or not, but only that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, providing it does in fact satisfy them of his guilt beyond a reasonable doubt. *State v. Intoxicating Liquors*, 12 Atl. 794, 795, 80 Me. 57.

Contempt proceedings.

The constitutional provision that the right of "trial by jury" shall remain inviolate has no application to a summary proceeding to punish for contempt. Such guaranty does not extend beyond the cases where such right existed at common law. The provision is that the right should remain inviolate. The right of a court to punish for contempt without the intervention of a jury was a well-established rule at common law. *State v. Mitchell*, 52 N. W. 1052, 3 S. D. 223 (citing *Ellenbecker v. Plymouth County District Court*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *State v. Becht*, 23 Minn. 411).

Condemnation proceedings.

The constitutional provision that the right of trial by jury shall remain inviolate does not apply to the case of taking private property for public use, but to suits in courts of justice; to some known and fixed mode of judicial proceeding for the trial of issues of fact in civil and criminal causes in courts of justice. It was intended as a constitutional safeguard in the trial of those cases for which it is stipulated that the courts shall remain open, and wherein a party shall have remedy by due course of law. *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 583, 598; *People v. Smith*, 21 N. Y. 595, 598; *Wixom v. Bixby*, 86 N. W. 1001, 1004, 127 Mich. 479.

Disorderly persons.

Act 1873, known as the "habitual criminal act," authorizing a single magistrate to deal with certain offenders, is not unconstitutional, as violating article 1 of the Constitution, declaring that trial by jury in all cases in which it has heretofore been used shall remain inviolate forever; both in England and in this state, disorderly persons, etc., having been made subject to summary trials without jury. *People v. McCarthy* (N. Y.) 45 How. Prac. 97, 98.

Trial by jury, guaranteed by the Declaration of Rights of Maryland, is the jury according to the course of the common law, and refers to such crimes and accusations as have, by the regular courts of law and the established mode of procedure as theretofore practiced, been the subjects of jury trial. Acts 1878, c. 415, § 10, conferring jurisdiction upon justices of the peace to try, convict, and commit to the house of correction vagrant and habitually disorderly persons,

is therefore not unconstitutional for failing to provide for a jury trial. *State v. Glenn*, 54 Md. 572, 599.

Prosecutions under ordinances.

The right to trial by jury does not extend to prosecutions for the violation of an ordinance. *State v. Fourcade*, 13 South. 187, 45 La. Ann. 717, 40 Am. St. Rep. 249.

Prosecutions for violation of city ordinances were conducted generally without juries prior to the adoption of the Constitution, and consequently did not fall within the constitutional guaranty. *Hunt v. City of Jacksonville*, 16 South. 398, 84 Fla. 504, 43 Am. St. Rep. 214.

The right of trial by jury guaranteed by Const. Ohio, art. 1, § 5, does not enlarge or modify the right of trial by jury, but its sole purpose is to guaranty the perpetuity of the institution as it then existed and as it had long existed at common law. At common law the right to demand a trial by jury did not exist for offenses made such by statute, which offenses are but quasi criminal. A statute, therefore, which authorizes a penalty by fine only upon a summary conviction under a police regulation or of an immoral practice prohibited by law, authorizing imprisonment as a means of enforcement of the payment of a fine, is not in conflict with this provision of the constitution, though it fails to provide for trial by jury. *Inwood v. State*, 42 Ohio St. 186, 187.

The right of trial by jury, given by all the Constitutions of Georgia and the Constitution of the United States, has never been held to apply to police courts of cities or towns, and arrests and trial, with fine and imprisonment, therein under ordinances thereof. *Hill v. City of Dalton*, 72 Ga. 314, 818.

There is no right of trial by jury in cases of petty offenses cognizable by local courts in the exercise of police jurisdiction. Hence one accused of a violation of an ordinance of a city prohibiting the sale of lottery tickets could not object that he was not tried by a jury. *Ex parte Kiburg*, 10 Mo. App. 442, 447.

The right of trial by jury as heretofore used in the state, given by the Constitution of 1798, does not apply to pecuniary penalties by municipal corporations or towns and cities for a breach of their local police regulations, but refers to the trial by jury as it existed in England and was secured by Magna Charta. *Williams v. City Council of Augusta*, 4 Ga. 509, 516.

The provision of a city charter authorizing the common council to provide for the enforcement of its ordinances by imprisonment not exceeding seven days or a fine not

exceeding \$20, without providing for a trial by jury, is not unconstitutional. *McGear v. Woodruff*, 83 N. J. Law (4 Vroom) 213, 215.

Statutory or equitable rights and remedies.

The right of trial by jury, which, it is declared, shall remain inviolate forever, guaranteed to the citizens a trial by jury only in those cases where at the time of the adoption of the Constitution the law gave that right, and not in those cases where the right, and the remedy with it, are thereafter created by statute, nor where the cause was already the subject of equity jurisdiction. Hence Rev. St. § 1744, providing for the enforcement of liens of mechanics and materialmen by bills of equity, is not in derogation of the provision of the statute that the right of trial by jury shall be secured to all and remain inviolate forever. *Hathorne v. Panama Park Co. (Fla.)* 82 South. 812, 813.

The constitutional provision of Illinois giving a right of trial by jury was designed simply to secure the right of trial by jury in all tribunals exercising common-law jurisdiction as it had theretofore been enjoyed. It was not intended to confer the right in any class of cases where it had not previously existed, nor was it intended to introduce it into special summary jurisdictions unknown to the common law and which did not provide for that mode of trial. The right of trial by jury does not extend to suits in chancery, which are of an equitable nature, without regard to the fact whether the cause of action was one of equitable cognizance prior to the adoption of the Constitution or since. But it is not competent for the Legislature to defeat the right of a trial by jury in common-law cases by simply declaring that they may be tried in courts of chancery and that the proceedings therein shall conform to the proceedings in chancery. *Ward v. Farwell*, 97 Ill. 593, 612.

Act Cong. April 7, 1874, c. 80, § 2, 18 Stat. 27, 28, prescribes that the appellate jurisdiction over judgments of territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal. Held, that the phrase "in cases of trial by jury" had regard to a trial by jury as in an action at common law, in which there is and must be a trial by jury, and the court is not authorized to try and determine the facts for itself, unless a jury is waived; and hence it has no application to a trial of special issues submitted to a jury in a proceeding in the nature of a suit in equity, not as a matter of right or to settle the issue of fact, but at the discretion of the court and simply to inform its conscience and aid it in making up its judgment. *Idaho & Oregon Land Imp. Co. v. Bradbury*, 10 Sup. Ct. 177, 178, 132 U. S. 509, 33 L. Ed. 433.

TRIAL DE NOVO.

A "de novo trial" in an appellate court is a trial had as if no action whatever had been instituted in the court below. *Karcher v. Green* (Del.) 32 Atl. 225, 8 Houst. 163.

"Trial de novo" means trial of the entire case anew, hearing evidence, whether additional or not, and not a trial on appeal and on nothing but the record to correct errors. *Shultz v. Lempert*, 55 Tex. 273, 277 (quoted in *Harrold v. Barwise*, 30 S. W. 498, 499, 10 Tex. Civ. App. 138).

"Trial de novo" means a trial anew in the appellate tribunal according to the usual or prescribed mode of procedure in other cases involving similar questions, whether of law or fact. *Lewis v. Baca*, 21 Pac. 343, 344, 5 N. M. 289.

"De novo" means anew; a second time. In civil cases this term has been construed to mean that a trial de novo, where an appeal is taken from a judgment of a justice court to the county court, is a trial upon the original papers and upon the same issues had in the court below. *Ex parte Morales* (Tex.) 58 S. W. 107, 108.

TRIAL JURY.

A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine by verdict a question of fact. *Code Civ. Proc. Cal.* 1903, § 193; *Code Civ. Proc. Idaho* 1901, § 3046; *Rev. St. Utah* 1898, § 1294.

A trial jury is a body of men, 12 in number in the circuit court, and 6 in number in the county court and courts of justices of the peace, drawn by lot from the jurors in attendance on the court at a particular term, and sworn to try and determine a question of fact. *Ann. Codes & St. Or.* 1901, § 962.

A trial jury in the territory of Utah is a body of 12 men possessing the requisite qualifications, duly summoned and sworn to well and truly try the questions of fact submitted to them by the court, and a true verdict render according to law and the evidence. *People v. Hopt*, 4 Pac. 250, 255, 8 Utah, 396.

The terms "trial juror" and "trial jury" are respectively equivalent to the terms "petit juror" and "petit jury" as used in the Constitution and laws of the state. *Code Civ. Proc. N. Y.* 1899, § 3343, subd. 19.

TRIAL OF THIS CASE.

A submission to arbitration, providing that the defeated party should pay all costs, past and present, incurred in the "trial of this case," means not any one particular trial,

but the whole procedure which follows the commencement of the suit. *Shurtleff v. Parker*, 138 Mass. 86, 88.

A stipulation that certain testimony taken on a former trial may be read in evidence "on trial of this cause" means any subsequent trial of the same cause, and not merely the first one. *Hinckley v. Beckwith*, 23 Wis. 328.

TRIALS AT COMMON LAW.

"Trials at common law," as used in 1 Stat. 92, providing that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in all trials at common law in the courts of the United States, means trials in a court of common-law jurisdiction, when exercising such authority, as contrasted with courts of admiralty, equity, or maritime jurisdiction. *United States v. Mundell* (U. S.) 27 Fed. Cas. 23, 26.

TRIBE.

See "Indian Tribe."

TRIBUNAL.

See "Competent Tribunal"; "Inferior Tribunals"; "Judicial Tribunal."

Under the statute providing that tribunals and magistrates having power to order commitments to the insane hospital shall certify the name of the town where the patient resided, etc., it is held that "tribunals" means courts of criminal jurisdiction administering the law. *Foster v. Inhabitants of Worcester*, 33 Mass. (16 Pick.) 71, 81.

TRIBUTARIES.

A policy of insurance, insuring the steamboat and giving permission to navigate the Mississippi and "tributaries," except the Missouri and Arkansas rivers, is construed to include waters which do not empty their waters directly into the Mississippi but into other waters or rivers which do, and hence would include Cypress Bayou, which empties into Red river; the Red river emptying into the Mississippi. *Miller v. Citizens' Fire, Marine & Life Ins. Co.*, 12 W. Va. 116, 131, 29 Am. Rep. 452.

TRICK.

"Trick" is defined as a sly, dexterous, ingenious procedure fitted to puzzle or amuse, and is synonymous with "strategy," "wile," "fraud," "cheat," "deception," or "delusion"; and hence, as used in *Gen. St.* 1894, § 6595,

providing that any one who obtains money by the use of any "trick" shall be deemed guilty of swindling, applies to obtaining money by means of the "short change trick." *State v. Smith*, 85 N. W. 12, 13, 82 Minn. 342.

TRICYCLE.

A tricycle, not being a bicycle or known by the general term bicycle, does not come within the provisions of an ordinance prohibiting the use of sidewalks by all varieties of vehicles known by the term of "bicycle." *Wheeler v. City of Boone*, 78 N. W. 909, 910, 108 Iowa, 235, 44 L. R. A. 821.

The terms "tricycle" and "bicycle," as used in the statutory provisions relative to the use of bicycles and tricycles, shall include all vehicles propelled by foot or hand power of the person riding them. *Rev. Laws Mass. 1902*, p. 531, c. 52, § 12.

The terms "bicycle" and "tricycle," as used in the section relating to bicycle riding, shall be deemed to include all vehicles propelled by the person riding the same by foot or hand power. *Gen. St. Conn. 1902*, § 2061.

The terms "bicycle" and "tricycle," as used in the act regulating the use of highways, etc., shall be deemed to include all vehicles propelled by the person riding the same, either wholly or in part. *Pub. St. N. H. 1901*, p. 256, c. 93, § 2.

TRIED TO STEAL.

The words "tried to steal," in a charge that plaintiff tried to steal defendant's wagon, does not impute the crime of larceny, and is not per se slanderous. *Steinecke v. Marx*, 10 Mo. App. 581.

TRIFLING SUM.

A "trifling sum," as that phrase is used in the definition of "nominal damages," is such a sum as a penny, one cent, six and a quarter cents, etc. *Maher v. Wilson*, 73 Pac. 418, 421, 139 Cal. 514.

TRIMMING.

"Trimming," in the canal boat, spoken of in *Laws N. Y. 1888*, c. 581, is shovelling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing and securing it for the voyage. *Budd v. New York*, 143 U. S. 517, 552, 12 Sup. Ct. 468, 38 L. Ed. 247, 250.

TRIMMINGS.

Goods woven wholly of silk, and used from 4 to 12 inches wide to trim women's

hats, are not assessable as "trimmings," but as manufactures of silk, under Act July 24, 1897, c. 11, § 1, Schedule L, par. 891, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]. *Robinson v. United States*, 121 Fed. 204, 205.

"Mourning crapes," so called, consisting of all-silk fabrics, in piece of the width known as "4/4," are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], as trimmings made of silk not specially provided for. *Robinson v. United States* (U. S.) 122 Fed. 970.

TRINITARIANS.

Trinitarians "are those who believe in the trinity or the tri-unity of God." *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

TRINKETS.

As used in Carriers Act 11 Geo. IV, and St. 1 Wm. IV, c. 68, § 1, providing that no common carrier shall be liable for the loss of trinkets contained in any parcel which shall have been delivered to be carried for hire, etc., "trinkets" cannot be defined with precise accuracy; but the closest approximation is that they must be articles of mere ornament, or, if ornament and utility be combined, the former must be the predominating quality. For instance, bracelets, pins, rings, brooches, and ornamented tortoise shell and pearl portemonnaies, however small their intrinsic value, are trinkets. *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251 258.

"Trinkets," as used in *Rev. St. § 4281* [U. S. Comp. St. 1901, p. 2942], requiring the shippers of trinkets to give to carriers by vessel written notice of the true character and value thereof, means an article of great value in small compass or shape or size, and does not mean articles of small value. Most lexicographers, in defining the term carefully, exclude articles of utility, such as bracelets, brooches, and pins, which are mere fasteners for dress. Thus Webster describes it as a small ornament, as a jewel, a ring, or the like; Richardson, any small piece of ornament or decoration; and Dr. Johnson, as ornaments of dress, or superfluities of decoration. *Ocean S. S. Co. of Savannah v. Way*, 17 S. E. 57, 60, 90 Ga. 747, 20 L. R. A. 123.

TRIVIAL IMPERFECTION.

A contractor agreed to excavate a cellar and erect walls of concrete and steps to the street, and plaintiff did the work thereon for said contractor. The work was accepted by the owner as complete, but later a carpenter was employed by the owner to place a frame in the cellar door, and plaintiff at

the owner's request filled a small hole outside of the cellar. Held, that the lack of this additional work was a "trivial imperfection," within Code Civ. Proc. § 1187, providing that a trifling imperfection shall not prevent the filing of a lien claim. *Lippert v. Lasar* (Cal.) 33 Pac. 797.

Code Civ. Proc. § 1187, as amended by St. 1887, p. 154, providing that every person, save the original contractor, claiming a lien, must within 30 days after the completion of the building file his lien, but any "trivial imperfections" in the construction shall not be deemed such a lack of completion as to prevent the filing of the lien, cannot be construed to mean unhung doors, unfinished plumbing, unfinished closets and bathroom, unplaced ventilators, and no mouldings. Such things are not trivial imperfections, but are necessary to be done to effect a completion of the building. *Schallert-Ganahl Lumber Co. v. Sheldon* (Cal.) 32 Pac. 235.

Code Civ. Proc. § 1187, providing that a "trivial imperfection" in a building will not be deemed such a lack of completion as to prevent the filing of any lien, refers to imperfect or defective performance of the work claimed to be done therein, and not to work admittedly uncompleted. It is not determined by its relative cost. *Blanchi v. Hughes*, 56 Pac. 610, 611, 124 Cal. 24.

The term "trivial imperfection," in Code Civ. Proc. § 1187, provides that any trivial imperfection in the construction of any building shall not be deemed such a lack of completion as to prevent the filing of any lien, may apply to a failure to complete a building costing \$4,000, which is completed thereafter at an expense of about \$7. *Santa Clara Valley Mill & Lumber Co. v. Williams* (Cal.) 81 Pac. 1128, 1129.

Whether the failure of a contractor to complete his contract to the letter is a substantial breach of the contract or a "trivial imperfection," which is not sufficient to affect his claim for a lien, is a question for the jury. *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 29 Pac. 629, 634, 94 Cal. 229; *Coss v. MacDonough*, 44 Pac. 325, 328, 111 Cal. 662.

TROLL

A "troll" is a long rope, extended on the water for many fathoms, with baited hooks attached to it about three or four feet apart. This is sunk in the water and occasionally drawn up with a fish on a hook. *The Lucy Anne* (U. S.) 15 Fed. Cas. 1092, 1093.

TROLLEY SYSTEM.

"Trolley system," as used in a statute authorizing a street railway company to use

the trolley system, is generally understood to imply the use of a stationary engine and overhead wires strung on poles. *Hooper v. Baltimore City Pass. Ry. Co.*, 37 Atl. 359, 361, 85 Md. 509, 38 L. R. A. 509.

TROOP HORSE.

"Troop horse," within the meaning of Act 1794, making a sheriff liable to a penalty for levying and selling a trooper's horse, does not apply to a horse belonging to a trooper, unless it is duly entered and registered as such with the captain of the troop. *Southwell v. Harley* (S. C.) 3 Rich. Law, 180, 181.

TROOPER.

The term "trooper" was said, in construing the act of 1794, making the sheriff liable for levying and selling a trooper's horse, to only include persons legally enrolled in some troop of cavalry. *Southwell v. Harley* (S. C.) 3 Rich. Law, 180, 181.

TROOPS.

The word "troops" conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service answering to the regular army. The organization of the active militia of a state is not in violation of Const. U. S. art. 1, § 10, which withholds from the states the power to keep "troops" in time of peace, as such militia is simply a domestic force, as distinguished from regular troops, and is only liable to be called into service when the exigencies of the state make it necessary. *Dunne v. People*, 94 Ill. 120, 138, 34 Am. Rep. 218.

TROTting.

There can be no just distinction taken between the trotting of horses and the racing of horses. *Ellis v. Beale*, 18 Me. 337, 339, 36 Am. Dec. 726.

TROUBLE.

Gen. St. c. 43, § 14, allowing a person whose land has been taken for laying out a street full indemnity for the "trouble and expense" to which he has been put by the proceedings, means "trouble from which some material or pecuniary injury results, involving labor and the expenditure of time or occasional inconvenience to the owner in the use and occupation of the land. But mental troubles, so difficult to estimate by any pecuniary standard, and which may vary in different individuals according to their temperament or health, do not come within the statute and are not the subject-matter

of damages." *Whitney v. City of Lynn*, 122 Mass. 338, 343.

TROUBLE HUNTER.

A "trouble hunter" is a lineman employed by a telegraph company, whose duty it is to trace out and remedy difficulties which might arise from the contact of the telegraph wires with other wires. *Judge v. Narragansett Electric Lighting Co.*, 42 Atl. 507, 21 R. I. 123.

TROUT.

The common and ordinary meaning of the word "trout" is a fresh-water fish—a fish which at least breeds and ordinarily lives in the fresh water, even if it may sometimes escape to the salt water when it has an opportunity; and although zoologically the term may be more inclusive, it was used in its more limited, but common and ordinary, sense in Rev. St. c. 40, § 49, providing that no person should sell or have in possession with intent to sell any landlocked salmon, trout, or togue between certain dates. *State v. Lewis*, 33 Atl. 10, 11, 87 Me. 498.

TROVER.

In 1 Chit. Pl. (14th Am. Ed.) p. 146, it is said: "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use, from which word, 'finding,' the remedy is called an action of trover. By a fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the finding or trover is now immaterial and not traversable; and the fact of conversion does not necessarily import an acquisition of property in the defendant. It is an action for the recovery of damages to the extent of the value of the thing converted. The object and result of the suit are not the recovery of the thing itself, which can only be recovered by an action of detinue or replevin. Lord Mansfield thus defined this action: 'In form it [i. e., the trover] is a fiction. In substance, it is a remedy to recover the value of the personal chattels wrongfully converted by another to his own use. The form supposes that the defendant might come lawfully by it, and, if he did not, yet by bringing this ac-

tion, the plaintiff waives the trespass. No damages are recoverable for the act of taking. All must be for the act of converting. In *Cooley*, Torts (2d Ed.) p. 516, it is said: "In form, the action is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases, where in truth the defendant has the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he sees fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten." *Burnham v. Pidcock*, 66 N. Y. Supp. 806, 33 Misc. Rep. 65.

The action of trover and conversion was, in its origin, an action on the case for the recovery of damages against the person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use. The circumstance of the defendant not being at liberty to wage his law in this action, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue that by a fiction of law actions of trover were at length permitted to be brought against any person who had in his possession by any means whatever the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver it up when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the finding or trover is now immaterial, and not traversable. It is an action for the recovery of damages to the extent of the value of the things converted. *Peterson v. Kier* (Pa.) 2 Pittsb. R. 191, 200.

The action of "trover" is a remedy to recover the value of personal chattels wrongfully converted by another to his own use, and in order to sustain it plaintiff must show a legal title to the property in himself; that is, he must prove property therein, either general or special, coupled with a right of immediate possession at the time of the conversion. Trover for conversion of money will not lie where plaintiff intrusted money to defendant with which to buy a lot and commence the erection of a building thereon, and defendant afterwards refused to so expend it or return it, but expended it for himself; there being no duty resting on defendant to keep the money intact in specie. *Larson v. Dawson*, 53 Atl. 93, 94, 24 R. I. 317, 96 Am. St. Rep. 716.

Lord Mansfield defines the action of trover to be a remedy "to recover the value

of personal chattels wrongfully converted by another to his own use." The taking may have been lawful. Hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them on demand made. Where goods have been converted by the bailee, it is presumed to be wrongful, and trover may be maintained without a previous demand; but such presumption may be rebutted by showing permission of the plaintiff to convert the property. *Waring v. Pennsylvania R. Co.*, 76 Pa. 491, 496.

"Trover" is an action in which the injury to be redressed is technically called "conversion," and the declaration counts on the real or supposed fact that the plaintiff casually lost his goods and the defendant found and appropriated them. In form the action is a fiction, and in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use; and the form supposes that the defendant may have come lawfully in possession of the goods. To sustain trover, the plaintiff must show a legal title, and he must either have actual possession of the property or the right to immediate possession at the time of the conversion, and the right to take possession at some future day, or a right in action is not sufficient; and in case the plaintiff has temporarily parted with his possession under a contract, or bailment, he cannot maintain trover, unless the time or the bailment had terminated at the time of the conversion. *McIntire v. Blakeley* (Pa.) 12 Atl. 825, 327.

Trover is grounded on the legal fiction of the finding of personal property casually lost by the owner and the subsequent conversion of the same by the finder to his own use or to the use of another, and the gist of the action is the wrongful conversion. *Blakey v. Douglas* (Pa.) 6 Atl. 398, 400.

"Trover" is the remedy to recover the value of personal property wrongfully converted by another to his own use. *Boulden v. Gough* (Del.) 54 Atl. 693.

"Trover" is an action *ex delicto*, and the gist of it is a wrongful conversion. *Finch v. Clarke*, 61 N. C. 335, 336.

In *Hambly v. Trott*, Cowp. 371, Lord Mansfield said that although technically and strictly an action of trover was an action *ex delicto*, yet that substantially and really it was, as he termed it, an action of property. During the last argument of the case he is reported to have said: "An action of trover is not now an action *ex delicto maleficio*, though it is so in form and also in substance. Trover is an action of property. If a man receives the property of an-

other, his fortune ought to answer it." *Chase v. Fitz*, 132 Mass. 359, 365.

A conversion is the gist of the action, and without conversion neither possession of the property, negligence, nor misfortune will enable the action to be maintained. Stephen says: "Trover is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." *Rogers v. Hule*, 2 Cal. 571, 572, 56 Am. Dec. 363.

Trover is a generic name, applied to those torts arising from unlawful conversion of any particular piece of personal property owned by another. *Spellman v. Richmond & D. R. Co.*, 14 S. E. 947, 949, 35 S. C. 475, 28 Am. St. Rep. 858.

Since the abolition of the common-law forms of action in pleading, the phrase "action of trover" does not accurately define a cause of action. The names of the ancient forms are still used for convenience as approximately designating different causes of action for which there is now only one form; but their use is sometimes deceptive, in that, while the essential elements of a cause of action as determined by principles of substantive law may be unaffected by the change in procedure, yet those insignia of a distinct cause of action which depended upon or grew out of the limitations and fictions involved in the use of prescribed forms have lost their significance as distinguishing marks of distinct causes of action. The gist of that action was a conversion, or the unlawful exercise of dominion over goods or chattels belonging to another, who is entitled to their immediate possession. Where a complaint alleges facts sufficient to constitute a cause of action for breach of contract, and such facts are proved, judgment for plaintiff must follow, though he has proceeded on the theory that the action was in trover, in which case the proof would be insufficient. *Metropolis Mfg. Co. v. Lynch*, 36 Atl. 832, 833, 68 Conn. 459.

Trover lies for the conversion of goods or personal chattels. It does not lie for fixtures *eo nomine*. The title to land cannot be tried in such action when the plaintiff is not in possession. It does not lie for property severed from the realty against one who has actual adverse possession under claim of title. *Darrah v. Baird*, 101 Pa. 265, 268, 269.

"In order to sustain the action of trover, there must have been on the part of the defendant some unlawful assumption of dominion over the property in question, in defiance or exclusion of the plaintiff's right, or else a withholding possession from the plaintiff under a claim of title inconsistent with his own." *Thweat v. Stamps*, 67 Ala. 96, 98.

An affidavit to hold to bail, stating that the defendant was "indebted to the plaintiff in trover," was bad as not sufficiently positive or certain according to the statute, as so technical a word as "trover" ought not to be used. *Hubbard v. Pacheco*, 1 H. Bl. 218.

Detinue distinguished.

See "Detinue."

As transitory action.

See "Transitory Action."

Trespass distinguished.

There is a material difference between "trespass" and "trover." Trover waives the trespass in taking, admits the possession to have been lawfully gotten, and proceeds to recover damages only for the unlawful conversion. In trespass, a jury may also give damages for the taking. *Hall v. Moor* (Pa.) 1 Add. 376, 377.

There are two principal differences between actions of trespass and trover for personalty appropriated by defendant, the first of which is that in trespass there is always either an original wrongful taking, or a taking made wrongful ab initio by subsequent misconduct, while in trover the original taking is supposed or assumed to be lawful, and often the only wrong consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. *Burnham v. Pidcock*, 66 N. Y. Supp. 806, 807, 83 Misc. Rep. 65 (citing *Cooley on Torts*).

TRUCK ACT.

In English law this name is given to St. 1 & 2 Wm. IV, c. 37, passed to abolish what is commonly called the "truck system," under which employers were in the practice of paying the wages of their work people in goods, or of requiring them to purchase goods at certain shops. This led to laborers being compelled to take goods of inferior quality at a high price. *State v. Peel Splint Coal Co.*, 15 S. E. 1000, 1010, 36 W. Va. 802, 17 L. R. A. 885 (citing *Black, Law Dict.*).

TRUCK WAGON.

"Truck wagon," as used in Laws 1838, c. 807, § 9, exempting from execution one cart or a truck wagon, does not include a peddler's wagon designed to be used in trade from place to place, the body of which was hung on springs and contained drawers for carrying goods, but refers to vehicles used for farm work or heavy hauling. *Smith v. Chase*, 71 Me. 164, 166.

TRUCKMAN.

As common carrier, see "Common Carrier."

TRUE.

See "Just and True"; "Substantially True."

Webster's International Dictionary defines the word "true" as: "(1) Conformable to fact; in accordance with the actual state of things; correct and not false, erroneous, inaccurate, or the like; as a true relation or narration, a true history; a declaration is true when it states the facts. (2) Right to precision; conformable to a rule or pattern; exact; accurate; as a true copy; a true likeness of the original." *Johnson v. Des Moines Life Ass'n*, 105 Iowa, 273, 276, 75 N. W. 101, 102.

A representation that a horse is "sound, kind, and true" is a false representation, within the meaning of a statute providing a punishment for obtaining goods by false pretenses, if made knowingly during negotiations for the sale of the horse, with intent to cheat and defraud the purchaser, and the latter is induced to purchase by reason thereof; the falsity not being apparent at the time. *Watson v. People*, 87 N. Y. 561, 564, 41 Am. Rep. 397.

As honest or sincere.

In one sense that only is true which is conformable to the actual state of things; but in another and broader sense the word "true" is often used as the synonym of honest, sincere, or not fraudulent, and as used in an application for an insurance policy, warranting the statements full, complete, and true in every particular, meant that the company required of the applicant, as a condition precedent to any binding contract, that he would observe the utmost good faith toward it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted. *Ames v. Manhattan Life Ins. Co.*, 58 N. Y. Supp. 244, 249, 40 App. Div. 465; *Globe Mut. Life Ins. Ass'n v. Wagner*, 58 N. E. 970, 971, 188 Ill. 133, 52 L. R. A. 649, 80 Am. St. Rep. 169. Under this construction of the word "true" it was held that a statement by the applicant that he was not affected with a particular disease, when as a matter of fact he was, was not an untrue answer, because, while he was in fact affected with such disease, he was not aware of it. *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 345, 346, 4 Sup. Ct. 466, 471, 28 L. Ed. 447.

Though sometimes signifying only that which is conformable to the actual state

of things, "true" is often used as a synonym for honest, sincere, or not fraudulent, and as used in a life policy, warranting the statements of insured as to the condition of his health at the time of the application to be true, does not warrant the absolute accuracy of such statements; but the warranty is not broken unless it appears that insured knew or believed at the time of making the warranties that they were incorrect. *Well v. New York Life Ins. Co.*, 17 South. 853, 857, 47 La. Ann. 1405.

As just.

The use of the word "true" in the verification of a lien notice showing a certain amount due after deducting all just credits and offsets, the affidavit merely alleging that the lien notice is true, is a sufficient compliance with the statutory requirement that the verification shall show that the claim is just. *Fairhaven Land Co. v. Jordan*, 32 Pac. 729, 731, 5 Wash. 729.

The omission of the words "true and just" from an inventory by an assignor for the benefit of creditors does not invalidate the inventory, though section 4668 requires the affidavit to be to the effect that the inventory is in all respects just and true, if other words having the same effect are used. Thus an affidavit which only stated that the inventory is true is sufficient, as Webster's Dictionary shows that the words "true" and "just" are synonymous. *Landauer v. Conklin*, 54 N. W. 322, 325, 8 S. D. 462.

TRUE ACCOUNT.

Rev. St. c. 125, § 16, requiring a creditor to render a "true account of the sum due" upon demand, is not complied with by an account rendered wherein it stated that two separate items are both due, when in fact only one of such items is due. *Cushing v. Ayer*, 25 Me. (12 Shep.) 383, 387.

The "true and just account" mentioned in the mechanic's lien law, requiring a person claiming such a lien to state a just and true account, means an account honestly stated. It does not require the statement of the exact account which a jury or court may find to be due. *Black v. Appolonio*, 1 Mont. 342, 346.

TRUE AND COMPLETE.

Civ. Code 1852, § 283 (Rev. St. 1881, § 462), provides that copies of records shall be proved and admitted as legal evidence by the attestation of the keeper of such records that the same are "true and complete" copies thereof. Held, that the words "true and complete," as used in such statute, were not technical words, and that a certificate using words of substantially the same import, or words of equivalent meaning, was a suffi-

cient attestation to authorize the admission of a copy of a record in evidence. Thus the words "full, true, and complete" were held to be certainly equivalent in meaning to the words used in the statute, and a certificate containing them was a substantial compliance with the statute. *Anderson v. Ackerman*, 88 Ind. 481, 490.

The certificate of the clerk to the transcript of a record that it is a "true and correct" copy, instead of a "true and complete" copy, as required by statute, will not be cause for dismissing the appeal; the words "true and complete" as used in the statute not being regarded as technical, and the words "true and correct" as used in the certificate being equivalent in meaning to the statutory words. *Walker v. Hill*, 12 N. E. 387, 388, 111 Ind. 223.

A transcript of a justice of the peace, exhibiting a complete proceeding and judgment against the defendant therein named, and certified as a true and correct copy, is admissible as evidence in support of a deed on a sale of real estate on execution thereunder, under Rev. St. 1894, § 624, Rev. St. 1881, § 612, which requires such justice to make out and certify a "true and complete transcript" of the proceedings and judgment; the phrases "true and correct copy" and "true and complete transcript" being equivalent terms. *Collier v. Collier*, 49 N. E. 1063, 1064, 150 Ind. 276.

TRUE AND FULL VALUE.

The term "true and full value," whenever used in the act relating to taxation, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. Gen. St. Minn. 1894, § 1511; Rev. Codes N. D. 1899, § 1176.

The term "true and full value," wherever used in the title on taxation, shall be held to mean the fair market value, in cash, at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. Rev. St. Tex. 1895, art. 5064.

TRUE AND PERFECT LIST.

The "true and perfect list" of taxable estate, which Rev. St. c. 6, § 92, requires a taxpayer to bring to the assessors as a condition precedent to a right of appeal to the county commissioners for any abatement of taxes, comprises a true enumeration, description, and specification of the property. No appraisement or estimation of the value of the property is essential. *Inhabitants of Orland v. County Com'rs*, 78 Me. 460, 461.

TRUE COPY.

McClain's Code, § 1733, requiring insurance companies, on the issue of any policy, to attach a "true copy" of the application or representation of insured, means not merely a substantial copy, but one so exact that upon comparison it can be said to be a true copy, without resorting to construction. If, upon comparison, it may be said that the copy is conformable to the facts, and in accordance with the actual state of things appearing in the original, then it may be said to be a true copy. *Johnson v. Des Moines Life Ass'n*, 75 N. W. 101, 102, 105 Iowa, 278.

TRUE DESCRIPTION.

Wag. St. p. 909, § 5, requiring that a mechanic, in order to obtain a lien, shall file a "true description" of the property, means such a description as would enable a party familiar with the locality to identify the premises. *De Witt v. Smith*, 63 Mo. 263, 265.

TRUE QUESTIONS OF FACT.

Shannon's Code, § 6285, referring to issues for jury trial in the chancery court, provides that "the issue shall be made up by the parties under the direction of the court, and set forth briefly and clearly the true questions of fact to be tried." These concluding words, "the true questions of fact to be tried," signify those controlling questions of fact whose decision will determine the real merits of the controversy, and do not include those of an immaterial, collateral, or inclusive nature. A mere dispute or a difference between statements of witnesses on a given point is not, under the statute, a true question of fact, or a proper subject for a separate issue, unless it is so central and far-reaching that its decision will control the final disposition of the cause as a whole or in some distinct branch. Any number of points in evidence tending severally to establish a controlling controverted fact should be covered by one issue, and not submitted separately in as many different issues. Whether or not such controlling fact really exists is a true question of fact, and the proper subject of a single issue. *Crisman v. McMurray*, 64 S. W. 711, 712, 107 Tenn. 469.

TRUE SUN TIME.

"True sun time" is obtained by the means of a dial, while mean sun time is what is called "standard time." There is a difference of four minutes for each degree between true sun time and standard or mean sun time. *Ex parte Parker*, 29 S. W. 480, 481, 35 Tex. Cr. R. 12.

TRUE TITLE.

The term "true titles" has been used to distinguish between the character of titles

acquired under Act 1819 and those acquired by adverse possession before that act; the title in the one case being vested in the adverse holder, while in the other he simply has a right of possession only. But no title can with propriety be said to ever become the true title until its superiority to all other titles is either conceded or established after contest. *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 59 S. W. 634, 637, 105 Tenn. 563.

TRUE VALUE.

"True value," as used in laws providing that property shall be assessed for taxes according to its true value, means the value which it has in exchange for money. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 607, 48 N. J. Law (19 Vroom) 146; *Central R. Co. v. State Board of Assessors*, 2 Atl. 789, 793, 48 N. J. Law (19 Vroom) 1, 57 Am. Rep. 516.

By the express provisions of Tax Law, § 53, the words "true value or valuation," as used in such act, means the usual selling price at the place where the property to which such term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. *State Board of Tax Com'rs v. Holliday*, 49 N. E. 14, 17, 150 Ind. 218, 42 L. R. A. 828.

"True value," as used in the tariff act of 1818, means the "actual cost of the goods to the importer at the place from which they were imported, and not the current market value of the goods at such place." *United States v. Tappan*, 24 U. S. (11 Wheat.) 419, 421, 6 L. Ed. 509; *Tappan v. United States* (U. S.) 23 Fed. Cas. 690, 691.

TRUE VERDICT.

A "true verdict" is the voluntary conclusion of the jury after deliberate consideration, and it is none the less a true verdict because the respective jurors may have been liberal in concessions to each other, if conscientiously and freely made. A true verdict is not the result of any arbitrary rule or order, whether imposed by themselves or by the court or officer in charge. If a jury should agree in advance that their verdict should be the result of a division by 12 of the sum total of all the jurors' separate assessments, a verdict brought about by such an agreement ought to be set aside. Where on the back of a paper containing instructions taken into the jury room and returned with the verdict there appears a memorandum showing 12 different amounts in a column, the total thereof, and its division by 12, the verdict which corresponds with the quotient so given will be set aside because of the presumption that it is the result of the jurors in advance agreeing to average

their separate assessments. *Southern Ry. Co. v. Williams*, 21 South 328, 329, 118 Ala. 620.

TRUE VOTE.

"True vote," as used in the Florida election law of 1872, means the vote actually cast, as distinguished from the legal vote. *State v. McLin*, 18 Fla. 17, 47.

TRULY.

See "Well and Truly."

"Truly," as used in an oath by a commissioner to take deposition in a foreign state that he shall, according to the best of his skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in the cause, take the examination and depositions of all and every witness and witnesses produced and examined by virtue of the commission, is not synonymous with "fairly," as used in *Nix*. Dig. p. 925, § 2, requiring that the commissioner take oath that he will faithfully, fairly, and impartially execute the commission. The words "fairly" and "truly" have widely different shades of meaning and convey entirely distinct ideas. "Every day's experience teaches us that language may be truly, yet most unfairly, repeated. The answer of the witness may be truly written down, yet it may convey a meaning quite different from that which the witness intended to convey, and did convey, to the person that heard him speak. On the other hand, language may be fairly reported, yet not in accordance with strict truth." *Lawrence v. Finch*, 17 N. J. Eq. (2 C. E. Green) 234, 239.

TRUNK.

The words "trunk" and "chest" are not synonymous, and therefore an indictment charging the theft of a trunk or chest is bad for want of certainty. *Potter v. State*, 39 Tex. 388, 389.

TRUSSED ROOFS.

"Trussed roofs," as used in a city ordinance requiring the outside walls of buildings having trussed roofs of a certain height to average at least a certain thickness, are roofs packed or bound closely. They are necessarily very heavy roofs, and, although they are said sometimes to be self-supporting, this is said only in respect to their being packed or bound closely, and not otherwise; for their weight, when supported either by walls or pilasters, is uncommonly heavy in comparison to the weight of other kinds of roofs. *Diamond State Iron Co. v. Giles* (Del.) 11 Atl. 189, 194, 7 Houst. 557.

TRUST.

A "trust" is defined by Black to mean an organization of persons or corporations formed for the purpose of regulating the supply and price of commodities, etc. *Mollyneaux v. Wittenberg*, 58 N. W. 205, 208, 39 Neb. 547.

What is commonly called a "trust" is a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which were well known and fully understood when the anti-trust act was approved. *United States v. Northern Securities Co.* (U. S.) 120 Fed. 721, 724.

In order to constitute a trust, within the statute making contracts void where a combination of capital, skill, or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities, there must be a combination of capital, skill, or acts by two or more. "Combination," as here used, means union or association. If there be no union or association by two or more of their capital, skill, or acts, there can be no combination; hence, no trust. When we consider the purposes for which the combination must be formed, the essential meaning of the word "combination," and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill, or acts denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. *State ex inf. Crow v. Continental Tobacco Co.*, 75 S. W. 737, 747, 177 Mo. 1 (citing *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079).

The term "trusts," as employed in the title of Act March 30, 1889, being "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations connected with them," is not employed in its technical legal sense. By very recent commercial usage, the meaning of the word has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity or the charges of transportation for the public. *Queen Ins. Co. v. State*, 24 S. W. 397, 402, 86 Tex. 250, 22 L. R. A. 483.

A "trust," within the meaning of the act of 1889 prohibiting trusts and conspiracies against trade, includes a contract for the sale of beer which provides that the purchaser shall handle only the beer named in the contract and that the manufacturer shall sell to

no other dealer in the town or vicinity. *Fuqua v. Pabst Brewing Co.*, 38 S. W. 29, 30, 90 Tex. 298, 35 L. R. A. 241.

A "trust" is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service, for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly; and a social club, composed of underwriters of the various insurance companies doing business within a city, which tended to maintain a uniform and equal rate of insurance, was unlawful as against public policy. *Marshall, J.*, stated that "in the olden times such practices were called 'contracts in restraint of trade.' Nowadays they are called 'trusts.' There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks when considered alongside of those of to-day. When the evils to the public interests that flow from these trust combinations are attempted to be described, words become mere weaklings in their power of expression, and one stands appalled at the helplessness of the people outside of judicial aid." *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 52 S. W. 595, 607, 152 Mo. 1, 45 L. R. A. 363.

A trust may or may not be endowed with corporate powers; if not, then it is a mere aggregation of individuals or partnerships. *State v. Haun*, 59 Pac. 340, 342, 61 Kan. 146, 47 L. R. A. 369.

A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state; second, to increase or reduce the price of merchandise, produce, or commodities, or to control the cost or rates of insurance; third, to prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce; fourth, to fix any standard or figure, whereby its price to the public shall be in any manner controlled or established, for any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in the state; fifth, to make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which

they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected. *Gen. St. Kan. 1901, § 7864.*

A "trust and combine" is a combination, contract, understanding, or agreement, express or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others—(a) in restraint of trade; (b) to limit, increase, or reduce the price of a commodity; (c) to limit, increase, or reduce the production or output of a commodity; (d) intended to hinder competition in the production, importation, manufacture, transportation, sale, or purchase of a commodity; (e) to engross or forestall a commodity; (f) to issue, own, or hold the certificates of stock of any trust or combine; (g) to place the control, to any extent, of business, or of the products or earnings thereof, in the power of trustees, by whatever name called; (h) by which any other person than themselves, their proper officers, agents, and employes, shall, or shall have the power to dictate or control the management of business; or (i) to unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity. But this shall not apply to the associations of those engaged in husbandry, in their dealings with commodities in the hands of the producer, nor to the societies of artisans, employes, and laborers formed for the benefit and protection of their members. *Code Miss. 1892, § 4437.*

A trust is a combination of capital, skill, or acts by any person or persons to fix the price of any article or commodity of trade, use, or merchandise, with the intent to prevent others from conducting or carrying on the same business, or selling or trafficking in the same article, use, or merchandise, or a combination of capital, skill, or acts by two or more persons, or by two or more of them, for either, any, or all of the following purposes: (1) To create or carry out restrictions in trade; (2) to limit or reduce the production or increase or reduce the price of merchandise or commodities; (3) to prevent competition in insurance, either life, fire, accident, or any other kind, or in manufacture, making, constructing, transportation, sale, or purchase of merchandise, produce, or com-

modities; (4) to fix any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any article of merchandise, produce, or manufacture of any kind intended for sale, use, or consumption in this state, to establish any pretended agency whereby the sale of any such article, commodity, merchandise, or product shall be covered up, concealed, or made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor, producer, or manufacturer to control the wholesale or retail price of any such article of merchandise, produce, or commodity after the title to the same shall have passed from such vendor or manufacturer; (5) to make or enter into, carry on, or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have heretofore bound themselves not to sell, dispose of, traffic in, or transport any article of merchandise, or commodity or article of trade, product, use, merchandise, consumption, or commerce, below a common standard figure, card, or list price, or by which they shall agree in any manner to keep the price of such article, product, commodity, or transportation at a fixed or graduated figure or price, or by which they shall in any manner establish or settle the price of any article of merchandise or commodity, or of insurance, fire, life, or accident, or transportation between them or between themselves and others, or with the intent to preclude, or the tendency of which is to prevent or preclude, a free and unrestricted competition among themselves or others, or the people generally, in the production, sale, traffic, or transportation of any such article of merchandise, product, or commodity, or conducting a like business, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale, production, or transportation of any such article of merchandise, product, or commodity, or the carrying on of any such business, that its price might in any manner be affected thereby. *Cobbey's Ann. St. Neb. 1903, § 11,500.*

A "trust" is a combination of capital, skill, or acts, by two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them, for either, any, or all of the following purposes: (1) To create or carry out restrictions in trade or commerce; (2) to limit or reduce the production, or increase or reduce the price, of merchandise or any commodity; (3) to prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity; (4) to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state; (5) to make

or enter into, or execute or carry out, any contracts, obligations, or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or any commodity, or any article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity, or transportation between them, for themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. *Bates' Ann. St. Ohio 1904, § 4427-1.*

A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: (1) To create or carry out restrictions in trade; (2) to limit or reduce the production, or increase or reduce the price, of merchandise or commodities; (3) to prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities; (4) to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state; (5) to make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected. *Pen. Code Tex. 1895, art. 976.*

A combination is within the denouncement of the statute, though there is no bad

motive, and its immediate result is a reduction in price, if its object is in restraint of trade and to create a monopoly. *San Antonio Gas Co. v. State (Tex.)* 54 S. W. 289, 290.

The purchase of six cotton compresses located at different parts of the state on the same day by one company, where the purchase does not restrict aids to commerce, the price for compressing cotton being the same throughout the state, being fixed by a commission, does not create a trust. *State v. Shippers' Compress & Warehouse Co.*, 69 S. W. 58-60, 95 Tex. 603.

TRUST.

See "Active Trust"; "Breach of Trust"; "Cestui Que Trust"; "Charitable Trust"; "Constructive Trusts"; "Direct Trust"; "Directory Trust"; "Discretionary Trust"; "Dry Trust"; "Enforceable Trust"; "Executed Trust"; "Executory Trust"; "Express Trust"; "Held in Trust"; "Implied Trust"; "In Trust"; "Involuntary Trust"; "Passive Trust"; "Place of Trust or Profit"; "Precatory Trust"; "Private Trust"; "Public Trust"; "Resulting Trust"; "Shifting Trust"; "Simple Trust"; "Special Trust"; "Spendthrift Trust"; "Voluntary Trust."

A trust is an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. *Pratt v. Thornton*, 28 Me. (15 Shep.) 355, 360, 48 Am. Dec. 492 (citing *Story, Eq. § 964*), *Raines v. Woodward* (S. C.) 4 Rich. Eq. 399, 406; *Gough v. Satterlee*, 52 N. Y. Supp. 492, 497, 32 App. Div. 33; *Dillenbeck v. Pinnell*, 96 N. W. 860, 861, 121 Iowa, 201; *Ex parte Faulkner*, 1 W. Va. 269, 298.

A trust is where the legal estate is in one and the equitable estate in the other. *Goodwin v. McMinn*, 44 Atl. 1094, 1095, 193 Pa. 646, 74 Am. St. Rep. 703; *Chaffees v. Risk*, 24 Pa. 432; *Gough v. Satterlee*, 52 N. Y. Supp. 492, 497, 32 App. Div. 33 (citing *Story, Eq. Jur. § 964*); *Gifford v. Rising*, 3 N. Y. Supp. 392, 393, 51 Hun, 1; *National Bank v. Ellicott*, 1 Pac. 593, 594, 31 Kan. 173.

A trust, in common parlance, may be said to be a confidence reposed by some one in some one for some public or private purpose. *Ex parte Faulkner*, 1 W. Va. 269, 298.

A trust is a relation between two persons, by virtue of which one of them, as trustee, holds property for the benefit of the other, the cestui que trust. *Corby v. Corby*, 85 Mo. 371, 389.

A trust signifies a holding of property subject to a duty of employing it or applying its proceeds according to directions given by

the person from whom it was derived. 2 Abb. Law Dict. 609; *Munroe v. Crouse*, 12 N. Y. Supp. 815, 819, 59 Hun, 248.

A trust, in its simplest elements, is a confidence reposed in one person, who is termed the "trustee," for the benefit of another, who is called the "cestui que trust"; and it is a confidence respecting property which is thus held by the former for the benefit of the latter. *Carter v. Gibson*, 45 N. W. 634, 636, 29 Neb. 324, 26 Am. St. Rep. 381 (citing *Will. Eq. Jur.* 186).

The word "trust" is often used in a broad and comprehensive sense. Every deposit is a trust; and the receipt of money to be paid to another, or to be applied to a particular purpose, and which is not so applied, constitutes a trust. *Kane v. Bloodgood* (N. Y.) 7 Johns. Ch. 90, 109, 11 Am. Dec. 417; *Brown v. Brown*, 31 N. Y. Supp. 650, 652, 88 Hun, 160; *Richardson v. Whitaker* (Ky.) 45 S. W. 774, 779; *Robinson's Committee v. Elam's Ex'r*, 14 S. W. 84, 90 Ky. 300; *Appeal of McMullin*, 18 Atl. 1056, 1058, 131 Pa. 370; *Rice v. United States*, 7 Sup. Ct. 1377, 1385, 122 U. S. 611, 30 L. Ed. 793.

A trust is an obligation arising out of a confidence reposed in the trustee or representative, who has the legal title to property conveyed to him, that he will faithfully apply the property according to the confidence reposed; in other words, according to the wishes of the grantor of the trust. This is the technical definition of a trust. *Beers v. Lyon*, 21 Conn. 604, 613 (citing 4 Kent, Comm. 304 et seq.); *Sinking Fund Com'rs v. Walker*, 7 Miss. (16 How.) 143, 185, 38 Am. Dec. 433 (quoting *Willis, Trustees*, 2); *Thornburg v. Buck*, 41 N. E. 85, 86, 13 Ind. App. 446.

Lewin says that a trust cannot be more exactly defined than in the terms employed by Lord Coke for the definition of a use, namely, a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person, touching the land for which the cestui que use has no remedy but by a subpoena in chancery. It is a confidence reposed in some other; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the beneficiary, for, as a man cannot sue a subpoena against himself, he cannot be said to hold in trust for himself. *Farmers' Loan & Trust Co. v. Carroll* (N. Y.) 5 Barb. 613, 643.

A trust is not merely a right to recover a judgment because of the commission of some wrong in violation of some duty arising from contract or statute, or natural or moral obligation, but it is an equitable right, title, or interest in property, real or personal; the legal title to the property being in some

other person. *National Bank v. Wilcott*, 1 Pac. 593, 594, 31 Kan. 173.

A trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with the property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence. *McCreary v. Gewinner*, 29 S. E. 960, 963, 108 Ga. 528.

A trust is merely what use was before the statutes of uses, and the same rule applies to trusts in chancery now which were formerly applied to uses, and in exercising its jurisdiction over executory trusts the court of chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party. *Fuller v. Missroon*, 35 S. C. 314, 329, 14 S. E. 714.

A trust is an interest in land existing only in *foro conscientiae*, and which can be reached, recovered, protected, and dealt with only in a court of equity. It is an estate of inheritance, of which the owner may be seised in law or fact. *Yeo v. Mecereau*, 18 N. J. Law (3 Har.) 387, 390.

Mr. Justice Swayne, in *Seymour v. Freer*, 75 U. S. (8 Wall.) 202, 19 Ed. 306, defined a trust as "where there are rights, titles, and interests in property distinct from the legal ownership. In such cases the legal title, in the eye of the law, carries with it to the holder absolute dominion, but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce, whenever its aid for that purpose is invoked." *Crosby v. Cotton*, 24 S. W. 343, 347, 5 Tex. Civ. App. 583.

A "use," a "trust," and a "confidence" is one and the same thing, and if an estate is conveyed to one person for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the usee, and no trust is created, though express words of trust are used. *Teller v. Hill*, 72 Pac. 811, 812, 18 Colo. App. 509 (citing *Perry*, Trusts [5th Ed.] 298).

The declaration of trust, whether written or oral, must be reasonably certain in its material terms, and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. Within such rule no trust is created in homestead property decreed to

a wife in adverse proceedings awarding such property to her, to be held by her in trust for her support and that of her children. *Simpson v. Simpson*, 22 Pac. 167, 168, 80 Cal. 237 (citing *Pom. Eq. Jur.* 1009).

Trusts are various. A debtor may be said to be a trustee for his creditor, a bailee is certainly one for his bailor, and an agent for his principal. *Pickens v. Dwight*, 4 S. C. (4 Rich.) 360, 367.

The word "trust," in its popular and broadest sense, embraces a multitude of relations, duties, and responsibilities. Thus executors and administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, bailees, factors, agents, commission merchants, and common carriers, as well as the officers of public and private corporations, all exercise a kind of trust. *Wilson v. Kirby*, 88 Ill. 566, 570 (citing *Perry*, Trusts, § 1).

The term "trust" is a very comprehensive one. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, is a trustee. The cases of hirer and letter to hire, borrower and lender, pawnor and pawnee, principal and agent, are all cases of express trust. It has never been held, however, that these and the like cases are such technical trusts as to bring them within the limited equity jurisdiction. *Warner v. McMullin*, 18 Atl. 1056, 1058, 131 Pa. 370; *Brown v. Brown*, 31 N. Y. Supp. 650, 652, 83 Hun, 160.

Where one person employs another as an agent, loans money, or sells property on credit, a confidence and trust is reposed to a greater or less extent, and yet such transactions have never been regarded by courts as falling within any recognized class of trusts.—*Weer v. Gand*, 88 Ill. 490, 493.

The confidence reposed in the trustee or holder of property for the benefit of another, and at other times the interest or right of the beneficiary in or to the property recognized and enforced in equity only, are both mentioned as a "trust." Perhaps it may be properly said that the confidence is the foundation of the peculiar interest or right, and gives to it the name of trust, though, generally, mere mutual promises and a compliance by one party will not create the trust. *Nease v. Capehart*, 8 W. Va. 95, 105.

Any agreement or contract in writing, made by a person having the power of disposal over real property, whereby such person agrees or directs that certain real estate shall be held or dealt with in a particular manner for the benefit of another, creates a trust. *Carter v. Gibson*, 45 N. W. 634, 636, 29 Neb. 324, 26 Am. St. Rep. 381.

The word "trust" in its popular sense covers many things besides legal and pe-

cunlary trust. A layman, using the word, might easily suppose that he was expressing thereby simply his belief or trust that the devisee would carry out his wishes; that, in saying that he gave his property to his wife in trust to carry out his express wishes as to the education and maintenance of the children, he was making an absolute gift to her of the property, trusting that she would faithfully carry out those wishes—in other words that the property was to be hers, simply burdened with the execution of his express desire. *Davies v. Davies*, 85 N. W. 201, 203, 109 Wis. 129.

The word "trust," found in Rev. St. 1893, c. 3, § 70, par. 6, which declares that, where a decedent has received money in trust, the claim against his estate shall be a preferred one, is to be taken as used in a restrictive sense, as applying to technical trusts only, and hence it did not apply to an agent who had negotiated his principal's note, and was to expend the proceeds for the principal's benefit. *Shipherd v. Furness*, 39 N. E. 1096, 1098, 153 Ill. 590.

Classification.

"Trusts" are divided in Perry, *Trusts*, §§ 25-27, into four classes: "Express trusts, sometimes called direct trusts; implied trusts; resulting trusts; and constructive trusts." *Gottstein v. Wist*, 61 Pac. 715, 718, 22 Wash. 581.

Civ. Code, § 2215, classifies trusts as (1) voluntary, which are express trusts, and (2) involuntary, which are implied or constructive trusts. *Barker v. Hurley*, 63 Pac. 1071, 1073, 132 Cal. 21.

A trust may be express or implied, and it is implied when deducible from the transaction as a matter of intent. There must be sufficient words to raise a trust, property which becomes subject to it, and an ascertained purpose to be accomplished. *Jones v. Wadsworth (Pa.)* 11 Phila. 227, 229.

Trusts are divided into simple and special trusts. A simple trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the cestui que trust has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A special trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has actual duties to perform, as when an estate is given to a person to sell and from the proceeds to pay the debts of the settlor. *Cone v. Dunham*, 20 Atl. 311, 313, 59 Conn. 145, 8 L. R. A. 647.

A trust may be either executed or executory. When the legal estate or the equi-

table title passes, it is executed; but when the trust is to be perfected at some future time by settlement or conveyance, it is executory, and the same rules which govern trusts of realty govern trusts of personalty. It is essential to the establishment of a trust that the person who created it be the real owner of the property which is to constitute the trust fund. It is essential that the language employed in the creation of a trust should be such as to leave no room for reasonable controversy as to the intention of the donor. The declaration relied upon as creating a trust must point out with reasonable certainty, not only the property or subject-matter of the trust, but also the purposes thereof and the person for whose benefit the trust is created. Indefinite, vague, and equivocal expressions are not sufficient, nor are declarations of a purpose to create a trust, or a mere voluntary promise to give property to a person, or to dispose of it in the future for the benefit of such person, when such promises remain unfulfilled, sufficient to create a trust. *Skeen v. Marriott*, 61 Pac. 296, 300, 22 Utah, 73.

"Trusts" are simple and special. In the one the trustee is passive, performing no duty, and the trust is merely technical. In the other he is active, executing the donor's will, and the trust is operative. A simple trust gives to the cestui que trust the right to the possession and disposal of the property, and legal estate is executed in him, unless when necessary to remain in the trustee to preserve it for the cestui que trust or pass it to another. A special trust maintains the legal estate in the trustee to perform the duties imposed by the donor, and the cestui que trust has but a right in equity to enforce the performance. *Dodson v. Ball*, 60 Pa. (10 P. F. Smith) 492, 500, 100 Am. Dec. 586.

Essentials.

Three things are indispensable to a valid trust: First, sufficient words to raise it; secondly, a definite subject; and, thirdly, a certain or ascertained object. *Farmers' Loan & Trust Co. v. Carroll (N. Y.)* 5 Barb. 613, 643; *Gough v. Satterlee*, 52 N. Y. Supp. 492, 497, 32 App. Div. 33.

The essential elements of a trust are: First, a sufficient expression of an intention to create a trust, and, second, a definite beneficiary. *Carter v. Gibson*, 45 N. W. 634, 636, 29 Neb. 324, 26 Am. St. Rep. 381.

A subject or corpus of a trust estate is absolutely essential, not merely to the validity of a trust, but to its existence. Courts will supply a trustee; in England, at times, under the cy pres power, they will select beneficiaries; but in no country will they furnish a trust estate. *Gough v. Satterlee*, 52 N. Y. Supp. 492, 497, 32 App. Div. 33.

One of the essential features of a trust is the creation of an estate, or principal sum, from which rents or profits may be derived that may be used for the benefit of another. *Gifford v. Rising*, 3 N. Y. Supp. 392, 393, 51 Hun, 1.

There are four essential elements of a valid trust of personal property: (1) A designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereto, to the trustee, with the intention of passing legal title thereto to himself as trustee. *Brown v. Spohr*, 84 N. Y. Supp. 995, 998, 87 App. Div. 522.

A trust implies two estates or interests, one equitable and one legal: one person as trustee holding the legal title, while another as the cestui que trust has the beneficial interest. Absolute control and power of disposal are inconsistent with the idea of trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors, and in such sense a trust exists as a natural person, but no further. *Hospes v. Northwestern Manufacturing & Car Co.*, 50 N. W. 1117, 1119, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Hawkins v. Donnerberg*, 66 Pac. 691, 695, 40 Or. 97.

Intent.

As was said by Andrews, J., in *Beaver v. Beaver*, 117 N. Y. 421, 428, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531, to constitute a trust there must be either an express declaration of trust or circumstances which show beyond a reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust *inter vivos* should be established, in the absence of express words, by circumstances capable of any construction or consistent with a different intention. *Hamer v. Sidway*, 11 N. Y. Supp. 182, 186, 57 Hun, 229.

Particular words unnecessary.

No express words are necessary to create a trust, if the intention clearly appears. *Gifford v. Rising*, 3 N. Y. Supp. 392, 393, 51 Hun, 1.

The creation of a trust does not depend upon the use of a particular form of words, but it may be inferred from the facts and circumstances of the case. To constitute a trust there must be either an expressed dec-

laration of trust or circumstances which show beyond a reasonable doubt that a trust was intended to be created. *O'Neill v. Greenwood*, 106 Mich. 572, 582, 64 N. W. 511.

To establish a trust no particular technical words are essential. Even the words "trust" or "trustee" are not essential. Any other words which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another, if certain as to all other requisites, are sufficient. On the other hand, if the words "trust" and "trustee" are used, they do not necessarily show an intention to create or declare a trust. The existence of a trust, express or implied, is to be determined by a reference to the facts upon which it depends and as matter of law. *Green v. McCord*, 66 N. E. 494, 495, 30 Ind. App. 470 (citing *Hedges v. Keller*, 104 Ind. 479, 3 N. E. 832; *Repp v. Leshner*, 27 Ind. App. 360, 61 N. E. 609).

The words "trust" and "trustee" have a definite and technical meaning, and are more generally, as well as more properly, used to create a trust; but it is well settled that there is no magic in particular words, and any language which satisfactorily indicates an intention to stamp upon a devise the character of a trust will be sufficient. In construing devises, no positive rule can be laid down as to what terms will carry a beneficial interest and what will carry a trust. The court must examine the whole will and carry out the intention of the testator. A testator devised to his wife, during her widowhood, all the property, real and personal, with a remainder over to designated persons, to dispose of according to their verbal directions. In the event of his wife's marriage, the testator gave to her one-fourth of the property to be wholly hers, to make use of as she might see proper, and the remaining three-fourths he gave to other persons, to be disposed of according to the verbal directions of the said donees, or either of them. * * * In view of the fact that these designated persons in the will were neither heirs nor next of kin to the testator, it will be held that they only took the property in trust, and, as the terms of the trust were not declared, the designated persons will be held to hold the property under a trust arising by imputation of law in favor of the heirs of the testator in regard to the real estate and in favor of his personal representatives as to the personal property. *Saylor v. Plaine*, 31 Md. 158, 163, 1 Am. Rep. 34.

Though it is true that a "trust" may exist without the use of the word, nevertheless its absence is significant where the claim is that the language creates an express trust. *Reynolds v. Hennessy*, 2 Atl. 701, 702, 15 R. L. 215.

Charge distinguished.

A charge on land is distinguished from a trust of the land, in that in the case of the former the land is devised generally for the beneficial enjoyment of the devisee, subject, however, to the payment by him of a specific sum or sums of money or the performance of a particular duty, while in the case of a trust the devise is limited to some particular purpose, with no beneficial interest in the devisee. Where testator gave his wife all his property for life, if she should remain his widow so long, on condition that she should, out of the income, maintain his children during minority, and the will expressly stating that the devise was in lieu of dower, a trust estate for testator's children was not created, but a life estate in the widow, charged with the children's support, was created. *Lang v. Everling*, 23 N. Y. Supp. 329, 331, 3 Misc. Rep. 530.

Debt distinguished.

See "Debt."

Power distinguished.

"The distinction between a power and a trust has been clearly defined by the courts. A mere power is not imperative, but leaves the action of the party receiving it to be exercised at his discretion; that is, the donor or grantor, having full confidence in the judgment, disposition, and integrity of the party, empowers him to act according to the dictates of that judgment and the promptings of his own heart. A trust is imperative, and is made with strict reference to its faithful execution. The trustee is not empowered, but is required, to act in accordance with the will of the one creating the trust." *Law Guarantee & Trust Co. v. Jones*, 58 S. W. 219, 220, 103 Tenn. 245 (quoting Sugd. Powers).

In *Taylor v. Benham*, 46 U. S. (5 How.) 233, 269, 12 L. Ed. 130, the Supreme Court of the United States says: "One of the tests as to a trust or a power is that a naked power to sell may be exercised or not by executors, and is discretionary, while an imperative direction to sell and dispose of the proceeds is a power coupled with a trust." So in *Story, Eq. Jur.* § 1070, the rule is stated in these terms: "In the nature of things, there is a wide distinction between a power and a trust. In the former, the party may or may not act in his discretion; in the latter, the trust will be executed, notwithstanding his omission to act." *Chew v. Hyman* (U. S.) 7 Fed. 7, 15.

Use distinguished.

Prior to St. 27 Hen. VIII, c. 10, the words "use" and "trust" were regarded as convertible terms; and although, even in that statute, the word "trust" is mentioned, as well as the word "use"—for it classes "trusts," "uses," and "confidences" in one

category, and undertakes to apply the same remedy to all by uniting the legal with the equitable interest, and thus creating a new legal estate (see 1 Sand. Uses and Trusts, 70-84)—still the distinction between the two terms is practical, substantial, and important. The elementary writers call our attention to three things as essential to the effectual operation of the statute of uses, namely: a person seised to a use, a cestui que use, and a use in esse (1 Cruise, Dig. 349; 2 Washb. Real Prop. *113), and when these three things concur, the use is said to be executed (Bac. Law Tracts, 351; 1 Sand. Uses and Trusts, 97, 98; 2 Washb. Real Prop. *119); that is, "the statute comes in and actually transfers the seisin and possession from the feoffee to use to the cestui que use, to all intents and purposes, without any actual entry being necessary to give him the seisin. It is not merely a title, but an actual estate, which is thus created in the cestui que use, as effectually as if it had been done by a conveyance with livery of seisin at common law." When, therefore, the three elements referred to existed, the use was said to become executed, and full effect was given to the statute; and thereupon only one interest or estate remained. But a trust, technically speaking, was and is practically different. A trust may, and perhaps ordinarily does, exist only where the use is incapable of being thus executed, and so the legal estate is necessarily left as at common law. *Hutchins v. Heywood*, 50 N. H. 491, 495.

A trust, technically speaking, ordinarily exists only where the use is incapable of being executed, and so the legal estate is necessarily left as at common law. If the beneficial interest which one person has in land which in the eye of the common law belongs to another is a permanent enjoyment of the benefits or profits of the land, it is a use; if the interest is for a temporary purpose, it is a trust. Technical words will not create a trust. It is a fixed rule of law that there is no magic in particular words. The test which determines whether the devise or conveyance is governed by the statute of uses, whereby the legal title is transferred, or whether a trust is created, whereby the legal title is reserved in the trustee, is very plain and simple. If the party who takes the beneficial interest has the full and uncontrolled use of the property, he takes the legal, as well as the equitable, title. If anything remains for the trustees to do concerning the property, such as may require them to retain the control of it to any extent or for any purpose, in such a case they retain the legal estate, and the beneficiary has only an equitable interest. *Appeal of Tappan*, 55 N. H. 317, 320.

A trust is a use not executed by statute. *Farmers' Loan & Trust Co. v. Carroll* (N. Y.) 5 Barb. 613, 643.

Office of administrator.

The term "trust" is a very broad one. In its most comprehensive sense it embraces every deposit; but it is held that the relations of an administrator to the assets of the estate and the distributees do not constitute a trust, within the meaning of Gen. St. c. 71, art. 4, § 20, providing that the provisions of the chapter as to limitations of actions shall not apply in the case of a continuing and subsisting trust. *Robinson's Committee v. Elam's Ex'r*, 14 S. W. 84, 90 Ky. 300.

Acts 1883, c. 168, providing that the Union Bank & Trust Company shall have the right and power to accept and execute all "trusts," whether the trust be that of guardian, executor, trustee, the committee of an estate of a non compos mentis, or any other trust, should be construed to apply to the office of administrator. *Union Bank & Trust Co. v. Wright* (Tenn.) 58 S. W. 755, 758, 52 L. R. A. 469.

Insolvent corporation.

Whatever technical objections may be made to the use of the word "trust" in connection with the relation existing between the directors of an insolvent private corporation and its creditors is a matter of no importance, for the substance of the matter is that the word "trust" is used to express the fact that the creditors of an insolvent corporation have the right to have the specific property owned by the corporation subjected to the payment of the sums due them. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S. W. 16, 23, 86 Tex. 143, 22 L. R. A. 802.

Statute of limitations.

The word "trust" is often used in a very broad and comprehensive sense. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had or received or in equity as a trustee for breach of trust. *Kane v. Bloodgood* (N. Y.) 7 Johns. Ch. 90, 11 Am. Dec. 417. The trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not cognizable at law, but fall within the proper and exclusive jurisdiction of this court. *Id.* This rule has been repeatedly adopted and approved in this state. *Gutch v. Fosdick*, 48 N. J. Eq. (3 Dick.) 353, 355, 22 Atl. 590, 27 Am. St. Rep. 473.

In construing Gen. St. c. 71, art. 4, § 20, providing that the provisions in the chapter which related to the limitation of actions should not apply in the case of a continuing and subsisting trust, the court says: "The term 'trust' is a very broad one. In its most

comprehensive sense, it embraces every deposit; and it, of course, would not do to hold that in all such cases the statute does not run, even though the claimant is invested with power and right to sue. Such a rule would evidently defeat the legislative purpose, and render nugatory in a great degree our 'statute of repose.' The trusts intended to be embraced by the statute, and to be excepted out of the limitation, are those of an exclusively equitable character, where the trustee has a right to hold the estate, and the cestui que trust has no right to sue and recover it. Where only the latter may do so, and forbears to exercise the right, the letter of our statute, as well as the policy of our law, gives the opposing party the right to rely upon the lapse of time. The time, by the terms of the statute, begins to run from the accrual of the cause of action." Thus the statute of limitations commences to run against an action by a creditor, whose debtor has assigned for the benefit of creditors, against the assignee for the settlement of the trust, at the time of a settlement in full between the assignee and the creditor. *Richardson v. Chanslor's Trustee*, 45 S. W. 774, 779, 103 Ky. 425.

TRUST CAPACITY.

Rev. St. § 5228, providing that "a party in any trust capacity, who has given bond in this state, with sureties according to law, shall not be required to give bond and security to perfect an appeal," does not include a county treasurer. An executor, administrator, guardian, assignee or trustee clearly acts in a trust capacity, while a treasurer, auditor, sheriff, and other public officers act in an official capacity. *Hubbard v. Topliff*, 54 N. E. 367, 60 Ohio St. 382.

TRUST COMPANY.

As bank, see "Bank."

As moneyed corporation, see "Moneyed Corporation."

A "trust company" is defined in the banking law to mean any domestic corporation formed for the purpose of taking, accepting and executing such trusts as may be lawfully committed to it, and acting as trustee in the cases prescribed by law and receiving deposits of money and other personal property and issuing its obligations therefor, and of loaning money on real or personal securities. A corporation denied the exercise of the powers of a trust company on its incorporation, but afterward expressly given the power to receive and execute trusts, is a trust company, subject to the banking law. *Venner v. Farmers' Loan & Trust Co.*, 66 N. Y. Supp. 773, 775, 54 App. Div. 271.

A trust company accepts and executes all trusts of every description committed to

it by any person or corporation or any courts of record; accepts title to real or personal estate on trusts; acts as agent for corporations in reference to issuing, registering, and transferring certificates of stock; accepts trusts for married women in respect to their separate property; and acts as guardian in respect to infants. Trust companies are therefore not, in the legal or commercial sense, engaged in the business of banking, so as to bring such companies into competition with national banks, within Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], prohibiting states from taxing national banks at a greater rate than other moneyed capital. *Jenkins v. Neff*, 57 N. E. 408, 410, 163 N. Y. 320.

Trust companies, as they are established in New York according to the powers conferred on them by their charter, are not, in any proper sense of the words, banking institutions. They are authorized to receive money in trust, and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation, or by any court of record; to receive the title to real or personal property on trust created in accordance with the laws of the state, and to execute the same; to act as agents for corporations in reference to issuing, registering, and transferring certificates of stock and bonds and other evidence of debt; and to accept and execute trusts for married women in respect to their separate estates, and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the state of New York worth double the amount loaned thereon, or in stocks of the United States or of the state of New York, or of incorporated municipalities within the state, from which it is evident that such companies are not banks, in the commercial sense of the word, and do not perform the functions of banks in carrying on exchanges of commerce. *Mercantile Nat. Bank v. New York City*, 7 Sup. Ct. 826, 837, 121 U. S. 138, 30 L. Ed. 895.

The words "trust company," as used in the chapter relating to investments and loans, shall be construed to include savings banks and trust companies. V. S. 1894, 4106.

TRUST DEED.

A trust deed is, in legal effect, a mortgage with a power of sale. *Aggs v. Shackelford County*, 19 S. W. 1085, 1086, 85 Tex. 145; *Connecticut Mut. Life Ins. Co. v. Jones* (U. S.) 8 Fed. 303, 304.

Trust deeds are mortgages under a power of sale, and differ only from mortgages

by providing for sale without foreclosure. *Cornell v. Conine-Eaton Lumber Co.*, 47 Pa. 912, 914, 9 Colo. App. 225; *Axman v. Smith*, 57 S. W. 105, 106, 156 Mo. 286; *Southern Bldg. & Loan Ass'n v. McCants*, 25 South. 8, 10, 120 Ala. 616.

A deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. *Union National Bank v. Bank*, 10 Sup. Ct. 1013, 1016, 136 U. S. 223, 34 L. Ed. 841.

A deed of trust is an assignment or transfer of property to a trustee for the purposes therein declared, usually made by a debtor to secure some or all of his creditors, either equally or preferentially. It is in the nature of a mortgage, and both are equally within the provisions of the registry laws of North Carolina, and in many respects are governed by the same principles of law. *Means v. Montgomery* (U. S.) 23 Fed. 421, 424; *In re Anderson* (U. S.) 23 Fed. 482, 491.

A deed of trust to secure a debt is a conveyance made to a trustee as security for a debt owing to the beneficiary, a creditor of the grantor, and conditioned to be void on payment of the debt by a certain time, but, if not paid, the trustee to sell the land, and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment. *Reynolds v. City of Waterville*, 42 Atl. 553, 555, 92 Me. 292.

A mortgage or deed of trust is a contract between the debtor and the creditor, and it is not binding upon any one until accepted by the beneficiary. *Byrd v. Perry*, 26 S. W. 749, 752, 7 Tex. Civ. App. 378.

A mortgage or deed of trust is a simple security for the debt, and, when considered in connection with the debts secured, it is personal assets. *Augusta National Bank v. Beard's Ex'r*, 42 S. E. 694, 696, 100 Va. 687.

In an action to reform a warranty deed and have it declared a mortgage, the term "trust deed," used in the complaint, was used in the sense of "mortgage," "mortgage deed," or "mortgage security." *Forester v. Van Auken* (N. D.) 96 N. W. 301, 304.

A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. By an absolute deed of trust the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The

latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt subject to the condition of a defeasance. *Mills v. Williams*, 81 Mo. App. 447, 459 (citing *Hoffman v. Mackall*, 5 Ohio St. 124, 130, 64 Am. Dec. 637).

Assignment distinguished.

See "Assignment for Benefit of Creditors."

As conveyance.

See "Conveyance."

Mortgage distinguished.

As mortgage, see "Mortgage."

The chief practical difference between a deed of trust with power of sale and a plain mortgage is that the deed of trust may be foreclosed according to its terms by the trustee without authority of court, whereas a simple mortgage can be foreclosed only under decree of court. *Axman v. Smith*, 57 S. W. 105, 106, 156 Mo. 236; *Cornell v. Conine-Eaton Lumber Co.*, 47 Pac. 912, 914, 9 Colo. App. 225.

"Deed of trust" is not synonymous with "mortgage," even when used in reference to security for debt. A deed of trust has no feature in common with a mortgage, except that it was executed to secure an indebtedness. In a mortgage there is a right, after condition broken, to foreclose on the part of the mortgagee, and a right of redemption on the part of the mortgagor. These two rights are reciprocal. When the one cannot be enforced, the existence of the other is denied; and, when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. *Southern Building & Loan Ass'n v. McCants*, 25 South. 8, 10, 120 Ala. 616 (quoting *Koch v. Briggs*, 14 Cal. 257, 71 Am. Dec. 631).

There is a manifest and well-settled distinction between an unconditional deed of trust and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof, for the purpose expressed, whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate or pledge of property as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the

payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. *Hoffman v. Mackall*, 5 Ohio St. 124, 130 (citing *Woodruff v. Robb*, 19 Ohio, 212, 216; 1 Hill. Mortg. 359).

TRUST ESTATE.

The term "trust estate" is used with some confusion in the text-books—sometimes to express the estate of a trustee, and sometimes that of the beneficiary. *Cooper v. Cooper*, 5 N. J. Eq. (1 Halst. Ch.) 9, 12.

A trust estate is a right in equity to take the rents and profits of land, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the "trustee," to execute such conveyances as the person entitled to the profits, who is called the "cestui que trust," shall direct; and to defend the title to the land. *Farmers' Loan & Trust Co. v. Carroll* (N. Y.) 5 Barb. 613, 643.

Under a will which gave all of the testator's estate in trust for his sister during her life, and to her children thereafter, and, in case of her death without issue, to be divided into two equal parts, one to go to H. in fee, and the other to be divided among his heirs, the heirs at law and H. on the death of the sister without issue become tenants in common of the real estate devised, and their shares vest at her death, and therefore there is no trust estate to be distributed under St. 1898, c. 65, providing that, whenever by the terms of a written instrument a trust estate is to be distributed, the probate court may, on application of any person interested, order such estate to be converted into cash and distributed to such persons as seem to be entitled thereto. *Heard v. Trull*, 54 N. E. 875, 877, 175 Mass. 239.

An estate held in trust is an estate where the legal title or ownership is in one person, denominated the trustee, to hold for the benefit and use of some other person, who is entitled to the income or profit. *Catlin v. Hull*, 21 Vt. 152, 157.

A power in trust is a mere authority or right to limit and use, while an estate in trust is an estate or interest in the subject. A trustee is always invested with a legal estate, but this is not necessary with

respect to the donee of the power. In the case of a power in trust there is always a person other than the donee or grantee of the power, which person is called the "appointee," answering to the *cestui que trust* in a simple trust. Every estate and interest not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust. *Stericker v. Dickinson* (N. Y.) 9 Barb. 516, 519.

TRUST EX MALEFICIO.

A trust *ex maleficio* can only result from some act of bad faith, and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such a trust. *Barry v. Hill*, 31 Atl. 126, 127, 166 Pa. 344.

Where two persons purchase separate tracts of land from the same vendor, and enter into possession of the respective tracts, and subsequently, by mutual agreement between the purchasers and the vendor, the land is sold under an order of the court, and it is agreed that one of such purchasers shall bid in the land, and then make a conveyance to the other purchaser of the land formerly purchased by the latter, if, upon such sale under the order of the court, the person designated to bid in the land does so, and, upon demand of the other purchaser, refuses to make the conveyance, he can be compelled to do so by a bill in equity to enforce the trust; he holding such land as trustee *ex maleficio*. *Kent v. Dean*, 30 South. 543, 544, 546, 128 Ala. 600.

TRUST FUND.

Where a single partner sells all the partnership property, and receives the money for it, he holds the shares of his copartners as trustee; and the money so received by him is, in the strictest sense of the words, trust funds. *Standish v. Babcock*, 29 Atl. 327, 329, 52 N. J. Eq. 628.

"Trust fund," as used in a deed conveying real estate to a trustee to hold in trust to the use of certain persons, and, on either of them attaining the age of 30 years, any additions of the trust fund to be conveyed to him, should be construed to embrace not only the original property included in the trust, but any subsequent part of it that might have been added thereto, including also the accumulations. *Draper v. Palmer*, 1 N. Y. Supp. 116, 120.

"Trust funds," as used in Bankr. Act Aug. 19, 1841, refusing a discharge to any person who, after the passing of the act, shall apply trust funds to his own use, does not include the amount of a note collected and retained by a factor who received the note for collection on account of his prin-

cipal. *Commercial Bank of Manchester v. Buckner*, 2 La. Ann. 1023, 1025.

Property of corporation.

The doctrine that the property of a corporation is a trust fund for the payment of its debts merely means that the property must be first applied to such payment, before any portion of it can be distributed among the stockholders. *Henderson v. Indiana Trust Co.*, 40 N. E. 516, 518, 143 Ind. 561.

The words "trust fund," as relating to the assets of an insolvent corporation, apply only after it has been placed in the hands of a receiver. *Merchants' Nat. Bank of Richmond v. Newton Cotton Mills*, 20 S. E. 765, 766, 115 N. C. 507.

The trust-fund doctrine is stated in *Thomp. Liab. Stockh.* § 10, as "a favorite doctrine of American courts that the capital stock and other property of a corporation is to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders of the corporation." Where a stockholder of a national bank died subsequent to the insolvency of the bank, and before any assessment was made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock was made on the administrator of his estate, which also was insolvent, such assessment is entitled to no preference in payment from his estate, as against his general creditors, on the ground that the statutory liability of such deceased stockholder to pay the sum equal to the face value of his stock towards the debt of such insolvent bank created from the assets of his estate a trust fund for the payment of such debts of the bank. In *re Beard's Estate*, 50 Pac. 226, 227, 7 Wyo. 104, 38 L. R. A. 860, 75 Am. St. Rep. 882.

In *First Nat. Bank v. Dovetail B. & G. Co.*, 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435, it was decided that the property of a corporation constituted a trust fund for its creditors, which only means that when a corporation is insolvent, and a court of equity has taken possession of its assets, such assets must be appropriated to the payment of the debts before distribution to its stockholders, but, as between a corporation and its creditors, the former does not hold the property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor. *Clapp v. Allen*, 50 N. E. 587, 589, 20 Ind. App. 263.

TRUST IN INVITUM.

Trusts in invitum are constructive trusts imposed by equity, contrary to the trustee's

intention and will, upon property in his hands. *Sanford v. Hamner*, 22 South. 117, 119, 115 Ala. 406.

TRUSTEE.

See "Acting Trustee"; "Constructive Trustee"; "Conventional Trustee"; "Testamentary Trustee"; "Township Trustee."

All trustees, see "All."

A trustee, in the widest meaning of the term, is defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another. *Hill, Trustees*, 41; *Taylor v. Davis*, 110 U. S. 330, 4 Sup. Ct. 147, 38 L. Ed. 163; *Truesdale v. Philadelphia Trust, Safe Deposit & Insurance Co.*, 65 N. W. 133, 134, 63 Minn. 49; *Taylor v. Mayo*, 4 Sup. Ct. 147, 150, 110 U. S. 330, 28 L. Ed. 163; *Robertson v. Bullions*, 9 Barb. 64, 101; *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305, 310.

A trustee of a legal estate is one to whom the estate has been conveyed in trust. *Manley v. Culver*, 20 Tex. 143, 146.

A person is said to be trustee, in whom a power over property, or affecting it, rests for the benefit of another; and a person having such power is as essentially a trustee as is one in whom a title to the property which he has a right to control is vested for the benefit of another. *Dority v. Dority*, 71 S. W. 950, 954, 96 Tex. 215, 60 L. R. A. 941.

Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, not only as to the person who reposes such confidence, but also as to a person of whose affairs he thus acquires information which was given to such person in a like confidence, or over whose affairs he by such confidence obtains any control, under Civ. Code, § 2219. *Colton v. Stanford*, 23 Pac. 16, 20, 82 Cal. 351, 16 Am. St. Rep. 137.

In the case of *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, Chancellor Kent said: "Every person who receives money to be paid to another or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee for a breach of trust." *Brown v. Maplewood Cemetery Ass'n*, 89 N. W. 872, 873, 85 Minn. 498 (citing *Taylor v. Benham*, 46 U. S. [5 How.] 233, 12 L. Ed. 130); *Warner v. McMullin*, 18 Atl. 1056, 1058, 131 Pa. 370; *Brown v. Brown*, 81 N. Y. Supp. 650, 652, 83 Hun, 160.

The person in whom the confidence of a trust is reposed is called the "trustee."

Civ. Code Mont. 1895, § 2953; Civ. Code Cal. 1903, § 2218; Rev. Codes N. D. 1899, § 4257; Civ. Code S. D. 1903, § 1610.

He is a trustee who takes a trust as a devisee under the will. He is an executor who takes under the probate of the will. In re *Anderson's Estate*, 5 N. Y. Leg. Obs. 302, 303.

The term "trustee" is used in Rev. St. § 5152, providing that persons holding stock as executors, etc., or trustees, shall not be persons subject to any liability as stockholders, does not refer only to a trustee appointed by will or by order of the court or judge, but to any one who stands in the relation of trustee to a cestui que trust. *Lucas v. Coe* (U. S.) 86 Fed. 972.

In Tax Law 1866, § 7, providing that every person shall be assessed in the township or ward where he resides for all personal property in his possession or under his control as trustee, guardian, or executor. The Legislature used the term "trustee" in its more technical and restricted sense; that is, they intended to designate thereby the class of persons who hold property on trust or confidence that they will apply the same for the benefit of those who are entitled according to an intention expressed either by the parties themselves, or by the deed, will, settlement, or arrangement of another. *State v. Irons*, 35 N. J. Law (6 Vroom) 464, 465; *State v. Grover*, 37 N. J. Law (8 Vroom) 174, 176.

A will appointing a brother as executor and trustee, where the provision of the will required action by him after the death of certain devisees, will be construed as nominating such brother as a legal trustee. *Leonard v. Haworth*, 51 N. E. 7, 8, 171 Mass. 496.

The word "trustees," in a will directing the doing of certain acts by trustees, was said to have been used in its technical sense. "In determining whether a trust was intended, the fact that the will was not prepared by a lawyer, or by a person familiar with the technical terms usually employed in such instruments or with the requisites of a valid trust, is to be borne in mind, and the fact must be taken into consideration that the scrivener had no accurate knowledge as to the meaning of the words 'trust,' 'trustee,' or 'trust fund,' as is evident from a consideration of the whole instrument. It is clear from a reading of this will that the word 'trustees' was not used or intended to be employed in its technical and general sense, as all the duties they were to perform were of an executorial character. That such was the nature of the trust reposed in them seems to be practically admitted, as they were appointed executors by the surrogate's court." *Trask v. Sturges*, 63 N. E. 534, 536, 170 N. Y. 482.

The wrongdoer who becomes possessed of property under such circumstances as amount to a tort has been styled a "trustee"; but this is for want of a better term, and because he has no title to property, and really holds it for the true owner. It might as well be said that, where two persons conspire to possess themselves of the personal property of another, when he brings trover for its recovery they should be styled "trustees," instead of "tortfeasors," and should be permitted to claim the benefit of a lien for care or for provender. *Henninger v. Heald* (N. J.) 30 Atl. 809, 811.

A bequest to the trustees of an institution means to the institution itself, although those having charge of it were in the charter called "managers." The words as so used should be construed to mean officers in charge, however they are designated. *New York Institution for Blind v. How's Executors*, 10 N. Y. (6 Seld.) 84, 92.

Where a bequest was made to a town in trust, with directions that the selectmen and a certain other should manage the fund, the selectmen and the other are not trustees, but the town; and, where the town afterwards was incorporated as a city, there was no vacancy in the trust, and the probate court had no authority to appoint trustees to manage the fund. *Higginson v. Turner*, 51 N. E. 172, 174, 171 Mass. 586.

In the terms "trustee" and "steward," as referring to a church organization, there is no legal import of such ownership or control of real property as to render such officers responsible for the negligent falling of a gate located in the church property, which results in the death of a child. *Fopplano v. Baker*, 3 Mo. App. 560.

The office of a trustee is to hold and safely keep the trust funds in accordance with the terms of the instrument creating the trust. Sometimes it is to pay income to the parties entitled thereto, or to accumulate the same during a stated period. If the trustee transfers securities, it must be in pursuance of express authority in the trust itself, or by virtue of an authority implied from the nature of the trust or the securities in his hands. *Fesmire v. Shannon*, 143 Pa. 201, 209, 22 Atl. 898.

A default judgment rendered on publication service against the Farmers' Loan & Trust Company is not binding on the Farmers' Loan & Trust Company, trustee; the word "trustee" signifying the opposite of the word "owner," and meaning that, while the party called "trustee" has the legal title, he has no beneficial interest. *Farmers' Loan & Trust Co. v. Essex* (Kan.) 71 Pac. 269, 270.

"Trustee," as used in the bankruptcy act, shall include all the trustees of an estate. U. S. Comp. St. 1901, p. 8420.

As descriptive personae.

The addition of the word "trustee" after one's signature is merely descriptive personae. *Swift v. Williams*, 11 Atl. 835, 841, 68 Md. 236; *Tradesmen's Nat. Bank v. Looney*, 42 S. W. 149, 153; *Id.*, 99 Tenn. 278, 38 L. R. A. 837, 63 Am. St. Rep. 830; *Chambers v. Webster*, 75 N. Y. Supp. 31, 33, 69 App. Div. 546; *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 62 N. E. 1079, 1082, 170 N. Y. 58, 88 Am. St. Rep. 640; *Moss v. Johnson*, 15 S. E. 709, 710, 36 S. C. 551; *Wallace v. Langston*, 29 S. E. 552, 562, 52 S. C. 133; *Bowen v. Penny*, 76 Ga. 743, 745; *Crusselle v. Chastain*, 76 Ga. 840. So, also, after the name of a payee, grantee, etc., where no declaration of trust is contained in the instrument. *Kanably v. Volkenberg*, 75 N. Y. S. 8, 10, 70 App. Div. 97; *Van Schaick v. Lese*, 66 N. Y. Supp. 64, 67, 31 Misc. Rep. 610; *Westmoreland v. Foster*, 60 Ala. 448, 449; *Thompson v. Toland*, 48 Cal. 99.

The word "trustee," following the name of one who has signed a contract, is prima facie descriptive only, and does not tend to show that the contract was executed in such capacity. *Peterson v. Homan*, 46 N. W. 303, 304, 44 Minn. 166, 20 Am. St. Rep. 564.

As a general rule, it is well settled that one will be held personally liable on a covenant made by him as trustee, for the obvious reason that, having no power to bind the trust estate, the covenantee would be otherwise without remedy; and it is therefore fair to presume that the covenant was made and accepted on the individual liability of the covenantor. The additional word "trustee," in such cases, is construed merely as a word of description, to show the capacity in which the covenantor acted. But where it plainly appears from the face of the instrument that the trustee did not mean to bind himself personally, the courts will construe the covenant according to the plainly expressed intent of the parties. *Glenn v. Allison*, 58 Md. 527, 529.

The word "trustees," in a stock certificate standing in the name of several trustees, cannot be regarded as mere descriptive personae, and rejected as a nullity, but is a plain and actual notice of the existence of a trust of some description; and it is the duty of one taking such a certificate as security for a debt to ascertain whether the trustee had the right to give it. *Shaw v. Spencer*, 100 Mass. 382, 389, 97 Am. Dec. 107, 1 Am. Rep. 115.

Where a fund was deposited to the credit of W., trustee—W. at the time having an account with the bank from which the money in question was checked—and then placed in the first-named account, the word "trustee" meant something. It was not merely descriptive personae, but was a description of the fund deposited. It imported the exist-

ence of a trust, and was notice of the character of the fund. *Bundy v. Town of Monticello*, 84 Ind. 119, 130.

It is a matter of common knowledge that many of the bank accounts in the name of a person simply as "trustee" require no strictness in the investment of the funds held in trust in what are called legal investments, and that a fund was on deposit in the name of one P., "trustee," though it gave notice to the banker that the funds were not or might not be the property of the depositor individually, was not notice that the giving of a check was *prima facie* a waste of the trust estate, or that the trustee was using the trust funds for his personal benefit. *Isham v. Post*, 23 N. Y. Supp. 211, 212, 3 Misc. Rep. 184.

The word "trustee" is one of significance, and is constantly made use of not only in legal phraseology, but in common speaking, to indicate that one holds the title to property in his own absolute right, but for the benefit of some other party or parties. Such words as "trustee," "administrator," and "executor" have a well-understood meaning, and, when attached to a name appearing on the corporate books, are certainly sufficient to notify all that such shares of stock are held by the subscriber not in his own right, but in a representative capacity; thus putting those dealing with the corporation on inquiry. *Welles v. Larrabee* (U. S.) 36 Fed. 866, 870, 2 L. R. A. 471.

The use of the term "trustee" in a deed as descriptive of the grantee is notice to one who takes title under the deed that the property is or may be held under a trust of some description, and puts him upon inquiry as to the existence and nature of the trust. *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 55 N. W. 825, 826, 40 Am. St. Rep. 299.

The word "trustee" was inserted after the name of the grantee in a deed, and the deed was accepted in that form. The grantee afterwards, in a contract relating to the land, affixed the word "trustee" to his signature. Held, that the word "trustee," thus used, without other words, was not mere *descriptio personæ*, but indicated that the grantee took the title, not in his individual capacity, but in trust for another, though the names of his *cestui que trust* were not disclosed by the deed. *Johnson v. Calnan*, 34 Pac. 905, 908, 19 Colo. 168, 41 Am. St. Rep. 224.

Agent distinguished.

An agent represents and acts for his principal. He may be either a natural or artificial person. A trustee is not an agent, but is a person in whom some estate, interest, or a power in or affecting property is vested for the benefit of another. When

an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not; but, when a trustee contracts as such, unless he is bound no one is bound, for he has no principal, and, as a trust estate cannot promise, the contract is therefore the personal undertaking of the trustee; and, though a principal holds the estate only with power and for the purpose of managing it, he is personally bound by a contract which he makes as trustee, even when designating himself as such. *Taylor v. Mayo*, 4 Sup. Ct. 147, 150, 110 U. S. 330, 28 L. Ed. 163.

A trustee in a trust deed is not the mere agent or attorney for the holder of the note, but he is the trusted agent of both debtor and creditor. In a sale of property under a deed, he should use all reasonable efforts and methods to make it bring as much as possible, and should be fair and impartial as between debtor and creditor. *Axman v. Smith*, 57 S. W. 105, 106, 156 Mo. 286.

An agent, in a general sense, and for certain purposes, is a trustee, but is not a trustee within the meaning of 1 Rev. St. tit. 2, pt. 1, c. 13, art. 1, § 5, providing that personal property held by persons as agents, trustees, executors, or administrators must be assessed against them, since these terms are limited in their meaning, and apply only to persons filling particular offices. *People v. Com'rs*, 3 N. E. 85, 86, 100 N. Y. 215.

Assignee.

"The word 'trustee,' taken by itself, is broad enough to include and does include an assignee, for an assignee is the trustee both for the creditors of the assignor, and also for the assignor himself. Said word, in the statutes relating to garnishment, must not be taken out of its setting, however, and simply its abstract or technical meaning determined, but it must be considered in its collocation, and also with reference to the process of garnishment provided by our statutes relating to that subject. The word in these statutes is limited in its application to the debtor or agent of the principal defendant against whom an action *ex contractu* at law only might be maintained in favor of such defendant." *Cross v. Brown*, 33 Atl. 147, 157, 19 R. I. 220.

Though in many sections of the Revised Statutes the terms "assignee" and "trustee" are coupled as though they meant the same, section 2734, requiring that the property of every person for whose benefit property is held in trust must be listed by the trustee, does not furnish authority for such listing by an assignee of an insolvent. The purpose of the provision is satisfied by confining its application to those trusts where title and possession are placed in one for the benefit

of others, in some permanent form, from which in general some interest, income, or profit is expected to be derived. *McNeill v. Hagerty*, 37 N. E. 523, 529, 51 Ohio St. 255, 23 L. R. A. 622.

An assignee is the person to whom property is made over or transferred, whether he receives it in his own right, or for the benefit of another, as for the benefit of creditors. Among the definitions of "trustee" is one to whom property has been conveyed to be held or managed for the benefit of another. To a certain extent, executors, administrators, guardians, and assignees are trustees. While in some respects, for the purpose of enforcement, the terms differ, in many respects they are interchangeable. Hence, where property is conveyed by a debtor to a third person, to be held and disposed of for the benefit of creditors, such transaction is an assignment, and the trust officer is the assignee, though the instrument is called a "trust deed," the property "trust property," and conveyed in trust. In such case "assignee" and "trustee" may be used interchangeably. *Schee v. La Grange*, 42 N. W. 616, 618, 78 Iowa, 101.

Banker distinguished.

See "Banker."

Committee of lunatic.

A committee of a lunatic is a trustee. To him is intrusted the entire control and care of the estate of the lunatic, and, although he is a mere servant or bailiff, he is invested with a trust. If a trustee, he is, of course, trustee of an express trust, and is authorized to bring, in his own name, as committee of the lunatic, an action for the purpose of setting aside an act or deed done by the lunatic. *Person v. Warren*, 14 Barb. 438, 494.

The committee of a lunatic is held not to be a trustee, within the meaning of a statute authorizing the assessment of property held by a trustee in the name of the trustee. *People ex rel. Smith v. Commissioners, etc.*, of New York, 3 N. E. 85, 87, 100 N. Y. 215.

Corporation.

The title to property belonging to a corporation is vested in it. It holds, subject to its charter and by-laws, for the use and benefit of its stockholders and the corporation, and therefore falls within the strict definition of a trustee; that is, one who holds the legal title for the use and benefit of others. Where a mining corporation purchases a majority of the stock of another mining corporation, and by so doing is able to elect a director under its control, and secure a bond and lease of the property of such corporation on its own terms and conditions, such lease and bond will be set aside

at the suit of minority stockholders of the latter corporation, though obtained without any actual fraud. *Glengary Consol. Min. Co. v. Boehmer*, 62 Pac. 839, 28 Colo. 1.

Directors of corporation.

See, also, "Bank Director."

Directors of a corporation such as a bank are not express trustees. In this connection, the court says, the language of Special Judge Ingersoll in *Shea v. Mabry*, 69 Tenn. (1 Lea) 319, that directors are trustees, etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandatories. They are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith. They do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property. They are equally interested with those they represent. They more nearly represent the managing partners in a business firm than a technical trustee. At most, they are implied trustees, in whose favor the statutes of limitation do run. *Wallace v. Lincoln Sav. Bank*, 15 S. W. 448, 453, 89 Tenn. (5 Pickle) 630, 24 Am. St. Rep. 625.

Pen. Code, § 165, inflicting a penalty for offering bribes to any member of the board of trustees of any county, city, or corporation, includes the board of directors of a corporation. *People v. Turnbull*, 29 Pac. 224, 93 Cal. 445.

Bank directors are often styled "trustees," but not in a technical sense. The relation between the corporation and them is rather that of principal and agent—certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 929, 141 U. S. 132, 35 L. Ed. 662.

The term "trustees," if used in a technical sense, can be construed, in Indiana, to include the directors of a bank of discount and deposit incorporated under the statutes of the state, and it is said that they can be held to a very high degree of diligence as to the financial affairs of the bank. They usually serve without pay, and the general direction of the business of the bank is necessarily to a large extent left to the executive officers of the corporation. *Codding v. Canaday*, 61 N. E. 567, 572, 157 Ind. 243.

Whatever technical objections may be urged to the use of the word "trustee" in connection with the relation existing between the directors and creditors of an insolvent corporation is immaterial, as the word "trustee"

tee" is used to give expression to the fact that the directors and other managing officers of such a corporation, lawfully having possession and control of the assets, are under obligation to apply them. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S. W. 16, 23, 86 Tex. 143, 22 L. R. A. 802.

Donee distinguished.

See "Donee."

Executors and administrators.

An executor is a trustee for the legatees. *Paxton v. Wood*, 77 N. C. 11, 17.

The court of chancery regards executors and administrators as trustees, and compels them faithfully to execute their trusts in administering the assets of the estate. *Hunt v. Sneed*, 64 N. C. 180, 181.

An administrator, under Pasch. Dig. art. 1373, declaring that, upon the issuance of letters of administration, the administrator shall have the right to the possession of the estate as it existed at the death of the testator, with certain exceptions, and providing that it shall be the duty of the administrator to recover and hold possession of such estate in trust, to be disposed of under the provisions of the law, is a trustee. *Jones v. Lee* (Tex.) 22 S. W. 1092, 1094.

Under a statute defining the jurisdiction of a surrogate's court, and not extending that jurisdiction to a settlement of accounts of testamentary trustees, it is held that an executor, although a trustee in a general sense, is not a trustee, within the meaning of the statute. *In re Hawley*, 10 N. E. 352, 357, 104 N. Y. 250.

The word "trustee," as used in statutes requiring personal property in the hands of a trustee to be assessed in the town in which such trustee resides, does not include an executor or administrator, as such, during settlement of the estate, and before final distribution. *Cornwall v. Tood*, 38 Conn. 443, 444.

An administrator is not a trustee, within Pub. Laws March 31, 1870, c. 858, § 1, providing that the personal estate of any person in the hands of his trustee shall be liable to be attached. An administrator is sometimes spoken of as holding the estate in his hands in trust. Wrongdoers are sometimes held to be trustees in order to effect equity in particular cases, and so an office is spoken of as a trust. But, in the sense in which the words are ordinarily used, an administrator cannot be considered a trustee. *Conway v. Armington*, 11 R. I. 116, 117.

In a will creating a trust fund, and providing that the probate court should appoint a proper person as administrator and trustee, to carry out the provisions of the will, the word "administrator" was probably used

to indicate that the trustee was expected to discharge the duties which ordinarily devolve upon the administrator. *Roberts v. Chambers*, 59 N. W. 45, 46, 91 Iowa, 204.

Holder of collateral.

The term "trustee," as used in *Mills' Ann. St. Colo.* § 496, providing that every executor, administrator, conservator, guardian, or trustee shall represent the stock in his hands at all meetings of any such corporation, and may vote accordingly as a stockholder, and every person who shall pledge his stock may nevertheless represent the same at all meetings and vote accordingly, means a person who holds the legal title to stock for the benefit of some third party, who is the equitable owner thereof and entitled to the dividends thereon, and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock, as a married woman, minor, etc., but does not include a person in whose hands stock is placed as collateral security. *National Bank of Commerce v. Allen* (U. S.) 90 Fed. 545, 552, 33 C. C. A. 169.

Master in chancery.

A master in chancery, who is the custodian, by order of the court, of money belonging to parties to suits or others, is a "trustee," in the true sense of the word. He is intrusted with the custody of money belonging to another, with the power, but without the right, to dispose of it for his own benefit, and therein lies the essential element of a trust. *Van Doren v. Van Doren*, 17 Atl. 805, 806, 45 N. J. Eq. 580.

Mortgagor.

A mortgagor occupying mortgaged property holds it as a fiduciary, to the extent that he may not destroy the property or commit waste to the prejudice of the owner or the mortgagee, and so may properly enough be called a "trustee," in a general sense, as that term is frequently used to cover fiduciary relations of many kinds which do not rise to the dignity of express trusts. *Merton v. O'Brien*, 94 N. W. 340, 342, 117 Wis. 437.

Mortgagees in possession are often spoken of as trustees, but they are so only in a very limited sense. As remarked by Shaw, C. J., in reasoning to a somewhat different point, "in some very limited respects a mortgagee is a trustee, as when he has entered and is in receipt of the rents and profits, and is liable to account therefor, and in that respect may be considered a trustee." *Murdock v. Clarke*, 24 Pac. 272, 274 (quoting *King v. Insurance Co.*, 7 Cush. 7).

As officers of corporation.

See "Officer (of Corporations)."

Partner.

The authorities settle the question that only in a qualified sense is a surviving partner a trustee of the representatives of a deceased partner, but he takes or retains the partnership property *jure proprio*, and the only trust which attaches to his possession and disposition of the property is his duty to settle up the affairs of the partnership, and account to the representatives of the deceased partner. *Krueger v. Speith*, 20 Pac. 664, 667, 8 Mont. 482, 3 L. R. A. 291.

Lord Westbury, in a very felicitous way, analyzes the use of the word "trustee," and properly defines and limits it. The distinguished jurist said: "Another source of error in this matter is the looseness in which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representative certain rights as against the surviving partner, and imposes upon the latter corresponding obligations. The surviving partner may be called, so far as these obligations extend, a 'trustee for the deceased partner'; but when these obligations have been fulfilled, or are discharged or terminated by law, the supposed trust is at an end. The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have singularly illustrated in a case that occurred some years ago in a court of law, where the court of law was told that, in an agreement for the sale of a house, the vendor was trustee for the purchaser, and the judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong when the vendor is called a trustee only by metaphor, and an improper use of the term; and it required some trouble to convince them that, though the vendor might be called a trustee, he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. * * * The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." *Burchinell v. Koon*, 46 Pac. 932, 933, 8 Colo. App. 463 (quoting *Knot v. Gye*, L. R. 5 H. L. 656; *Hume v. Woodruff*, 38 Pac. 191, 26 Or. 373).

Where a single partner sells all the partnership property, and receives the money for it, he holds the shares of his co-partners as

trustee. *Standish v. Babcock*, 29 Am. 327, 329, 52 N. J. Eq. 628.

Receiver.

Laws 1893, c. 293, prescribing a six-months limitation for actions by a receiver of a foreign mutual fire insurance company for claims due from policy holders within the state, applies to an action by a trustee of such a company organized under the laws of Ohio, since the same functions exercised under the laws and practice of Ohio by a trustee are exercised by a receiver under the laws of Wisconsin. *Mansfield v. William Becker Leather Co.*, 68 N. W. 411, 93 Wis. 656.

Statehouse commissioner.

Commissioners appointed by the General Assembly, and charged with the expenditure of a fund created for the building of a statehouse, are not trustees, in a legal sense, but are officials of the state. In re New Statehouse (R. I.) 37 Atl. 2, 4.

Stockholder.

Under an act providing that the trustees and corporators of any company shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, etc., it is held that stockholders are included in the terms "trustees" and "corporators." *Shufeldt v. Carver*, 8 Ill. App. (8 Bradw.) 545, 548.

No person will be regarded as holding stock as a trustee, or by way of collateral security, within the meaning of section 9, Wag. St. p. 301, and therefore exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business. *Fisher v. Seligman*, 75 Mo. 13, 24.

"Trustees," as used in a statute declaring that the trustees and corporators of any company organized in the act shall be liable for the debts of the company, etc., means shareholders, and not merely commissioners or promoters, of corporations so organized. *Gulliver v. Roelle*, 100 Ill. 141, 147.

TRUSTEE DE SON TORT.

A trustee de son tort is he who, of his own authority, enters into the possession or assumes the management of property which belongs beneficially to another. *Morris v. Joseph*, 1 W. Va. 256, 259, 91 Am. Dec. 386; *Bailey v. Bailey*, 32 Atl. 470, 471, 67 Vt. 494, 48 Am. St. Rep. 828.

A trustee in invitum or trustee de son tort is one who acts without authority or exceeds his authority in some matter of fact or law. An agent following instructions does not, and cannot thereby, make himself a trustee in invitum or de son tort. *Houston v. Farris*, 11 South. 330, 331, 93 Ala. 587.

Persons receiving money in a fiduciary capacity are sometimes denominated trustees ex maleficio and trustees de son tort; but, when such terms are employed, they are employed only to designate those implied trusts which the law raises for the purposes of justice. *Brown v. Brown*, 31 N. Y. Supp. 650, 652, 83 Hun, 160.

TRUSTEE EX MALEFICIO.

When a party has acquired the legal title to property by unfair means, he will be deemed to hold it in trust for the injured party, who may call for a conveyance thereof. The party guilty of fraud is said in such cases to be a trustee ex maleficio. *Bisp. Eq. § 91*. Mr. Pomeroy has stated the doctrine as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealment, or other undue influence, duress, taking advantage of one's weakness or necessities, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one truly and equitably entitled to have the same." *Parrish v. Parrish*, 54 Pac. 352, 354, 33 Or. 486 (citing 2 Pom. Eq. Jur. § 1053).

An attorney purchasing property intrusted to him to sell is termed a trustee ex maleficio. *Yeoman v. Townshend*, 26 N. Y. Supp. 606, 609, 74 Hun, 625.

Persons receiving money in a fiduciary capacity are sometimes denominated trustees ex maleficio and trustees de son tort, but when such terms are employed they are employed only to designate those implied trusts which the law raises for the purposes of justice. *Brown v. Brown*, 31 N. Y. Supp. 650, 652, 83 Hun, 160.

TRUSTEE IN BANKRUPTCY.

The position of a trustee in bankruptcy is a peculiar one. He takes the place of the bankrupt, being vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, and, with reference to pending suits, is treated like any other person who acquires title pendente lite. As such, he is bound by a judgment subsequently rendered, unless, by a direct proceeding before the court rendering it, he can have it set aside. He may also be said to

represent the creditors, and is a trustee with limited powers, and must look to the provisions of the bankrupt law not only as the source of his power, but also for the manner of its exercise. *Belcher Land Mortg. Co. v. Bush* (Tex.) 67 S. W. 444, 446.

The trustee in bankruptcy peculiarly represents the creditors of the bankrupt, and his claims to property are essentially in their behalf. *Arnold v. Eastin's Trustee*, 76 S. W. 855, 860, 25 Ky. Law Rep. 896.

A trustee in bankruptcy is an officer of the court, who has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold moneys in his hands in trust for its equitable distribution among creditors. *In re Myers* (U. S.) 99 Fed. 691, 694.

A trustee in bankruptcy, under the bankrupt act, is an officer, and, in a certain restricted sense, an officer of the court. But he is not an officer of the court in any such sense as a receiver. He takes the legal title to the property, and in respect to suits stands in the same general position as a trustee of an express trust or an executor. *In re Smith* (U. S.) 9 Am. Bankr. Rep. 603, 21 Fed. 1014.

TRUSTEE IN INSOLVENCY.

As personal representative, see "Personal Representative."

TRUSTEE OF EXPRESS TRUST.

A person with whom or in whose name a contract is made for the benefit of another is a "trustee of an express trust," within the meaning of the provision that such a person may sue without joining with him the persons for whose benefit the action is prosecuted. *Code Civ. Proc. Cal. 1903, § 369*; *Rev. St. Utah 1898, § 2902*; *Code Civ. Proc. N. Y. 1899, § 449*; *Ballinger's Ann. Codes & St. Wash. 1897, § 4825*; *Wright v. Tinsley*, 30 Mo. 389, 395; *Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. 436, 442, 160 Ind. 97, 60 L. R. A. 822; *Hastings v. Gwynn*, 12 Wis. 671.

The term "trustee of express trust," in the Code provision authorizing a trustee of an express trust to sue without joining with him the person for whose benefit the action is prosecuted, means a trustee created by express agreement to that effect, or something which in law is equivalent to such an agreement. In every case the trust must be expressed by some agreement of the parties, not necessarily, perhaps, in writing, but either written or verbal, according to the nature of the transaction. *Robbins v. Deverill*, 20 Wis. 142, 148.

The cashier and custodian of the funds of a bank which is not incorporated, but

merely a partnership, of which such cashier is a member, who habitually makes contracts for the bank, may sue on such contract in his own name in behalf of the bank; he being a trustee of an express trust. *Merchants' Bank v. McClelland*, 13 Pac. 723, 724, 9 Colo. 608.

One with whom a contract for the carriage of goods is made, and who is described therein as the consignor or consignee and sole owner, although not in fact the owner, is a trustee of an express trust. *Waterman v. Chicago, M. & St. P. Ry. Co.*, 21 N. W. 611, 613, 61 Wis. 464, 50 Am. Rep. 145.

A trustee of an express trust is a person with whom or in whose name a contract is made for the benefit of another. Thus, where a plaintiff bid in property and received a certificate of sale, and the sheriff's deed for the same issued in his own name as between him and the bank for which he purchased, he was a trustee of an express trust. *Walker v. McCusker*, 12 Pac. 723, 725, 71 Cal. 594.

Where one transfers a claim to an attorney for collection, with directions to the attorney to apply the proceeds to demands held by the attorney for collection against the party transferring the claim, the attorney holds the claim as trustee of an express trust. *Wynne v. Heck*, 92 N. C. 414, 416.

A written order by the owner of personal property, authorizing plaintiff to dispose of it and collect the proceeds, does not constitute plaintiff a trustee of an express trust. *Swenson v. Kleinschmidt*, 26 Pac. 198, 199, 10 Mont. 473.

Const. 1874 provides that the homestead shall not be exempt from execution on judgments rendered "against executors, administrators, guardians, receivers, attorneys for money collected by them, and other trustees of an express trust for moneys due in their official capacity." Held, that since all the specific classes therein named were persons holding money exclusively for the benefit of others, and since the relation between them and those for whom they held was in each case one of confidence and trust, the "other trustees of an express trust" mentioned must refer to the same class of trustees, and therefore, where an attorney became surety on his client's bond to relieve his client's money from garnishment, and received the money until the suit was decided, and converted it, he could not be said to hold it as a trustee of an express trust. *Sanders v. Sanders*, 20 S. W. 517, 518, 56 Ark. 585.

Agent.

An agent to whom goods are assigned for his principal, and who has no pecuniary interest in them beyond his lien for commission, and who has contracted with the common carrier for their delivery, is a trustee of an

express trust. *Wolfe v. Missouri Pac. Ry. Co.*, 11 S. W. 49, 51, 97 Mo. 473, 3 L. R. A. 539, 10 Am. St. Rep. 331.

An agent who collected money belonging to his principal, and delivered it to an express company, and paid the charges for carrying and delivering the money to another agent, was a "trustee of an express trust," and, as such trustee, such agent may maintain an action against the express company to recover such money on the company's failure to deliver. *Snider v. Adams Express Co.*, 77 Mo. 523, 526.

An agent who takes a contract for the benefit of his principal in his own name is within Gen. St. Minn. 1878, c. 66, § 23, allowing a trustee of an express trust to sue in his own name. *Cremer v. Wimmer*, 42 N. W. 467, 40 Minn. 511.

The executive agent of a corporation who transacts business in his own name is the trustee of an express trust and may sue, without joining the corporation. *Albany & R. Iron & Steel Co. v. Lundberg*, 7 Sup. Ct. 958, 960, 121 U. S. 451, 30 L. Ed. 982.

An agent of a mowing machine company, who contracts to sell and sells mowing machines for the company, is a trustee of an express trust, and hence may sue on the contract in his own name. *Davis v. Reynolds* (N. Y.) 48 How. Prac. 210, 212.

Assignee.

An assignee in bankruptcy is the trustee of an express trust, expressly authorized to sue by Code, § 317. *Reade v. Waterhouse*, 52 N. Y. 587, 589.

An assignee for the benefit of creditors is a trustee of an express trust. That the duties of the assignee, in disposing of the trust estate, are regulated by law, rather than by the express terms of the deed of assignment, does not render the trust any less an express one. *Caldwell v. Matthewson*, 45 Pac. 614, 615, 57 Kan. 258.

Assignee of collateral.

One to whom a bond and mortgage were assigned as collateral security is a trustee of an express trust, and may maintain an action to foreclose the mortgage without joining his assignor as a party thereto. *Chew v. Brumagen*, 80 U. S. (13 Wall.) 497, 502, 20 L. Ed. 663.

Committee of lunatic.

The committee of the estate and person of a lunatic is not the trustee of an express trust, and therefore the committee cannot institute an action in his own name, but the action must be brought in the name of the lunatic. *Burnet v. Bookstaver* (N. Y.) 10 Hun, 481, 484.

Grantee.

Where land has been conveyed to one by deed for the benefit of another, he is a trustee of an express trust, and the proper person to bring an action under it in behalf of the beneficiary. *Brown v. Cherry* (N. Y.) 56 Barb. 635, 640, 38 How. Prac. 352, 357.

Guardian.

A guardian appointed by the probate court under the act providing for the appointment, and prescribing the duty of guardians, is not a trustee of an express trust, and hence is not authorized to bring an action for the benefit of his ward in his own name. *Fox v. Minor*, 32 Cal. 111, 116, 91 Am. Dec. 566.

A guardian is not the trustee of an express trust, against whom limitations will not run. *Harris v. Calvert*, 44 Pac. 25, 29, 2 Kan. App. 749.

Insured.

One who has insured his life for the benefit of another is a trustee of an express trust, and may bring an action on the policy without joining the beneficiary. *Kerr v. Union Mut. Life Ins. Co.*, 69 Hun, 393, 397, 23 N. Y. Supp. 619.

A trustee of an express trust, within Code, § 113, who is expressly authorized to sue without joining the beneficiary, includes a person with whom or in whose name a contract is made for the benefit of another; and under an insurance policy payable to the personal representatives of insured—the sum specified to be for the benefit of his wife—such representatives were trustees of an express trust. *Greenfield v. Massachusetts Mut. Life Ins. Co.*, 47 N. Y. 430, 435.

Officer of fraternal organization.

One who takes upon himself an office in a fraternal and benevolent organization, the duties of which office, as set forth in its printed or written by-laws or regulations, are to collect the moneys of such organization and pay them over to another of its officers, is the trustee of an express trust, and hence liable, under Gen. St. 1897, c. 100, § 95, for the embezzlement of the moneys collected by him. *State v. Campbell*, 52 Pac. 454, 455, 59 Kan. 246.

Payee.

Where a note is payable to one for the benefit of another, such payee is a "trustee of an express trust," within Practice Act, § 4, and entitled to sue on the note. *Winters v. Rush*, 34 Cal. 136, 138.

An administrator to whom a promissory note is given, payable to him by name, with the addition of his office as administrator, after he has resigned the office, and an administrator de bonis non is appointed, is, as to such note, a trustee of an express trust,

and may sue upon such note in his own name. *Harney v. Ducher*, 15 Mo. 89, 93, 55 Am. Dec. 131.

Where a note was made payable to W. or any authorized agent of a certain college, "for the endowment of said college," W. was the trustee of an express trust, within the meaning of section 6 of the practice act, authorizing a trustee of an express trust to bring an action in his own name. *Winters v. Rush*, 34 Cal. 136, 138.

The agent of a foreign corporation, to whom a subscription note is made payable, as executive agent of the company, for stock of the corporation to be issued to the signer, is a trustee of an express trust, within Code, §§ 111, 113. *Considerant v. Brisbane*, 22 N. Y. 389, 392.

An action on a note payable to plaintiffs, as agents of a syndicate, may be maintained by the plaintiffs in their own name, as trustees of an express trust; such action being authorized by the Code. *Coffin v. President Grand Rapids Hydraulic Co.*, 32 N. E. 1076, 1078, 136 N. Y. 655.

People or state.

Where a bond of a trustee was given to the people of the state for the benefit of those interested in the trust estate, the people were "a trustee of an express trust," within Code, § 113, authorizing suit to be brought in the name of such a trustee. *People v. Norton*, 9 N. Y. 176, 179.

In Code Civ. Proc. § 369, authorizing a trustee of an express trust to sue without joining with him the person for whose benefit the action is prosecuted, it is provided that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section. The state may bring an action on the official bond of a collector of license taxes, which bond was made payable to the state. *People v. Stacy*, 16 Pac. 192, 193, 74 Cal. 373.

Under a statute authorizing trustees of an express trust to sue without joining with them the person for whose benefit the action was brought, and declaring that a trustee of an express trust shall be construed to include a person with whom or in whose name a contract is made for the benefit of another, the state may bring an action on a recognition for a criminal action which is made out in the name of the state, though the money recovered belongs to the county in which the party was held to stand trial, and not to the state. *State v. Wettstein*, 25 N. W. 34, 38, 64 Wis. 234.

Receiver.

A receiver is not a trustee of an express trust. *State ex rel. Fichtenkamm v. Gamba*, 68 Mo. 289, 297.

TRUSTEES OF THE POOR.

Trustees of the poor are not private parties. They are public officers, and hence, where they are defendants in an action, and attending as witnesses in behalf of the corporation, with no private interest therein, they are entitled to witness fees. *Taylor v. Trustees of the Poor of Newcastle County (Del.)* 40 Atl. 116.

TRUSTEE PROCESS.

"Trustee process" is the name by which the process corresponding to garnishment is known in Massachusetts. *White v. Simpson*, 18 South. 151, 153, 107 Ala. 386; *Pennsylvania R. Co. v. Rogers*, 44 S. E. 300, 302, 52 W. Va. 450, 62 L. R. A. 178.

The term "trustee process" is the term generally employed in the Northeastern states to designate garnishment proceedings. It is so used in Rhode Island. In some states it is called "factorizing." In the one case the party in possession is called the "trustee," in the other the "factor." *Cross v. Brown*, 83 Atl. 147, 157, 19 R. I. 220.

"Trustee process," or "process of foreign attachment or garnishment," is, so far as it relates to the trustee, an attachment of the property in his hands, and a summons to him to appear at court. *Creed v. Gilman*, 48 N. E. 778, 169 Mass. 562.

A trustee process is in the nature of the proceeding in rem. It is a sequestration of the debt due from the trustee in order that it may be devoted to the payment of one to whom the trustee's creditor is himself indebted. *Lancashire Ins. Co. v. Corbetts*, 46 N. E. 631, 634, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275.

The trustee process, or the name by which the process for responding to a garnishment is known in Massachusetts, will operate as a species of compulsory assignment, by which a creditor may obtain that by operation of law which his debtor might voluntarily assign to him in payment of his debt. *White v. Simpson*, 18 South. 151, 153, 107 Ala. 386.

The trustee process is an equitable proceeding, and, where an assignee has been appointed, and no creditors have proved their claims within the prescribed time, creditors cannot reach the funds in the hands of the assignee by trustee process. *Tucker v. Chick*, 87 Atl. 672, 673, 67 N. H. 77.

TRUSTEE'S SALE.

As judicial sale, see "Judicial Sale."

TRUSTOR.

The person whose confidence creates the trust is called the "trustor." *Civ. Code Mont.*

1895, § 2953; *Civ. Code Cal.* 1903, § 2218; *Rev. Codes N. D.* 1899, § 4257; *Civ. Code S. D.* 1903, § 1610; *Colton v. Stanford*, 23 Pac. 16, 20, 82 Cal. 351, 16 Am. St. Rep. 137.

A trustor is one who gives a deed of trust by way of a mortgage. *Stephens v. Clay*, 30 Pac. 43, 44, 17 Colo. 489, 31 Am. St. Rep. 328.

TRUTH.

See "Whole Truth."

"Truth," as applied to the doctrine of Christian science, is that which is always the same, and can never change; the one Supreme Being; the All Powerful; that which created all things that are; He who made all that was made, and made it good, as is said in His word. *State v. Buswell*, 58 N. W. 728, 730, 40 Neb. 158, 24 L. R. A. 68.

"According to the best lexicographers of our language—at least, in this country—the words, 'truth,' 'veracity,' and 'honesty' are almost synonymous; very nearly the same definitions being given to each of the words. Truth is so nearly allied to honesty and moral soundness, it seems to us, that, where a witness has testified in chief that the reputation of a person for truth and veracity is good, it is competent to ask him on cross-examination if he has not heard of a certain matter which would seriously effect the reputation of the party for honesty and moral soundness, as being necessarily inconsistent and at variance with the reputation he has given the party." *Wachstetter v. State*, 99 Ind. 290-297, 50 Am. Rep. 94.

Fact distinguished.

A "truth," in pleading, is the legal principle which declares or governs the facts and their operation and effect, and is widely different from a "fact," which, in pleading, is a circumstance, act, event, or incident, though the terms "fact" and "truth," in common parlance, are often used as synonymous. *Drake v. Cockcroft (N. Y.)* 1 Abb. Prac. 203, 205.

TRUTHFULNESS.

The word "truthfulness," as used in an application for insurance, wherein the applicant warrants the truthfulness of his statements, should be construed to mean according to the knowledge and information possessed by the applicant. The word is susceptible of this meaning, and since the law does not favor forfeitures, or a construction of an application or a medical examination which renders the statements warranties, with harsh and inequitable results, that meaning should be applied. *Jennings v. Supreme Council of Loyal Additional Ben. Ass'n*, 81 N. Y. Supp. 90, 100, 81 App. Div. 78.

TRY.

An averment that another tried to do anything, implying physical effort, is the equivalent of saying that he attempted to do it. In an action for slander, a count averring that defendant feloniously and maliciously charged plaintiff, in the presence of others, with having tried to steal, but could not, is equivalent to charging him with an attempt to commit larceny, and such a charge is actionable per se. *Berdeaux v. Davis*, 58 Ala. 611, 612.

A record showing that the jurors were tried in the manner required by law imports that the jurors were tested as to their fitness and qualification. *Ohio River Railroad Co. v. Blake*, 18 S. E. 957, 958, 38 W. Va. 718.

A statement in the record on appeal that the jury was sworn to try the issues was of no effect where the record also showed that the parties proceeded to trial without a replication to the plea of set-off, as there was no issue. *Reagan v. Irvin*, 25 Ark. 86, 88.

TUG.

As boat, see "Boat."

As common carrier, see "Common Carrier."

TUITION.

Tuition is the charge made for instruction, rather than a rent for use of buildings in which instruction is imparted. *Linton v. Lucy Cobb Institute*, 45 S. E. 53, 55, 117 Ga. 678.

"Tuition," as used in Rev. St. § 388, providing that no student who shall have been a resident of the state for one year next preceding his admission shall be required to pay any fees for tuition in the university, construed not to include incidental expenses, and hence students may be charged therefor without regard to the statute. *State v. Regents of the University of Wisconsin*, 11 N. W. 472, 473, 54 Wis. 159.

Laws 1893, c. 175, providing that, on the death of one parent, the surviving parent may by will dispose of the custody and tuition of an infant child, includes guardianship of the estate as well as of the person. In re *Zwickert*, 26 N. Y. Supp. 773, 774, 5 Misc. Rep. 272.

TUMBLE STUFF.

"Tumble stuff" is used in the mining law to designate that superficial deposit on the earth's surface which is movable, as contrasted with the immovable mass that lies below. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

TUMBREL.

A "tumbrel" was an instrument of punishment known to the ancient common law, by which a woman convicted of being a common scold was punished by being plunged into the water. Lord Coke says that, in law, "it signifieth a stool that falleth down into a pit of water for the punishment of the party in it." *United States v. Royall* (U. S.) 27 Fed. Cas. 907, 908.

TUMULT.

Rev. St. c. 113, declares that no person shall make any "brawl or tumult" in a street, lane, alley, or public place. Held, that the Legislature intended to provide a punishment for one offense; brawl and tumult being relative terms, the one employed to express the meaning of the other. *State v. Perkins*, 42 N. H. 464, 465.

TUMULTUOUS ASSEMBLY.

"Tumultuous" means conducted with disorder; noisy, confused, boisterous, disorderly, as a tumultuous assembly or meeting. Ky. St. § 8, makes any city liable for injury to property by any riotous or tumultuous assemblage of people, etc. In an action for damages alleged to have been inflicted by such an assembly, it was insisted for the city that the words "tumultuous assemblage" referred only to an unlawful assembly, bent on evil, such as a mob, and that it should not be held to apply to a crowd of merry-makers celebrating the advent of Christmas, which was in fact the assemblage that inflicted the injury complained of in the case. It was, however, held that the purpose of the assembly, or the aim that it had primarily in view, was not material, if it was in fact tumultuous, and that, as a matter of fact, an assemblage of 1,000 people in the main street of a city, obstructing the use of the street, and discharging bombs, skyrockets, Roman candles, and other missiles loaded with powerful explosives, at private property, endangering life and preventing the use of the street for purposes of business, was a tumultuous assembly. *City of Madisonville v. Bishop*, 67 S. W. 269, 270, 113 Ky. 106, 57 L. R. A. 180.

TUNNEL CLAIM.

A tunnel location has been called a "tunnel claim" by the highest judicial authority, and it seems that a valid tunnel location may inure to the benefit and protection of mineral lodes discovered in such tunnel. *Eillet v. Campbell*, 33 Pac. 521, 525, 18 Colo. 510.

TUNNEL RIGHT.

A tunnel right through a specific piece of ground is a right to enter upon and occupy

the ground for the purpose of prosecuting work in the tunnel, and to extract therefrom waste rock or earth necessary to complete the running of the tunnel, and making such use thereof after completion as may be necessary to work the mining ground or lode owned by the party running the tunnel; and, by implication, a grant of a tunnel right carries with it the right to dump waste rock and earth on land owned by the grantors at the time of the conveyance of the tunnel right. *Scheel v. Alhambra Mining Co. (U. S.)* 79 Fed. 821, 825.

TURBARY.

See "Common of Turbary."

TURKEY.

An indictment for stealing two "turkeys" was not supported by evidence of the theft of two "dead turkeys" stolen from a larder. *Rex v. Holloway*, 1 Carr. & P. 128.

TURN OUT.

"Turn out," as used in a receipt given to an administrator by an assignee of claims against the estate, providing that if it should turn out that the assignee had received more than was due, or that there were prior liens, he would refund the overpayment, meant when those facts, if existing, were discovered by the administrator, or might have been discovered with reasonable diligence. *Eller v. Church*, 28 S. E. 364, 121 N. C. 269.

An old field, that had formerly been cleared, inclosed, and cultivated, but of which the fences are down, and the land grown up in broom sedge and pine bushes, is said to be "turned out," in the common parlance of the country. *Hall v. Canford*, 50 N. C. 3, 4.

Act Feb. 26, 1817, providing that a wife may secure a divorce from her husband in case he shall "turn her out of doors," does not apply to an instance where she is not ejected by force, or compelled to leave because of a threat to employ it, and a reasonable apprehension that it would be used against her, or a refusal to receive her upon demand that she should be taken into her husband's house as a wife, or an emphatic refusal to allow her to remain after she had returned, accompanied by the declaration that she wished to remain and conduct herself as a wife should do, or where the facts do not show a justification on the part of the wife in withdrawing from the house of her husband. *Appeal of Sower*, 89 Pa. 173, 181.

As side track.

The words, "turn-outs, switches, and sidings, in relation to railroads, are of mod-

ern growth, and not only in early use, but in the dictionaries, are treated as to some extent interchangeable. Webster defines a turn-out as a short side track on a railroad, which may be occupied by one train while another is passing on a main track; a siding. *Appeal of River Front R. Co.*, 19 Atl. 356, 357, 133 Pa. 134.

A turn-out is a short railroad side track, upon which one train may be shunted to permit another to pass on the main track; a short side track on a railway, designated to enable one train to pass another. A statute authorizing a railroad to take lands for the construction of turn-outs does not authorize it to take lands for the construction of another main line adjoining its constructed road. *Erie R. Co. v. Steward*, 70 N. Y. Supp. 698, 700, 61 App. Div. 480.

Freightyards containing 450 acres, operated as one yard, are not turn-outs or switches, as those terms are understood by railroad men in railway parlance. *People v. New York Cent. & H. R. Co.*, 51 N. E. 312, 314, 156 N. Y. 570.

TURN-OUT ROAD.

A turn-out road is a road used temporarily by the public in consequence of a temporary obstruction of a public road. Such a road, which is not made a public road as required by statute, or acquired by the public by prescription or dedication, is not a public road, within Cr. Code, § 4095, providing for the punishment of one who discharges a gun or any other kind of firearm along or across a public road. *McDade v. State*, 11 South. 375, 376, 95 Ala. 28.

TURNING ROW.

A turning row is a strip of unplowed ground lying between plowed fields on each side, and upon which the teams used in cultivating the fields are turned around. *Langan v. Whalen (Neb.)* 93 N. W. 393.

TURNPIKE.

See "Public Turnpike."

The word "turnpike" does not mean road, but gate—such as are used to throw across the road to obstruct travelers, carriers, and the like, until the tolls are collected. A road is termed a turnpike road not because of its form or of the material of which it is composed, but because of the form and character of the gates placed on the road to obstruct the passage of travelers until they have paid the tolls always collected on such roads. *Jersey City & B. P. Plank-Road Co. v. Haight*, 30 N. J. Law (1 Vroom) 443, 446.

A turnpike is a highway, differing neither in responsibility for proper maintenance, nor in any other particular, from an ordinary highway, save in the mode of constructing and maintaining it. It is regarded, in law, as a public easement, and not as private property. *State ex rel. Allison v. Hannibal and Ralls County Gravel Road Co.*, 39 S. W. 910, 912, 138 Mo. 332, 38 L. R. A. 457.

A turnpike road is a road having toll-gates or bars on it, and on which tolls are collected. *Northam Bridge Co. v. London Ry.*, 6 M. & W. 428, 439.

A turnpike road is a road which is private property, and is subject to be traveled over on condition of first paying such stipulated sum as is prescribed by the Legislature. *Bradshaw v. Rodgers* (N. Y.) 20 Johns. 103, 105.

Whether a road is a turnpike road is a question depending on whether it is a road maintained by tolls payable by passengers, and not whether it is an important road or not. No amount of traffic can make a road a turnpike road. *Reg. v. East & West I. D. Ry. Co.*, 2 Ellis & Bl. 464, 472.

Whenever the word "turnpike" occurs in the act relating to free turnpike roads, it shall be held and taken to mean and include all turnpikes and gravel roads either purchased or constructed by counties, and which are used as free turnpikes or gravel roads. *Horner's Rev. St. Ind. 1901*, § 5106.

Bridge.

The term "turnpike road" includes turnpike bridges. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52, 52 Am. Rep. 66.

As a public highway.

As road or street, see "Road"; "Street."

Turnpikes are public highways, notwithstanding the exaction of toll for passing on them. *Dodge County v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

Turnpike roads are, in point of fact, the most public roads or highways that are known to exist; and, in point of law, they are made entirely for public use, and the community have a public interest in their construction and preservation. They are under legislative regulation, and the gates are subject to be thrown open, and the company indicted and fined, if the road is not made and kept easy and safe for the public use. *Rogers v. Bradshaw* (N. Y.) 20 Johns. 735, 742.

Turnpikes adopted by law, and used for the three purposes of permitting persons to pass and repass on foot, and horseback, and in carriages, as public highways, are public highways, within Rev. Code, c. 34, § 2, punishing with death robbery in or near a pub-

lic highway; and the fact that the agency of individuals or of corporations is used for the purpose of constructing and keeping in repair these kind of public highways in no wise affects the principle or policy of the statute. *State v. Johnson*, 61 N. O. 140, 143.

A turnpike is a public highway, differing neither in the responsibility for its maintenance, nor in any other particular, from an ordinary highway. No additional burden is imposed on the servient estate by changing a public highway into a tollroad. The change is not in the character of the servitude, but in the method of sustaining the highway. In the one case it is sustained by taxes; in the other, by tolls. *St. Joseph Plankroad Co. v. Kline*, 30 South. 854, 858, 106 La. 325.

A turnpike road can be constructed and opened under authority of law only, and when used by the public it becomes a public highway. It differs from a common highway in the fact that it is not constructed in the first instance at the public expense, and the cost of construction is reimbursed by the payment of toll imposed by authority of law. Its use is common to all who comply with the law. Common understanding and public policy unite in requiring that a turnpike be held to be a public highway. *People's Telephone & Telegraph Co. v. President, etc., Berks & D. T. Road*, 49 Atl. 284, 286, 199 Pa. 411 (citing *Northern Central Ry. Co. v. Com.*, 90 Pa. 300, 306; *Pittsburgh, M. & Y. R. Co. v. Com.*, 104 Pa. 583).

A turnpike road is a public highway established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveler had the same right to use it, paying the toll established by law, as he would have to use any other public highway. *Commonwealth v. Wilkinson*, 33 Mass. (16 Pick.) 175, 177, 28 Am. Dec. 654.

Where defendant obtained an order from a board of auditors fixing his rates, and giving him a right to demand and receive tolls from all persons passing over a road, this right was a franchise, and made the road a legalized tollroad or turnpike. Such roads are public highways. They are constructed, like other highways, for the convenience of the public, in the hope of profit to their proprietors, it is true, yet for a public purpose; and travelers have a right to use them on paying the specified tolls. *People v. O'Keefe*, 21 Pac. 538, 539, 79 Cal. 166, 171.

A turnpike is a public highway which the public have a right to use on paying toll. If it is appropriated to some other public use, the turnpike company would be entitled to compensation, and, if the new use was essentially different from the old, the owner of the reversion would also be entitled to compensation. *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich. 265, 272, 24 Am. Rep. 545.

A turnpike is a public highway, and no adverse right to maintain an inclosed bank of earth projecting into it arises from mere lapse of time. *Appeal of Stevenson (Pa.)* 2 Montg. Co. Law Rep. 73, 80.

Turnpike roads are public highways. It is the franchise of a citizen to use them free of every restriction that is not explicitly imposed by the Legislature. *Geiger v. Perkiomen & R. Turnpike Road (Pa.)* 11 Montg. Co. Law Rep. 25, 27 (citing *Huntingdon, C. & I. Turnpike Co. v. Brown (Pa.)* 2 Pen. & W. 462-464).

A turnpike road is not a highway, within the meaning of Gen. St. c. 60, § 22, requiring towns to keep in repair the highways. *Town of North Providence v. Dyer-ville Mfg. Co.*, 13 R. I. 45, 47.

Material of road as affecting.

A plankroad constructed by a private company and under legislative authority, and dedicated to public travel, with gates erected thereon for the collection of tolls, as a condition of such travel, is properly termed a "turnpike road," without regard to the material of which the surface of the road may be composed. *Haight v. Jersey City & B. P. Plankroad Co.*, 32 N. J. Law (3 Vroom) 449, 451.

A turnpike road is one which is repaired by tolls collected on it, and whether it is so, or not, does not depend on the width or make of the road. *Reg. v. East & West I. D. & B. J. Ry. Co.*, 22 Eng. Law & Eq. 113, 117.

A "turnpike road" means a macadam pavement. *City of Louisville v. Tyler*, 64 S. W. 415, 416, 111 Ky. 588.

In an action to collect toll on a gravel road which at places was only 8½ feet in width—it being claimed by defendant that the provision of 1 Rev. St. 1876, p. 664, amending all acts of incorporation for the construction of plankroads and turnpike roads by providing, "where they are now required to construct a double track, either of plank or of metal, the same may be changed to a single track, not less than eight and a half feet in width," did not apply to gravel roads—the court said: "This construction of the statute is, we think, entirely too narrow and technical, and we are not inclined to adopt it. In Worcester's Dictionary a

turnpike road is defined to be a road made by individuals or by a corporation, on which tolls are collected. This definition is certainly broad enough to include gravel roads, on which, under the statutes of this state, tolls may be lawfully collected. *Neff v. Mooresville & W. Gravel Road Co.*, 68 Ind. 279, 284.

TURNPIKE COMPANY.

A turnpike company is one that owns and receives toll on a turnpike road. *Jersey City & B. P. Plankroad Co. v. Haight*, 30 N. J. Law (1 Vroom) 443, 445.

A turnpike company is one which has the power to collect tolls from persons passing over their roads, and to enforce the collection by erecting turnpikes or gates, or both, to obstruct the passage until the tolls are paid. *Haight v. Jersey City & B. P. Plankroad Co.*, 32 N. J. Law (3 Vroom) 440, 451.

TURNPIKE GATE.

Tollgate synonymous, see "Tollgate."

TURPITUDE.

See "Moral Turpitude."

TUTOR.

The term "tutor" is a name used in the civil law to designate one who has charge of the maintenance and education of an infant. *Sproule v. Davies*, 75 N. Y. Supp. 229, 230, 69 App. Div. 502.

TUTRIX.

The use of the term "tutrix" to distinguish a female from a male tutor is conventional. The terminology of the Code recognizes no such distinction of sex in tutorship. A tutor is a tutor, whether the person be man or woman. Though in some articles the Code refers to a female tutor as a tutrix, yet in all articles prescribing the nature, powers, and duties of tutorship it uses simply the words "tutor" and "tutorship," and those provisions apply equally to female as to male tutors. *Succession of Roudreaux*, 7 South. 453, 454, 42 La. Ann. 296.

TWENTY-ONE.

As used in Shannon's Code, § 4318, providing for the delivery of a ward's property to her upon attaining the "age of twenty-one years," the term is synonymous with "full age" or "coming of age," so that there is nothing in the statute fixing 21 years as the age at which a guardian shall settle with

wards who are of full age in the state of their domicile; and hence a minor 18 years of age, but emancipated by the law of her domicile, is entitled to a settlement with her guardian under the statute. The word "twenty-one" happens to be used in the statute merely because that is the age of majority at common law, which is the law of Tennessee on that subject; there being no statute declaring it. *Memphis Trust Co. v. Blessing*, 58 S. W. 115, 117, 103 Tenn. 237.

Mill. & V. Code, § 3419, provides that every minor, upon attaining the age of "twenty-one" years, on receipt of money, shall receipt to the guardian for the same. Section 3358 provides that a guardian who fails to deliver up effects of the ward "upon majority" is guilty of a misdemeanor. Held, that the term "twenty-one" as used in section 3419, should be construed as synonymous with "full age," since it happens to be used in the statute merely because that is the age of majority at common law, which is the law of Tennessee on that subject, there being no statute declaring it; and hence a guardian is not required to wait until the ward is 21 years of age before settling with him, where the ward was a minor domiciled in another state and emancipated by its laws of the disabilities of infancy, but such ward might demand and receive personal property held for her by a guardian appointed and resident in Tennessee, as she will be regarded of full age in Tennessee for that purpose. *Woodward v. Woodward*, 11 S. W. 892, 898, 87 Tenn. (3 Pickle) 644.

As a game.

A statute making the game of "twenty-one" a misdemeanor, without further defining the character of the game, is not sufficiently descriptive to create a crime; for it is a word which does not convey a fixed or ascertainable meaning in law or in English. The word "twenty-one" does not inform us what class of acts there are which constitute the game. A law is a rule of action prescribed. A word which has no fixed meaning cannot constitute a rule of action; for the connotation is not definite, nor does it prescribe either to the public or to the courts what acts are or are not criminal. *Harland v. Territory*, 13 Pac. 453, 457, 8 Wash. T. 131.

TWENTY-SECOND OF FEBRUARY.

The "22d of February" is a voluntary holiday, and an act done on that day which is not prohibited by statute is quite as effective as if done on any other day. *Handy v. Maddox*, 37 Atl. 222, 224, 85 Md. 547.

TWICE IN JEOPARDY.

See "Jeopardy."

TWILIGHT.

Twilight is the light received before the rising and after the setting of the sun, or when the sun is less than 18 degrees below the horizon, occasioned by the illumination of the earth's atmosphere by the direct rays of the sun and their reflection on the earth. The length of twilight necessarily depends on the time of the year and the distance from the equator. *State v. Magers*, 57 Pac. 197, 198, 35 Or. 520.

TWISTED STRAW.

The term "twisted straw" is used in trade and commerce to designate the raw material used in making straw laces. A stock of rye straw is split into two parts, and these parts twisted together compose the "twisted straw" of commerce. *Rheimer v. Maxwell* (U. S.) 20 Fed. Cas. 630.

TWO.

"Two," as used in Laws 1892, c. 668, § 1, par. 1, providing for the consolidation of two corporations into a new corporation, authorizes by intendment the consolidation of two or more corporations. *People v. Rice*, 21 N. Y. Supp. 48, 49, 66 Hun, 130.

Where there is a contract for making two boilers and a cylinder and to put up an engine, the words "two boilers and a cylinder" should be construed to mean an entire steam engine, if it appear that in the locality where the contract was made such phrase be a word of art having such significance. *James v. Bostwick* (Ohio) Wright, 142, 143.

TWO HUNDRED AND FORTY ACRES.

As used in Act Feb. 1, 1877, authorizing the swamp land commissioners to sell swamp land belonging to the state, but providing that no person shall be allowed to enter more than "240 acres," this is construed to be synonymous with three-eighths or six-sixteenths of a section. *Phillips v. Gastrell*, 62 Miss. 362, 365.

TWO MONTHS SUCCESSIVELY.

An order requiring the publication of a notice for "two months successively" is satisfied by a publication for ten weeks. *Foster v. Givens* (U. S.) 67 Fed. 684, 693, 14 C. C. A. 625.

TWO-THIRDS.

Of qualified voters.

Act Dec. 19, 1865, providing that the mayor and council of the city of St. Joseph

should cause all propositions to create a debt by borrowing money to be submitted to a vote of the qualified voters of the city, and in all such cases should require "two-thirds of such qualified voters" to sanction the same, means two-thirds of the qualified voters who voted at the special election, and not two-thirds of all the voters resident in the city, whether voting or not. State ex rel. Bassett v. Renick, 87 Mo. 270, 272.

Of stockholders.

"Two-thirds of the stockholders," in an act requiring two-thirds of the stockholders to approve and consent to the abandonment of a canal, meant the amount of stock in value, and not the number of stockholders. *Fredericks v. Pennsylvania Canal Co. (Pa.)* 42 Leg. Int. 428.

TWO-THIRDS VOTE.

As used in the Constitution, requiring a "two-thirds vote" of the Legislature for certain purposes, the phrase means a vote in each house of two-thirds of all the members

thereof. *State v. Gould*, 17 N. W. 276, 81 Minn. 189.

Const. art. 9, § 7, providing that no law creating a public debt shall take effect until it shall have been passed by the vote of "two-thirds" of the members of the General Assembly, etc., means two-thirds of the members present, a quorum voting. *Bond Debt Cases*, 12 S. O. 201, 285.

TYMBRELLA.

An instrument of punishment known to the ancient common law, by which a woman convicted of being a common scold was punished by being plunged into the water. Lord Coke says that "in law it signifieth a stool that falleth down into a pit of water for the punishment of the party in it." *United States v. Royall (U. S.)* 27 Fed. Cas. 908, 908.

TYPEWRITING.

"Typewriting" is a substitute for and the equivalent of writing. *Appeal of Deep River Nat. Bank*, 47 Atl. 675, 677, 73 Conn. 341.

U

UBERRIMÆ FIDÆ.

Contracts of life insurance are said to be "uberrimæ fidæ" when any material misrepresentation or concealment is fatal to them. *Equitable Life Assur. Soc. v. McElroy* (U. S.) 83 Fed. 631, 636, 28 C. C. A. 365.

ULTIMATE.

The word "ultimate" means at last, finally, or at the end. *Cambria Iron Co. v. Keynes*, 47 N. E. 548, 550, 56 Ohio St. 501.

Ultimate means the last in the train of progression or sequence, tended toward by all that precedes; arrived at as the last result; final. *Read v. State Ins. Co.*, 72 N. W. 665, 668, 103 Iowa, 307, 64 Am. St. Rep. 180.

ULTIMATE FACT.

An "ultimate or issuable fact" is one essential to the claim or defense, and which cannot be stricken from the pleading without leaving it insufficient. *Meyer v. School Dist.* No. 31, 57 N. W. 68, 69, 4 S. D. 420.

Where, in legal proceedings, from the facts in evidence, the result can be reached by an exact process of rational reasoning adopted in the investigation of proof, it becomes an ultimate fact, to be found as such. *Levins v. Rovegno*, 12 Pac. 161, 162, 164, 71 Cal. 278.

In an action in which a partnership was alleged and an accounting prayed, the partnership being in issue, and the trial court having found "that there was no partnership between plaintiff and defendants as charged in the complaint," the court said: "The fact that there was a partnership is the ultimate fact alleged in the complaint. There are certain acts and conditions and circumstances set out in the complaint, from which this ultimate fact is deduced; that is, there is in the complaint much detail of mere evidentiary facts. The material issue of fact is, however, was there a partnership? and the findings respond to this issue. This was the ultimate fact to be ascertained, and it is none the less a finding of fact because drawn as a conclusion from other facts." *Kahn v. Central Smelting Co.*, 2 Utah, 371, 375, 376.

"Ultimate facts," as used in a statute making it the duty of the clerk of the court in which a suit is commenced to issue a writ of attachment on the filing by the plaintiff of an affidavit stating the ultimate facts, means the ground of attachment in manner and form as expressed by the statute. *First Nat. Bank v. Swan*, 23 Pac. 743, 747, 3 Wyo. 356.

"Ultimate facts" are, when considered with reference to the facts or evidence by which they are established or proved, but the logical results of the proofs, or, in other words, mere conclusions of fact, as, in an action for negligence, a finding that the plaintiff did not use ordinary care to avoid injury, or that the defendant was not guilty of willful or wanton injury, or, in an action for fraud, a finding that the evidence does not show fraud. *Caywood v. Farrell*, 51 N. E. 775, 776, 175 Ill. 480.

"Ultimate," as used in Code Iowa 1873, § 2807, providing that a special verdict must present the ultimate facts as established by the evidence, the fact found must be one inhering in, and one necessary to determine in arriving at, the general verdict. *Read v. State Ins. Co.*, 72 N. W. 665, 668, 103 Iowa, 307, 64 Am. St. Rep. 180.

ULTIMATE PAYMENT.

The word "ultimate" means at last, finally, or at the end; so that a guaranty of ultimate payment will permit extension of credit to the principal debtor. *Cambria Iron Co. v. Keynes*, 47 N. E. 548, 550, 56 Ohio St. 501.

To guaranty, in addition to full and prompt payment, the "ultimate payment," can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals, and extensions. *Gay v. Ward*, 84 Atl. 1025, 1026, 67 Conn. 147, 32 L. R. A. 818.

A bond in which the obligor guaranteed the full, prompt, and "ultimate payment" of all promissory notes, imported that the relation of borrower and lender would continue during a long period of time—for years. "The parties contemplated that, though the lending would be in form on the comparatively short time customary to a bank, yet in fact the borrower would long continue to be such by renewal or extension, and the bond is formed to meet such a contingency. To 'guaranty full and prompt payment' would meet the case of a note on usual bank time actually to be paid in full at maturity. To guaranty, in addition to 'full and prompt payment,' the 'ultimate payment,' can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals, and extensions." *National Exch. Bank v. Gay*, 17 Atl. 555, 556, 57 Conn. 224, 17 L. R. A. 343.

ULTIMATELY.

A guaranty reciting, "I will be ultimately accountable to you for the sum of

\$150, if H. shall purchase goods of you and shall fail to pay you for them," means that, if H. should not comply with the terms of his engagement as to the payment for the goods purchased, then on due notice of the advances made on the faith of the guaranty he would be accountable and pay for such advances, not exceeding the limited amount, and does not mean that he would pay at some indefinite period. *Seaver v. Bradley*, 6 Me. (6 Greenl.) 60, 64.

ULTRA VIRES.

An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the rights of certain parties when the corporation is not authorized to perform it without their consent, or with reference to some specific purpose when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 99 Am. Dec. 300 (quoted in *McPherson v. Foster*, 43 Iowa, 48, 65, 22 Am. Rep. 215); *Field v. City of Shawnee*, 54 Pac. 318, 319, 7 Okl. 73.

The expression "*ultra vires*" is used to express either that the act of the directors or officers is in excess of their authority as agents of the corporation, or that the act of a majority of the stockholders is in violation of the rights of the minority, or that the act has not been done in conformity with the requirements of the charter, or that the act is one that the corporation itself has not the capacity to do, as being in excess of its corporate powers. In its legitimate use the expression should be applied only to the latter class of cases. *Depue, J.*, in a dissenting opinion in *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 7 Atl. 523, 531, 48 N. J. Law (19 Vroom) 530.

The term "*ultra vires*," as applied to the acts of a corporation, is used in two different senses: First, as to the state, meaning an act which transcends the power conferred by law on the corporation; something which is not within the scope of the powers of a corporation to perform under any circumstances or for any purpose, as, for example, where a corporation authorized only to build a railroad engages in banking. This is the primary and really only proper sense of the term. But it is also used in a secondary sense, as something beyond the power of the majority to bind dissenting stockholders or something in violation of the legal rights of creditors, and sometimes in the sense merely of something beyond the authority of corporate agents or executive of-

ficers. The primary meaning of the term applies only when the public is concerned. The secondary meaning, when the question is between the corporation and its shareholders, or creditors, or other parties dealing with it, or between it and its agent or executive officer. *Minnesota Thresher Mfg. Co. v. Langdon*, 46 N. W. 310, 312, 44 Minn. 37.

The doctrine of *ultra vires*, as now interpreted by the courts and applied to corporations, signifies merely such acts and doings of any corporation which, though it may have the power to perform or adopt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers. In the same sense precisely every act performed by a natural person which the law does not sanction, nor confer on him any right to do, would be illegal, and might be termed *ultra vires*. In the well-considered case of *State v. Morris & E. R. Co.*, 23 N. J. Law (3 Zab.) 360, 368, the whole subject is ably reviewed and the modern doctrine clearly expressed. *Denver & R. G. Ry. Co. v. Harris*, 2 Pac. 369, 370, 371, 3 N. M. (3 Gil.) 114.

Ultra vires contracts of a corporation are such as do not in any manner serve the accomplishment of the purposes for which the corporation is chartered. They are contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized. *Tourtlot v. Whithed*, 84 N. W. 8, 13, 9 N. D. 407.

A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred on it by the Legislature—is not voidable only, but is wholly void, and of no legal effect. The objection to such a contract is not merely that the corporation ought not to have made it, but that it could not make it; i. e., had no power to make it. Therefore a contract cannot be ratified by either party, nor can performance on either side give rise to any obligations thereunder. *Central Transp. Co. v. Pullman's Palace Car Co.*, 11 Sup. Ct. 478, 488, 139 U. S. 24, 35 L. Ed. 55; *Durkee v. People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340; *National Home Bldg. & Loan Ass'n v. Home Sav. Bank*, 54 N. E. 619, 621, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245; *California Bank v. Kennedy*, 167 U. S. 362, 367, 17 Sup. Ct. 831, 833, 42 L. Ed. 198; *Directors, etc., of Ashbury Ry. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *First Nat. Bank v. American Nat. Bank*, 72 S. W. 1059, 1061, 173 Mo. 153; *G. V. B. Min. Co. v. First Nat. Bank of Halley* (U. S.) 95 Fed. 23, 33, 36 C. C. A. 633.

The term "*ultra vires*" is used to designate the acts of corporations beyond the scope

of their powers as defined by their charters or acts of incorporation. So, whether with strict propriety or not, the term is also used in different sense. Thus an act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. When an act is ultra vires in this sense, it is generally, if not always, void in toto. *Anderson v. Cleburne Bldg. & Loan Ass'n* (Tex.) 16 S. W. 298, 300.

An ultra vires act or contract on the part of the corporation, as not being within the powers conferred on it or within the object of its creation, is void. *Lightcap v. Bradley*, 58 N. E. 221, 223, 186 Ill. 510 (citing *Lurton v. Jacksonville Loan & Building Ass'n*, 58 N. E. 218, 219, 187 Ill. 141).

An act is "ultra vires" a corporation when it is beyond and outside of the scope of the powers conferred by its founders, when the corporation is without authority to perform it under any circumstances or for any purpose. Under the United States statutes national banks have the power to increase their capital to such a limit as may be approved by the Comptroller of the Currency, and where stockholders have assented to an increase they cannot set up any defects or irregularities in the exercise of the power as a defense in an action to enforce their liability. *Latimer v. Bard* (U. S.) 76 Fed. 538, 543.

If a wrongful act by a city be not ultra vires, it may be the foundation of an action of tort against it. The term "ultra vires" is used in this connection in the sense of meaning an act which both extrinsically and in its external aspects is under all circumstances wholly and necessarily beyond the possible scope of the charter powers of the municipality. *Commercial Electric Light & Power Co. v. City of Tacoma*, 55 Pac. 219, 220, 20 Wash. 288, 72 Am. St. Rep. 103 (quoting *Dillon, Mun. Corp.*).

A case of "ultra vires" is where an existing corporation attempts to act on some subject-matter not within its charter powers. The fact that a corporation, whose charter provides that "25 per cent. of the capital stock shall be paid in before said company can exercise the privileges and powers granted," enters into a contract for the construction of necessary works for the corporation before the 25 per cent. has been paid in, does not release one from his subscription for stock of the corporation; the act not being ultra vires. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403, 409, 20 Atl. 315, 8 L. R. A. 637.

The directors of a corporation are wholly without authority to enter into a contract bad in itself, and such a contract is ultra vires. In *re Bumm's Estate*, 8 Pa. Dist. Ct. R. 191, 197.

Illegality distinguished.

"Ultra vires" and "illegality" represent totally different and distinct ideas. It is true a contract may have both these defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors, and under the corporate seal, for the building of a church or college or almshouse, would be clearly ultra vires, but it would not be illegal. *Bissell v. Michigan Southern & N. L. R. Co.*, 22 N. Y. 258, 262. The distinction is drawn in some of the states that, when an executed contract is merely ultra vires—that is, without authority—a suit can be maintained to enforce it, but that, where the act is prohibited by statute or the terms of the charter, it cannot be enforced; but it is unnecessary for us to discuss or express an opinion on this distinction. Whatever may be the difference of opinion on this subject, the tendency of the courts of the different states, as well as the Supreme Court of the United States, is to look with disfavor upon the defense of ultra vires set up against a contract executed in whole or in part. In the case of *Ohio & M. R. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693, it is stated that "the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail, where it would defeat the ends of justice or work a legal wrong." The fact that a contract entered into by a county was ultra vires was held no defense to an action by the county to recover the consideration by the contractor or the failure of the latter to perform. *Edwards County v. Jennings* (Tex.) 33 S. W. 585, 586.

ULTRAMARINE BLUE.

"Ultramarine blue" is imported in the form of powder, of little lumps or drops, and in pulp. The pulp is a thick paste, which is made by grinding the ultramarine in water, and is used to produce a high gloss upon paper hangings. It is sold by the pound, but the price is produced in accordance with the quantity of water contained in it. It is dutiable under Act Oct. 1, 1890, par. 55, on the full weight of the paste, and not on the weight of the ultramarine contained therein when dry. *United States v. Zentgraf* (U. S.) 60 Fed. 1014, 1015, 9 C. C. A. 335.

UMPIRE.

An umpire is one who takes on himself the decision, after arbitrators have disagreed. *Haven v. Winnisimmet Co.*, 93 Mass. (11 Allen) 377, 383, 87 Am. Dec. 723.

An umpire is a person whom two arbitrators select to decide the question in con-

troversy, in regard to which the arbitrators are unable to agree. *Ingraham v. Whitmore*, 75 Ill. 24, 30.

"The word 'umpire,' in common signification, denotes one who is to decide the controversy in case arbitrators cannot agree; and hence a submission 'to two arbitrators and their umpire,' or 'two and their umpire,' in case of disagreement, means precisely the same thing." *Tyler v. Webb*, 49 Ky. (10 B. Mon.) 123.

Where an umpire has been duly appointed, and in consequence of a disagreement of the arbitrators has entered on the performance of his duties, the authority to make a final decision on all the matters embraced in a submission is vested exclusively in him. The original powers of the arbitrators have ceased to exist, they being *functi officio*. *Lyon v. Blossom*, 11 N. Y. Super. Ct. (4 Duer) 313, 325.

As contained in an agreement between the insurer and the insured to submit to arbitration the amount of damage suffered by fire, and providing that each party should appoint an arbitrator by whom the loss should be estimated and appraised in detail, "together with a third person, to be selected by them, who shall act as umpire to decide between them in the matters of difference only, and the said three persons, or any two of them, shall true return and award make," does not constitute such third person a third arbitrator to act with the other two in making the estimate. *Hartford Fire Ins. Co. v. Bonner Mercantile Co.* (U. S.) 56 Fed. 378, 381, 5 C. C. A. 524.

UNABLE.

Unable to attend to his duties.

St. Okl. 1893, c. 22, art. 5, § 9, authorizing the district courts to appoint county attorneys in case the regular county attorney shall be absent from the court or "unable to attend to his duties," will be construed to mean some physical or mental incapacity to perform the duties of county attorney, and not competency or incompetency of the attorney. *Mahaffey v. Territory*, 66 Pac. 342, 345, 11 Okl. 213.

Unable to find goods or chattels.

A return on an execution that the officer is unable to find any goods or chattels of the within-named defendants is equivalent to the technical phrase "no goods," and shows that there was no personal property which the officer could find on which to levy. *Treptow v. Buse*, 10 Kan. 170, 178.

Unable to pay his debts.

The phrase "unable to pay his debts" means presently unable so to do, and is a different thing from alleging that the property of a man, taken at a fair valuation, is

not sufficient to pay his debts. *Martin v. Bigelow*, 78 N. Y. Supp. 443, 445, 36 Misc. Rep. 298.

Unable to support himself.

A covenant to support a certain person when he should become "unable" to support himself means that the obligor should respond for the covenantee's needs only when the necessity therefor arose, and such person is not entitled to support when he has enough property in his hands to support himself for a year. *Burcham v. Burcham*, 40 N. E. 28, 12 Ind. App. 625.

Unable to take care of themselves.

Act Aug. 3, 1882, c. 376, 22 Stat. 214 [U. S. Comp. St. 1901, p. 1288], authorizing the commissioners of immigration to examine into the condition of passengers arriving in any ship or vessel, and if on such examination there shall be found any persons "unable to take care of themselves" without becoming a public charge, they shall report the same in writing to the collector of the port, and such person shall not be allowed to land, does not mean an inability in reference to the passenger's personal efforts alone; but all the means of care or support that are provided for the passenger must be taken into account, and the law only intends those that are likely to become a public charge because they cannot take care of themselves and are not under the charge or protection of any other person who by natural relation or by assumed responsibility furnishes reasonable assurance that they will not become a charge upon the public. In re Day (U. S.) 27 Fed. 678, 681.

UNADJUSTED.

See, also, "Adjust."

The term "unadjusted," as applied to a demand, signifies that the amount is uncertain and not agreed on. *Richardson v. Woodbury*, 43 Me. 206, 214.

UNADMINISTERED.

"Unadministered assets," as used in Act Cong. Feb. 20, 1846, declaring that the court may require "assets or estate of the decedent which remain unadministered" to be delivered to the newly appointed administrator, meant assets or estate remaining in specie and unchanged in form; that being the well-settled signification of the words, unless the contrary appears. *United States v. Walker*, 3 Sup. Ct. 277, 281, 109 U. S. 258, 27 L. Ed. 927.

UNALIENABLE RIGHT.

An "unalienable right," within the meaning of the Constitution, is in its nature

one which cannot be surrendered to government or society because no equivalent can be received for it, and one which neither the government nor society can take away because they can give no equivalent; one of the natural, essential, and inherent rights which belong to all men, and not only that, but an unalienable right, which a man cannot surrender, and which neither government nor society can take from him, as declared in Const. art. 5. Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason, and it is also his natural and unalienable right not to be hurt, molested, or restrained in his personal liberty or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion, provided he does not disturb others. *Hale v. Everett*, 53 N. H. 9, 60, 16 Am. Rep. 82.

UNANIMOUS.

A quorum of four judges holding an Appellate Division are in contemplation of law the Appellate Division, and the unanimous vote of affirmance is a compliance with the provision of Code Civ. Proc. § 191, subsec. 2, providing that a unanimous affirmance in certain cases shall be final, unless a question of law is certified or leave to appeal given. *Harroun v. Brush Electric Light Co.*, 46 N. E. 291, 292, 152 N. Y. 212, 38 L. R. A. 615.

A "unanimous reversal" by the Appellate Term differs from a "unanimous affirmance," in that the latter involves the conclusion that there was sufficient evidence to sustain the facts, whereas the former may be based on the facts as well as the law, though, if the decision does not so state in express terms, the Court of Appeals is obliged to presume, for the sole purpose of reviewing the questions of law, that it was on the law only. *People v. Sutphin*, 59 N. E. 770, 771, 166 N. Y. 163.

UNANSWERABLE EVIDENCE.

Conclusive or unanswerable evidence is that which the law does not permit to be contradicted; for example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it. Code Civ. Proc. Cal. 1903, § 1837.

UNAPPROPRIATED.

"Unappropriated," as used in the general laws of the United States of 1881, authorizing the holders of scrip known as "Valentine scrip" to enter unappropriated lands of the United States, would include land until

it had been surveyed, though squatters had settled thereon, but had taken no measures to procure title. *Ferry v. Street*, 7 Pac. 712, 714, 4 Utah, 521.

UNASCERTAINED.

"Unascertained duties" are payments to a collector of customs in gross on an estimate as to amount, and where the merchant on a final liquidation will be entitled by law to allowances or deductions which do not depend on the rate of duty charged, but on the ascertainment of the quantity of the article subject to duty. In this class of payments no question of law is in general supposed to arise between the merchant and the government. The payment of unascertained duties by the merchant, in order to obtain the permit to land his goods, is made without reference to the nature or character of the questions that may arise before the appraisers, measurers, or weighers, or the collector, and affords time to those officers to ascertain the quality, quantity, weight, or measure, and also the rate or amount of duty to be paid, while at the same time the merchant acquires possession of the bulk of his shipment and may deal with the goods as his own. The payment is but preliminary and indefinite, a sum in gross and by estimate, intended to be large enough to cover the actual legal amount of duty when ascertained. The ascertainment of the duty is subsequently made in conformity with the report of the proper custom house officers, the money in hand is applied, and any balance found on liquidation over and above the legal duties is refunded to the merchant. *Moke v. Barney* (U. S.) 17 Fed. Cas. 574, 575.

UNASSIGNED.

For the purpose of the chapter relating to volunteer forces, the term "unassigned battalion" shall apply to a battalion not attached to a regiment, and the term "unassigned company" to a company not attached to a regiment or battalion. Code Ga. 1895, § 1109.

UNAUTHORIZED.

In commenting on the dictum of Judge Cobb in *Vose v. Muller*, 23 Neb. 171, 36 N. W. 583, to the effect that the unauthorized drinking of intoxicating liquors should be held per se to vitiate a verdict, the court say: "Probably the court in that case meant by 'unauthorized' the procurement of liquors without the court's authorization by jurors sitting as such, either during court sessions or in deliberation upon a case submitted." *Ankeny v. Rawhouser*, 95 N. W. 1053, 1054, 2 Neb. (Unof.) 32.

UNAUTHORIZED BY LAW.

The phrase "unauthorized by law," as found in statutes relative to insurance made by companies unauthorized by law, means prohibited by law. *Fire Department of City of New York v. Stanton*, 51 N. Y. Supp. 242, 243, 23 App. Div. 334.

UNAVOIDABLE.

The word "unavoidable," in an allegation in a complaint against a railroad for injury that the engine and car on which the plaintiff was riding when injured were unavoidably run and driven on the track on which the defendant had negligently left open the switch, means that with the exercise of ordinary care the running on such track was unavoidable. The word does not mean "inevitable," and thus require a high degree of care to be shown to entitle plaintiff to recover. *Chicago & A. R. Co. v. Harrington*, 61 N. E. 622, 628, 192 Ill. 9.

A collision, which would excuse a common carrier for failure to deliver goods, must be such as could not be avoided by human prudence and skill. In other words, it must be the effect of the *vi divina*; the operation of wind and waves, combined to a degree not to be resisted by human skill or forethought, as if two vessels meet in a storm at night, or even in the day, when there is clearly no blame attributed to either side. By the law of England, if it appears to have been unavoidable, without fault in any one, the owner of a ship or cargo damaged must bear the loss; but, when resulting from the want of diligence or skill in either, it makes the common carrier liable. If the captain of the vessel which causes the injury be in fault, he is answerable to the owners of the injured vessel, and they to the persons for whom they carry. *Blythe's Ex'rs v. Marsh* (S. C.) 1 McCord, 360, 365.

Where, by reason of a buoy being displaced by some supposed natural cause 10 or 15 days before, a vessel, relying upon such buoy being in its proper position, was stranded, the court, in considering whether such accident was the result of an unavoidable peril of the sea, which would exempt a carrier from liability for loss of goods, said: "The owners are liable for every injury that might have been prevented by human foresight. Is there anything in the shifting of the buoy proximately and immediately causing unavoidable loss? On the contrary, has it more than a remote bearing upon the loss, or such as may excuse the captain personally? Take the nearest analogous cases for illustration. Two vessels come into collision in a dense fog. Here the fog is the immediate, natural, and culpable cause of the collision. A shoal unexpectedly changes its bed, and a ship grounds upon it. Here the

unknown shoal is the immediate and sole cause of the stranding. The same may be justly said of unknown snags or sawyers in river navigation. In all such cases the cause of the loss is unseen and inevitable, and a blow is struck against which the power of man cannot guard the vessel. Such are the blows that are within the unavoidable perils of the sea, and 'which have too familiarly,' said Judge Story, 'been called the acts of God, in contradistinction to human acts.' It is difficult in many cases to lay down the plain cause of demarcation, especially where, as in this case, the carrier has a reasonable excuse for his not using great sagacity and great human exertion. The captain was probably surprised upon discovering where the buoy floated, and at his own mistake in being altogether governed by it. But human pains might have guarded against such surprise and mistake. He might have suspected the removal of the buoy, and not gone on relying upon it as far as he did, and then, when it was too late, discovering that he was in shallow water, changed his course. Great sagacity and human caution might have done so before." *Reaves v. Waterman* (S. C.) 2 Spears, 197, 208.

A storm is "unavoidable," in the sense that it cannot be prevented. *Newport News & M. V. Co. v. United States* (U. S.) 61 Fed. 488, 490, 9 C. C. A. 579.

UNAVOIDABLE ACCIDENT.

Act of God distinguished, see "Act of God."

An "unavoidable accident," is one which occurs without any apparent cause; at least, without fault attributable to any one. *Clyde v. Richmond & D. R. Co.* (U. S.) 59 Fed. 394 399.

Where an accident occurs without the negligence of either party, it is known as an "unavoidable accident." *Galveston, H. & S. A. R. Co. v. Gormley* (Tex.) 35 S. W. 488, 489.

"By common acceptance 'unavoidable accident' means a casualty which happens when all the means which common prudence suggests have been used to prevent it." *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

An unavoidable accident is an act of God; that is, any accident produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. *Fish v. Chapman*, 2 Ga. (2 Kelly) 849, 356, 46 Am. Dec. 393.

"Unavoidable accident" means that there must be a vis major and that the interfering cause was irresistible, since, if by any care, prudence, or foresight the accident could have been guarded against, it was not

unavoidable. *Central Line of Boats v. Lowe*, 50 Ga. 509, 511.

"Unavoidable accident," is defined in *And. Law Dict.* p. 13, as an accident which results from human agency, but is unavoidable under the circumstances. *Dreyer v. People*, 58 N. E. 620, 623, 188 Ill. 40, 58 L. R. A. 869.

"Unavoidable accidents," within the meaning of an exception in a bill of lading exempting the carrier from liability for unavoidable accidents, is not limited to unavoidable accidents occurring on the line of the first carrier, if the bill of lading is a through bill of lading, calling for transportation over connecting lines. *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514, 519, 6 Am. Rep. 124.

Act March 2, 1799, c. 128, § 27, providing that if, after the arrival of any ship laden with foreign goods bound to the United States within the limits of any of the districts of the United States or within four leagues of the coast thereof, any part of the cargo shall be unladen for any purpose whatsoever from out of such ship, before such ship shall come to the proper place for the discharge of her cargo, or some part thereof, etc., the goods unladen shall be forfeited and lost, except in case of some "unavoidable accident, necessity, or distress of weather," means any unavoidable accident or necessity arising from any other cause, as well as from distress of weather. *United States v. Hayward* (U. S.) 26 Fed. Cas. 240, 249.

Rev. St. c. 120, § 11, declares that if any action is duly commenced on a note within six years, and the writ fails of sufficient service or return by any unavoidable accident, or by default or neglect of the officer, etc., the plaintiff may commence a new action. Held, that the term "unavoidable accident" must have a reasonable construction, and does not limit the case to a cause or accident which no possible diligence could guard against, but means simply an unforeseen cause preventing the service of the writ, where due diligence has been used by the creditor to commence his suit seasonably by the due and ordinary course of law; and hence, where the creditor seasonably commenced his suit, and placed his writ, as he believed or had good reason to believe, in the hands of a proper officer for service, but by mistake described the residence of the debtor as he had known it, and as it was until within a short time before, when he had changed it to another town and county, of which the plaintiff had no knowledge, and which the officer did not immediately discover, such mistake was an unavoidable accident, within the meaning of the statute. *Bullock v. Dean*, 53 Mass. (12 Metc.) 15, 17.

"When we speak of an unavoidable accident in legal phraseology, we do not mean

an accident which it was physically impossible in the nature of things for the defendants to have prevented; all that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man down to exercise." *Dyvert v. Bradley* (N. Y.) 8 Wend. 469, 473.

"Unavoidable accident," sufficient to relieve a vessel from liability for collision, is a disaster or casualty happening from natural causes, without negligence or fault on either side, and if both parties have endeavored by every means in their power, with due care and caution and with a proper display of nautical skill, to prevent the occurrence of the accident. *Sampson v. United States*, 12 Ct. Cl. 480, 491 (citing *Union S. S. Co. v. New York & V. S. S. Co.*, 65 U. S. [24 How.] 307, 16 L. Ed. 699).

The words "unavoidable accidents," as used in a bill of lading signed by a common carrier, exempting it from liability for unavoidable accidents, do not limit or restrict its liability in any way. *Seligman v. Armijo*, 1 N. M. 459, 463.

"Unavoidable accident," as used in Rev. St. c. 81, § 87, authorizing the commencement of a new suit after the expiration of the period of limitations, where a former writ has failed of a sufficient service by unavoidable accident, is not satisfied by the failure of the mails to carry a writ to a certain destination in time for service, when the writ has been in the hands of the plaintiff for ample time prior to its transmission to have been served. "That cannot be deemed an unavoidable accident that could have been so easily avoided." *Marble v. Hinds*, 67 Me. 203, 205.

The ignition of a combustible substance lying along the track of a railroad, by sparks dropped by a passing engine, is not an unavoidable accident. *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14, 19, 6 Am. Rep. 695.

The destruction of the crops of a tenant by overflows is an unavoidable accident, within the meaning of Civ. Code, art. 2719, providing that the lessee must deliver a new lease to the lessor at the expiration of the term on the same condition on which it was taken possession of, making necessary allowances for "unavoidable accidents," unavoidable accidents being those accidents which are not attributable to the lessee, or to members of his family, or to any sublessee. *Payne v. James*, 12 South. 492, 493, 45 La. Ann. 381.

Where a man shoots at a fox, and thereby unintentionally kills a dog, it is not such an unavoidable accident as will excuse him from liability. *Wright v. Clark*, 50 Vt. 130, 135, 28 Am. Rep. 496.

As used in a contract binding defendant to deliver to plaintiff at his stable 5,000 bush-

els of corn and 50,000 pounds of fodder as early next fall as the same will be dry enough to house, unavoidable accidents only excepted, related to the time when the grain and fodder should be delivered, and hence it was no defense to an action for failure to deliver that, owing to an unusual drouth during the season, defendant's crop fell short, so that he did not raise sufficient to supply his own plantation and fill his contract with the plaintiff; such fact not amounting to unavoidable accident. *McGehee v. Hill* (Ala.) 4 Port. 170, 175, 29 Am. Dec. 277.

"Unavoidable accident" is an event from an unknown cause, or an unusual or unexpected event from a known cause. Where a person who had stepped into a freight car to unload freight stepped off such car when it was moved by an engine, and fell and broke his hip, the accident will not be deemed an unavoidable one, as it might have been reasonably anticipated by the injured person. *Smith v. Southern Ry. Co.*, 40 S. E. 86, 87, 129 N. C. 374.

In an action for damages resulting from the collision of canal boats, the court said. "The rule in such cases is that, if the injury is occasioned by an unavoidable accident, no action will lie for it; but if any blame is imputable to the defendant, though he had no intention to injure the plaintiff or any other person, he is liable for the damages sustained. * * * When we speak of an 'unavoidable' accident in legal phraseology, we do not mean an accident which it was physically impossible in the nature of things for the defendant to have prevented. All that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise." *Dygart v. Bradley* (N. Y.) 8 Wend. 469, 472, 473.

Inevitable accident synonyms.

"Unavoidable accident," as used in a bill of lading, instead of the usual expression, "inevitable accident," does not vary the meaning of the instrument, or change the liability of the carrier, but is a synonym of the latter expression. *Fowler v. Davenport*, 21 Tex. 626, 631.

"Unavoidable accident" is usually termed "inevitable accident," and a defense that an injury was the result of an "unavoidable accident" cannot be sustained when the disaster was caused by negligence, and negligence may be predicated of failure to furnish a seaworthy vessel. *Haulenbeck v. Hunt*, 63 N. Y. Supp. 406, 408, 49 App. Div. 47.

UNAVOIDABLE CASUALTY.

The phrase "unavoidable casualty," as used in leases, has a well-settled meaning.

It does not signify a mere want of repair arising from lapse of time or improper use of premises, neither does it include any injuries which may happen by reason of the common and ordinary use and occupation of the leased or adjoining premises. The term has a much more restricted meaning, and comprehends only damage or destruction arising from supervening and uncontrollable force or accident. By a strict definition it signifies events or accidents which human prudence, foresight, and sagacity cannot prevent. *Tays v. Ecker*, 24 S. W. 954, 955, 6 Tex. Civ. App. 188 (citing *Welles v. Castles*, 69 Mass. [3 Gray] 323, 325).

Where a lease of factory property contained a provision that in case the buildings or any part thereof should be destroyed or damaged by "unavoidable casualty," so that the same shall be rendered unfit for use and occupation, then the rent should be abated, etc., the giving away of two steam boilers on the premises while in use on low pressure and with moderate fire, so that they had to be replaced by others, which caused a closing down of the factory for three weeks, such accident should be construed to be an unavoidable casualty, within the meaning of such words as used in the condition in the lease. *Phillips v. Sun Dyeing, Bleaching & Calendering Co.*, 10 R. I. 458, 461.

Events or accidents which human prudence, foresight, and sagacity cannot prevent are included within the term, "unavoidable casualty." *Crystal Spring Distillery Co. v. Cox* (U. S.) 49 Fed. 555, 559, 1 C. C. A. 365 (citing *Welles v. Castles*, 69 Mass. [3 Gray] 323, 325).

An unavoidable casualty is an event or casualty happening against the will and without the negligence or other default of a party. *Hodgson v. Dexter* (U. S.) 12 Fed. Cas. 283.

"Unavoidable casualty," as used in a lease, providing that the lessee should not be liable for payment of rent in case the buildings were destroyed by an unavoidable casualty, means an unexpected occurrence not contemplated in the making of the contract. *Phillips v. Sun Dyeing, Bleaching & Calendering Co.*, 10 R. I. 458, 460.

"Unavoidable casualty," is used in a lease exempting a lessee from the payment of rent in case of damage to or destruction of the premises by unavoidable casualty, "does not signify a mere want of repair arising from lapse of time or improper use of the premises, nor from trespasses or nuisances occasioned by the acts of the tenants or from the acts of third persons, nor does it include any injuries which may happen by reason of the common or ordinary use of the estate leased or adjoining premises. The term has a much more restricted meaning,

and comprehends only damage or destruction arising from a supervening and uncontrollable force or accident. By a strict definition, as applied to the subject-matter, it signifies events or accidents which human prudence and sagacity cannot prevent." *Welles v. Castles*, 69 Mass. (3 Gray) 323, 325.

As used in Code Ohio, § 534, providing that a judgment may be vacated after the term at which it was obtained for "unavoidable casualty or misfortune" preventing the party from prosecuting or defending, means accidental injury or sickness, etc., rather than a want of knowledge of the service of a summons because of the defendant's absence from the state. *Howard v. Abbey*, 2 Ohio Dec. 64, 65.

UNAVOIDABLE DANGER.

An exception of "unavoidable danger" in a contract of a common carrier does not limit his responsibility to the exercise of ordinary care and diligence. It may be doubtful whether the exception of "unavoidable danger" properly means more than unavoidable accidents, or such acts as the law has allowed to be in excuse. Fire cannot be considered an unavoidable danger, but is one to which, from the very nature of transportation by rail, it was to be expected the goods were to be exposed. *Union Mutual Ins. Co. v. Indianapolis, A. & C. R. Co.*, 12 Ohio Dec. 745, 1 Disn. 480.

"Unavoidable dangers," as used in a bill of lading whereby a common carrier by water contracted to deliver goods safely and in good order, the "unavoidable dangers of river navigation and fire excepted," has been treated by numerous courts, judges, and writers as exactly equivalent to the common-law exception of the "act of God." Some treat them as identical terms, for the purpose of making "unavoidable accident" mean "act of God" in the sense of a sudden and violent act of nature, as lightning, tempests, etc., while others make them equivalent for the purpose of making "act of God" mean any accident which the carrier cannot by proper care, foresight, and skill avoid. It is impossible to define "unavoidable accident" by excluding the element of the intervention of man. Accident may be legally inevitable or unavoidable, though there be the intervention of man having some influence in it. The term "unavoidable accident," as used in the ordinary exceptions in bills of lading, has a much larger sphere than that which is attributed to the term "act of God." When a bill of lading provides that the carrier shall not be liable for the "unavoidable dangers" of navigation, it means dangers that are unavoidable by the carrier, supposing him to have exercised all the precaution, care, and skill that the law usually demands of common carriers. It means that he shall not be

answerable as an insurer against accidents which the law regards as inevitable, and hence he is not liable for loss caused by a collision which was unavoidable by him. *Hays v. Kennedy*, 41 Pa. (5 Wright) 378, 379, 80 Am. Dec. 627.

"Unavoidable dangers and accidents of the road," as used in a bill of lading for the carriage of goods by a common carrier, excepting him from liability for injuries from the unavoidable dangers and accidents of the road, is synonymous with "acts of God," and hence does not restrict the general liability of a common carrier. *Walpole v. Bridges* (Ind.) 5 Blackf. 222.

"Unavoidable dangers of the river," as used in a bill of lading which excuses a common carrier from liability for loss occasioned by unavoidable dangers of the river, includes only those dangers which result from unavoidable accident, and would not include dangers arising by reason of the negligence or ignorance of the master or crew of a vessel. *The Ocean Wave* (U. S.) 18 Fed. Cas. 566, 567.

Where a policy insuring a steamboat recites that the insurer assumes the unavoidable dangers of the river, and that it should be free from all loss caused by barratry, the fact that the boat was stranded by carelessness and unskillfulness of the master would not preclude a recovery, in the absence of fraud in some officer, particularly when the word "unavoidable" does not refer to the duties of those in charge of the boat, but to such perils which are incident to navigation and from their nature are inseparable from it. *Louisville Underwriters v. Pence*, 19 S. W. 10, 12, 93 Ky. 96, 14 Ky. Law Rep. 21, 40 Am. St. Rep. 176.

UNAVOIDABLE INTERRUPTION.

Where a contract between a telegraph company and the sender of a message exempts the company from liability for "unavoidable interruptions in the working of its lines," such phrase means an interruption that could not be avoided. *Kirby v. Western Union Tel. Co.*, 55 N. W. 759, 760, 762, 4 S. D. 105, 30 L. R. A. 612, 621, 624, 46 Am. St. Rep. 765.

UNAVOIDABLY PREVENTED.

Code, § 316, providing that a motion for a new trial must be made at the term at which the verdict or decision is rendered, and, except for the cause of newly discovered evidence, shall be within three days after the verdict or decision is rendered, unless "unavoidably prevented," refers to circumstances beyond the control of the party desiring to file the motion, and does not excuse mere neglect. *Roggencamp v. Dobbs*, 20 N. W. 100, 101, 15 Neb. 620.

UNBALANCED BID.

An "unbalanced bid" in public contracts is defined by the Century Dictionary to be a bid for the performance of a given work at specified rates for each of the various kinds of labor or material required, which, by being made on an erroneous estimate of quantities of each, appears, assuming these quantities to be correct, to be low in comparison with other bids, when a computation based on the true quantities would make the bid high. *People v. McDonough*, 83 N. Y. Supp. 125, 127, 85 App. Div. 162.

UNCERTAIN.

The word "uncertain" may include any doubt, whether reasonable or not. Nothing is absolutely certain that rests on the testimony of men, and where evidence is given to establish any proposition tending to prove guilt it is sufficient if it remove all reasonable doubt, so that an instruction that if the jury find that none but Chinese witnesses testified to the circumstances of the killing and as to the parties concerned in it, and the jury are in such doubt as to the credibility or truthfulness of such witnesses as to feel uncertain whether they should be believed, the defendant may be acquitted, may be properly refused. *State v. Ah Lee*, 7 Or. 237, 258.

In using the words "uncertain, speculative, and contingent," for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of doubt that the loss to him resulted from the action of defendant in violating his agreement. In many cases such proof cannot be given. Yet there might be a reasonable certainty, founded on inferences legitimately and properly deducible from the evidence, that the plaintiff's loss was not only in fact occasioned by defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to a reasonable intent is necessary, and the meaning of the language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract, and was a probable and direct result thereof. *United States Trust Co. v. O'Brien*, 38 N. E. 266, 267, 143 N. Y. 284.

The word "uncertain," in Rev. St. art. 649, which provides that, if plaintiff's cause of action be a claim for unliquidated or uncertain damages founded on a tort or breach

of covenant, the defendant shall not be permitted to set off any debt due him by plaintiff, does not characterize a demand for the conversion of a sum of money. *Jones v. Hunt*, 12 S. W. 832, 833, 74 Tex. 657.

Bankr. Act U. S. 1841, § 5, declares that all creditors whose debts are not due and payable until a future day, etc., or all persons having "uncertain or contingent demands" against a bankrupt, shall be permitted to come in and prove such debts or claims, and shall have the right, when their debts become absolute, to have the same allowed. Held, that the term "uncertain or contingent demands," as so used, did not include demands the existence of which depended on a contingency, but merely meant existing demands, the cause of action on which depended on a contingency. *French v. Morse*, 68 Mass. (2 Gray) 111, 112.

In matters of obligation, a thing is uncertain when the description is not that of an individual object, but designates only the kind, such as some corn, some wine, a horse. *Civ. Code La. 1900*, art. 3556, subd. 7.

UNCERTAINTY.

Webster defines that which is uncertain to be that which is doubtful, unsure, dubious. An instruction which declares that, if the evidence leaves a fact in a state of doubt and "uncertainty," then the jury must consider it as not proven, exacts too high a measure of proof. *Rowe v. Baber*, 8 South. 865, 866, 93 Ala. 422.

The word "uncertainty," as used in Code Civ. Proc. § 430, subd. 7, which provides that "uncertainty" in a complaint is a ground for demurrer, refers to the uncertainty defined by the authorities in pleading; and such authority does not include ambiguity. *Kraner v. Halsey*, 22 Pac. 1137, 1138, 82 Cal. 209.

UNCHASTE.

See, also, "Chaste."

An unchaste woman is "a sexually impure woman ordinarily." *Foster v. Hanchett*, 35 Atl. 316, 68 Vt. 319, 54 Am. St. Rep. 886.

Under Cr. Code, c. 4, § 12, declaring the carnal knowledge of a female child under the age of 18 with her consent to be rape, unless she was over 15 years of age and previously unchaste, the term "unchaste" does not require that she be a woman of notoriously lewd and lascivious habits, or that she must be a prostitute. *Bailey v. State*, 78 N. W. 284, 285, 57 Neb. 706, 73 Am. St. Rep. 540.

A woman is unchaste who has had unlawful intercourse, or is guilty of such conduct as would tend to indicate that she was ready and willing to submit to the unlawful

embraces of a man. The embracing of a man and woman does not necessarily indicate unchastity, but words spoken of a woman charging that at a certain time and place the man was embracing her, and when discovered the parties seemed very much confused, etc., impute "unchastity," within the meaning of Code Civ. Proc. § 1906, providing that an action for words importing unchastity to a woman are actionable, without alleging special damage. *Mason v. Stratton*, 1 N. Y. Supp. 511, 512, 49 Hun, 606.

UNCLAIMED.

Laws 1899, p. 1294, c. 582, amending Railroad Law, Laws 1890, p. 1097, c. 565, § 46, provides that unclaimed live stock may be sold by any railroad without notice. Held, that the word "unclaimed" means unclaimed within a reasonable time after notice; and where a consignee of fish packed in ice failed to call for them for 54 hours, although two notices were sent to him, and he had ample opportunity to do so, the fish were properly regarded by the railroad as "unclaimed." *Leech v. New York, N. H. & H. R. Co.*, 83 N. Y. Supp. 166, 168, 40 Misc. Rep. 634.

UNCLE.

An "uncle" is defined to be the brother of a father or mother, and according to the common understanding there is no distinction between the whole and half blood. *State v. Reedy*, 24 Pac. 66, 67, 44 Kan. 190.

"Uncle," includes an uncle of the half blood. *State v. Guiton*, 24 South. 784, 785, 51 La. Ann. 155.

UNCOMPLETED.

Under the statute providing that it shall be lawful for any railroad company which shall have entered in good faith upon the work of constructing its road, and shall have become unable to complete the construction of the same or any part thereof, to sell and convey the whole, etc., to any other railroad company, not being a competing line, etc., a road is "uncompleted" where it has neither station house, side tracks, nor turntables, or rolling stock fit for use, and has leased what it used about as long as it could, and is unable to furnish what is necessary for its successful operation. *Young v. Toledo & S. H. R. Co.*, 76 Mich. 485, 493, 43 N. W. 632, 635.

UNCOMPOUNDED MEDICINAL DRUG.

An "uncompounded medicinal drug," in pharmacy, is a drug not made up of two or more constituent drugs or chemicals, but a

single drug as prepared without admixture for the pharmacist's use, and with no reference to its elementary chemical constitution, whether simple or compound. Iron, sulphur, or iodine are examples of simple chemical elements that are drugs when suitably prepared for medicinal use. Quinine, opium, etc., are common examples of single "uncompounded medicinal drugs," though compounds chemically considered. *United States v. Stubbs* (U. S.) 91 Fed. 608, 610.

UNCONDITIONAL.

A will giving to testator's wife all his interest in real estate, mortgages, notes "absolutely and unconditionally" means no more than that the wife should have the property without condition during the time in which she was to hold it. *Kratz v. Kratz*, 59 N. E. 519, 520, 189 Ill. 276.

UNCONDITIONAL AND SOLE OWNERSHIP.

"Unconditional and sole owner," as used in a policy of insurance which provided that, if the assured is not the "unconditional sole owner" of the property, this policy shall be void, includes a vendee in possession under an executory contract to purchase. *Rumsey v. Phoenix Ins. Co.* (U. S.) 1 Fed. 396, 398.

The interest of a mortgagor in realty before foreclosure is "unconditional and sole ownership," within the meaning of a fire policy that it shall be void if the interest of the assured be other than unconditional and sole ownership. *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 91 N. W. 1014, 1015, 115 Wis. 402.

The provisions of a policy to the effect that its validity shall be dependent on plaintiff's "unconditional and sole ownership" of the property insured had reference only to the quality of plaintiff's title, not to liens, and the policy was therefore not rendered void because of a chattel mortgage. *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 20 N. Y. Supp. 646, 647, 1 Misc. Rep. 114.

A provision in a policy that the "interest of the insured shall be free and unincumbered ownership" renders it void where it was subject to a mortgage not stated in the policy. *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431.

A party stated, in an application for a fire policy, that he was the unconditional owner of the building insured, which stood on a large tract of land in which the insured owned an undivided fourth in fee and the life interest in the remainder; but at the time the extent of his interest in the remainder, whether for life or in fee, was in litigation. The building was his dwelling,

built at his expense. Held that, as in a partition the building would be assigned to him with his fourth, a representation that he was the unconditional owner thereof did not avoid the policy. *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 669, 7 L. R. A. 81.

The omission of the owner of the equitable title to property to state the nature thereof will not render a policy of insurance invalid, under a condition forfeiting the insurance in case the interest is other than the entire, unconditional, and sole ownership, if the fact is not so represented to the company. *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605. And he will be regarded as the absolute owner, although he may not have paid the purchase money. *Ramsey v. Phoenix Ins. Co. (U. S.)* 2 Fed. 429. Under these principles, where plaintiff insured certain buildings on land which he had contracted to purchase, but on which he had made no payment, and the policy was conditioned to be void if his interest was other than the "entire, unconditional, and sole ownership," or if the insured property was a building on land not owned by him in fee simple, the policy was not vitiated merely because he failed to hold the legal title to the land. *Imperial Fire Ins. Co. v. Dunham*, 12 Atl. 668, 675, 117 Pa. 460, 2 Am. St. Rep. 686.

Since a fee-simple estate is the highest tenure known to the law, and since landowners in fee simple, in the absence of any proof to the contrary, are presumed to be the owners of the buildings located and standing on the premises, it follows that the interest of the fee-simple owner of land in the buildings thereon is "the entire, unconditional, and sole ownership" of such property, within the meaning of a fire insurance policy requiring such ownership; and the fact of the existence of a lease of such buildings for a term of 10 years does not change the rule. *Lycoming Fire Ins. Co. of Muncy v. Haven*, 95 U. S. 242, 245, 24 L. Ed. 473.

Where a fire policy provided that, if the interest of the insured be other than "unconditional and sole," it shall be void, the phrase means that the interest must be completely vested in the assured, not contingent or conditional, nor for years or life, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so, whether the title is legal or equitable. *Hartford Fire Ins. Co. v. Keating*, 38 Atl. 29, 31, 86 Md. 130, 63 Am. St. Rep. 499.

UNCONDITIONAL CONTRACT.

In the opinion rendered in *Dye v. Garrett*, 78 Ga. 471, 3 S. E. 691, it was said that an "unconditional contract" is one that has no condition in it. It is such a one that the court, by looking at the paper itself, may determine that judgment shall be rendered for

the plaintiff in the case. *Rodgers v. Caldwell*, 37 S. E. 865, 866, 112 Ga. 635. See, also, *Everett v. Westmorland*, 92 Ga. 670, 19 S. E. 37.

A suit on notes, some of which were due and some not matured, except under a stipulation that they should become due if any one of the series was not paid within 30 days after maturity, is not founded on "unconditional contracts" in writing, within the meaning of paragraph 7, § 4, art. 6, of the Constitution, and requires a verdict by jury. *Howard v. Wellham*, 41 S. E. 62, 114 Ga. 934.

UNCONDITIONAL HEIRS.

"Unconditional heirs" are those who inherit without any reservation or without making an inventory, whether their acceptance be express or tacit. Civ. Code La. 1900, art. 882.

UNCONDITIONAL PROMISE TO PAY.

An unqualified order or promise to pay is unconditional, within the meaning of the negotiable instruments law, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount, or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. Ann. Codes & Sts. Or. 1901, § 4405.

UNCONSCIENTIOUS.

2 Pom. Eq. Jur. § 803, says the terms "fraud" or "fraudulent," as used by the courts in speaking of equitable estoppels, are virtually synonymous with "unconscientious" or "inequitable." *The Ottumwa Belle (U. S.)* 78 Fed. 643, 648.

UNCONSCIONABLE.

As defined by Bouvier, an unconscionable bargain is a contract which no man in his senses, not under a delusion, would make on the one hand, and which no fair and honest man would accept on the other. Such a contract, whether founded on fraud, accident, mistake, folly, or ignorance, is void at common law. It is not necessary to invoke the aid of a court of equity to reform it, and courts of law will always refuse to enforce such a bargain, as against public policy, honesty, fair dealing, and good morals. *Hume v. United States*, 10 Sup. Ct. 134, 136, 132 U. S. 406, 33 L. Ed. 393.

Where a theater lease provided for the payment of an annual rental of \$22,500, a provision or a deposit by the tenant of \$5,000 and a forfeiture of the same on a breach was

not "unconscionable." *Adler v. Kramer*, 80 N. Y. Supp. 624, 626, 39 Misc. Rep. 642.

An agreement whereby an attorney retained \$1,200 pension money out of a little over \$1,700 received by him was an unconscionable agreement. *In re —*, 86 N. Y. 563, 564, 571, 573.

UNCONSTITUTIONAL

The term "unconstitutional law" must vary in its meaning in different states, according as the powers of sovereignty are or are not exercised by the individual or body which exercises the power of ordinary legislation. Where the lawmaking department is restricted in its powers by written fundamental law, as in the American states, we understand by unconstitutional law one which, being opposed to the fundamental law, is therefore in excess of legislative authority and void. Indeed, the term "unconstitutional law," as employed in American jurisprudence, is a misnomer and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all. *Cooley Const. Lim.* pp. 2, 3; *State v. McCann*, 72 Tenn. (4 Lea) 1, 10.

Judge Cooley says: "The term 'unconstitutional law,' as employed in American jurisprudence, is a misnomer and implies a contradiction; that enactment which is opposed to the Constitution, being in fact no law at all." Again this same author says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their construction are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." A legislative act in conflict with the Constitution is not only illegal or voidable, but absolutely void. It is as if never enacted, and no subsequent change of the Constitution removing the restriction could validate it or breathe into it the breath of life. *In re Rahrer* (U. S.) 43 Fed. 556, 558, 10 L. R. A. 444.

Objection in a state court that an act of the state is "unconstitutional and void" relates only to the power of the state Legislature under the state Constitution, and does not raise the question that the act was in contravention of the Constitution of the United States. *Layton v. Missouri*, 23 Sup. Ct. 137, 138, 187 U. S. 356, 47 L. Ed. 214.

A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or state Constitution. *Commonwealth v. Powell*, 1 Pa. Co. Ct. R. 94, 97 (citing *Commonwealth v. Maxwell*, 27 Pa. [3 Casey] 444, 456).

An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is in legal contemplation as inoperative as though it had never been passed. Therefore an unconstitutional act purporting to create an office gives no validity to the acts of a person acting under color of its authority. *Norton v. Shelby County*, 6 Sup. Ct. 1121, 1125, 118 U. S. 425, 30 L. Ed. 178; *Melody v. Goodrich et al.*, 70 N. Y. Supp. 568, 569, 35 Misc. Rep. 138.

UNCONTROLLABLE

An allegation in a complaint for divorce that the defendant was subject to "uncontrollable paroxysms of rage and violence" means that such paroxysms of rage and violence were beyond the control of the plaintiff and not beyond the control of the defendant, and that she was not, therefore, unaccountable for the same. *Sylvia v. Sylvia*, 17 Pac. 912, 915, 11 Colo. 319.

UNCONTROLLABLE IMPULSE

An uncontrollable impulse, sufficient to destroy criminal responsibility, exists only where it destroys the power of the accused to comprehend rationally the nature, character, and consequences of a particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts and that they are wrong. The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it. *State v. O'Neil*, 33 Pac. 287, 294, 51 Kan. 651, 24 L. R. A. 555.

UNCULTIVATED.

Comp. Laws 1879, c. 89, § 12, authorizing a road overseer to enter on any "uncultivated land unincumbered by a crop" to obtain stone, etc., does not mean land which has once been under cultivation, but on which there is no present crop, but land which has not been cultivated. *Barrett v. Nelson*, 29 Kan. 594, 596.

UNDEPRECIATED MONEY.

A note given for land sold in 1864 upon a credit, with the understanding that at the time of the sale that payment should be required in "undepreciated money," does not, by force of that term, require the payment

of specie or its equivalent. It is held that the time and circumstances under which the note is given are to be considered in ascertaining the intention of the parties, and that payment made in money in the ordinary commercial and business transactions of a country was a payment in undepreciated money in the contemplation of the contract. *Blackburn v. Brooks*, 65 N. C. 413.

UNDER.

A recital in municipal bonds that they were issued under and by authority of a statute is held equivalent to saying that it was done in conformity with the statute and authorized by it. *Risley v. Village of Howell* (U. S.) 64 Fed. 453, 457, 12 C. C. A. 218.

The word "under," as used in the recital in municipal bonds to the effect that the bonds are issued under the provisions of a given statute, is not synonymous with the phrase "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of," but simply asserts that the bonds are subject to or controlled by the provisions of the statute named, and the purchaser is thereby informed where he should look in order to learn what the provisions of the statute are which confer and limit the power to issue the bonds. *Bates v. Riverside Independent School Dist.* (U. S.) 25 Fed. 192, 194.

A covenant in a deed by the grantor that his land is free from all incumbrances done or suffered by "those under whom they claim" means those from whom they have derived the title. *Williams v. Hall*, 62 Mo. 405, 406.

As at a lower level.

"Under," as used in Rev. St. Mass. c. 39, § 67, providing that every railroad corporation may raise or lower any turnpike or way for the purpose of having their railroad pass over or under the same, is not precisely the opposite of "over." One passes over a road if he crosses it on the surface, as well as when he passes above it on a bridge; but he cannot be said to pass under it, unless on another surface at a lower level. *Newburyport Turnpike Corp. v. Eastern R. Co.*, 40 Mass. (23 Pick.) 326, 328.

As by virtue of.

"Under," in a notice that a certain person was not entitled to vote under the reform act, was equivalent to "by virtue of" the act. *Huggett v. Lewis*, 28 Eng. Law & Eq. 326, 327.

As in subordination to.

As used in Wag. St. p. 274, § 8, providing that the words "grant, bargain, and sell," in all conveyances, shall be construed

to be express covenants that the grantor was at the time of the execution of the conveyance seised of an indefeasible estate in fee simple, and that such estate was free from incumbrances done or suffered by the grantor or "any person claiming under him," refers to those holding subordinately and not adversely to the grantor, since the statutory provision against incumbrances is based on the idea that the grantor had not previously sold the land conveyed, but that he was at the time of entering into it the owner thereof, and that it may have been incumbered by him, or by some person rightly claiming an estate in the land consistent with the owner's title, or some estate therein in trust for the owner. *Clore v. Graham*, 64 Mo. 249, 253.

"Under" has the same signification as the phrase "by virtue of," which is defined in the Century Dictionary as meaning "by or through the authority of." It is also defined "in subordination to" (Worcester Dict.), and "in conformity with" (Cent. Dict.); and it has such meaning in Act April 5, 1889, § 1, giving a lien for labor performed or material furnished for any building or improvement under or by virtue of the contract with the owner, or his agent, trustee, contractor, or contractors. *Bassett v. Mills* (Tex.) 34 S. W. 93, 94.

As subject to.

"Under this contract," as used in a contract providing that any question or dispute that shall arise under this contract shall be referred, etc., means the subject of the contract, or covered by the contract. *Hostetter v. City of Pittsburg*, 107 Pa. 419, 432.

"Under," as used in a statute providing that chiefs of police shall have power, under such rules as the police board may establish, to suspend, fine, or dismiss any subordinate officer, means "subject to," and indicates an intention to give the chief power to do these things, but makes him subject to the police board. *Eslinger v. Pratt*, 46 Pac. 763, 766, 14 Utah, 107.

UNDER AND SUBJECT TO.

An assignment of land on which a perpetual rent had been reserved, declared in the habendum to be "under and subject to the payment of the said rent as the same shall accrue, forever," means that the grantee is to take an incumbered estate, without recourse to the grantor for a breach of the statutory covenant arising from the words "grant, bargain, and sell," used in the assignment. *Walker v. Physick*, 5 Pa. 193, 203.

The words "under and subject," in a grant of land under and subject to the payment of the several ground rents which

have been reserved in an original grant, operates to bind the grantee to indemnify the grantor no longer than his tenancy of the freehold. *American Academy of Music v. Smith*, 54 Pa. 130, 132.

The words "under and subject to," in a deed which recites that the grantee takes the land conveyed under and subject to a mortgage debt, does not operate to make him personally liable for the debt, where there is no agreement or consent on his part to pay the debt, and no consideration moves to him for its payment. *Girard Life Ins. & Trust Co. v. Stewart*, 86 Pa. 89, 91.

A clause in a deed of conveyance "under and subject" to a mortgage or other incumbrance is a covenant of indemnity only as between grantor and grantee, for the protection of the former, unless there be an express agreement to pay the incumbrance, or unless such an agreement may be implied from the circumstances. *Thomas v. Wiltbank*, 6 Wkly. Notes Cas. 477, 479.

A conveyance of land "under and subject" to a mortgage or other incumbrance is of itself a covenant of indemnity only for the protection of the vendor. It is only where there is an express agreement to pay the incumbrance, or where such agreement might be implied from the circumstances, that there is liability to the incumbrancer, or that he may sue in the name of the vendor to his use. *Appeal of Moore*, 88 Pa. 450, 453, 32 Am. Rep. 469; *Samuel v. Peyton*, 88 Pa. 465, 469.

In an action by a mortgagee to recover a deficiency resulting on the foreclosure of the mortgage from the grantee of the mortgagor, whose deed recited that the conveyance was under and subject to such mortgage, the court said: "The most that can be claimed for the words 'under and subject,' in the conveyance, is that as between the parties it creates a covenant of indemnity to the grantor on the part of the grantee. It creates no liability to the mortgagee, and does not authorize a suit in his own name." *Taylor v. Mayer*, 93 Pa. 42, 44.

A deed to a building association "under and subject" to the lien of a mortgage creates a covenant on the part of the grantees to indemnify the grantor against the mortgage debt. *Greene v. Rick*, 121 Pa. 130, 139, 15 Atl. 497, 2 L. R. A. 48, 6 Am. St. Rep. 760.

The legal import of the "under and subject to the lien of" clause in a deed is that the vendee will discharge the lien of the incumbrance by payment, or, in default thereof, that the land shall remain liable therefor, and shall be, as between himself and his vendor, primarily liable to the extent of its actual value. If the mortgage money is more than the value of the land,

the vendor will be liable to his creditor for such surplus, and will be without recourse to his vendee for the amount so paid; but if the vendee neglects or refuses to pay, and the holder of the mortgage proceeds upon the bond or otherwise against the mortgagor, the implied covenant to indemnify him to the extent of the value of the land is broken, and his vendee is liable to him upon it. *Blood v. Crew Livick Co.*, 33 Atl. 344, 346, 171 Pa. 328.

"Under and subject" to a mortgage, as used in a deed, do not import a promise to pay, nor create a personal liability. *Lavelle v. Gordon*, 39 Pac. 740, 741, 15 Mont. 515.

UNDER AUTHORITY OF LAW.

In Const. art. 5, § 29, providing that the county court shall hold at least four terms a year, as may be provided by the Legislature or by the commissioners' court of the county, under authority of law, and such other terms each year as may be fixed by the commissioners' court, the purpose of the use of the words "under authority of law" was not merely to empower the Legislature to authorize the commissioners' court to act in the premises, but it was rather to make their action subordinate and subject to legislative control. *Hughes v. Doyle*, 44 S. W. 64, 65, 91 Tex. 421.

UNDER COLOR OF.

See "Color."

UNDER CONTRACT.

A person who entices from the employ of a farmer a minor child, who is working on his farm under a contract made with the minor's father, is not guilty of violating 2 Rev. St. 1893, § 291, providing for the punishment of any person who shall entice any servant or laborer "under contract" with another to violate such contract. *State v. Aye*, 41 S. E. 519, 63 S. C. 458.

UNDER CONTROL.

Where a railroad engineer had testified that he had his train under control, it was proper to allow him to explain the meaning of "having the train under control," since, while the expression might be fully understood by railroad men operating a train, a jury would not, perhaps, have a clear idea of what was meant. *Texas & N. O. R. Co. v. Mortensen*, 66 S. W. 99, 103, 27 Tex. Civ. App. 106.

UNDER THE DIRECTION OF.

Rev. St. U. S. § 458 [U. S. Comp. St. 1901, p. 257], provides that the Commissioner of the General Land Office shall perform,

"under the direction of the Secretary of the Interior," all executive duties pertaining to the survey and sale of lands, or in any wise respecting such lands. Held, that the phrase "under the direction of the Secretary of the Interior" is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the operations of the Land Department. It means that in the immediate matters relating to the sale and disposition of the public domain, and the administration of the trust involving on the government, the Secretary is the supervising agent of the government. *Stoneroad v. Stoneroad*, 15 Sup. Ct. 822, 826, 158 U. S. 240, 39 L. Ed. 966; *Orchard v. Alexander*, 157 U. S. 372, 381, 384, 15 Sup. Ct. 635, 39 L. Ed. 737, 741.

UNDER DISABILITY.

See "Disability."

UNDER FALSE PRETENSES.

To charge a person with having obtained property under false pretenses conveys the idea that such person has been guilty of swindling, and therefore it is libelous per se to publish that a note given to plaintiff was obtained from the maker under false pretenses. *Young v. Sheppard* (Tex.) 40 S. W. 62.

UNDER HIS HAND.

The averment, in an action on notes, of a promise by defendant under his hand should be construed as equivalent to an averment of a promise in writing signed by defendant. The word "hand," in legal parlance, is often used to denote handwriting or written signature, as "Witness my hand and seal," or "Witness my hand." If the instrument be not under seal, also, as used in Gen. St. §§ 978, 985, and Mills' Ann. St. §§ 1484, 1491, authorizing a judge or justice of the peace to issue a warrant in certain cases "under his hand" means a writ or process in writing, signed by the judge or justice. *Salazar v. Taylor*, 33 Pac. 369, 370, 18 Colo. 538.

A special count on a note alleged to have been given by defendants under their hands, etc., is satisfied by the signing of a note by one of the parties by making his mark thereto. *Walbridge v. Arnold*, 21 Conn. 424, 428.

As used in a declaration in an action on a note, stating that the defendants by a note "under their hands" promised to pay, the phrase quoted embraces a note signed by procuration. *Phelps v. Riley*, 3 Conn. 266, 270.

UNDER IMPROVEMENT.

The term "under improvement," in Gen. St. c. 128, §§ 1, 4, authorizing the fence view-

ers, upon application, to make a division of the fences between owners of adjoining lands under improvement, means "used, occupied, employed, or turned to profitable account. The purpose of the statute was to require owners of adjoining lands occupying or using them, or beneficially using them in such a way as to derive some profit or advantage therefrom, to maintain the fences equally." *Chase v. Jefts*, 58 N. H. 280, 281.

Woodland through which the owner's cattle roamed as a part of their pasture is "under improvement," within the meaning of Gen. St. c. 128, § 1, relating to the maintenance of partition fences between land and woodland which is not "under improvement." *Piper v. Piper*, 60 N. H. 98, 99.

Rev. St. Me. c. 18, § 18, authorizing the selectmen of a town to lay out private ways leading from "land under improvement" in a town to a town or highway, includes a mill lot on which a mill is erected. *Lyon v. Hamor*, 73 Me. 56, 57.

UNDER THE INFLUENCE OF LIQUOR.

As used in an accident insurance policy, providing that no claim should be made thereunder where the death or injury happened while the insured was, or in consequence of his having been, "under the influence of intoxicating drinks," the quoted phrase means that the insured must have drunk enough to disturb the action of the mental or physical faculties, so that they were no longer in their normal condition. *Shader v. Railway Passengers' Assur. Co.* (N. Y.) 3 Hun, 424.

"Under the influence of intoxicating liquors," as used in an accident policy providing that the insurer shall not be liable for injuries received by the insured while under the influence of intoxicating liquors, means a condition amounting to intoxication, and does not include every instance in which the insured has partaken of any quantity of intoxicants. *Campbell v. Fidelity & Casualty Co. of New York*, 60 S. W. 492, 496, 100 Ky. 661.

The phrase "under the influence of liquor" means the same as "drunk" or "intoxicated," in an instruction, in an action for death occasioned by drunkenness caused by liquor furnished by defendant, that exemplary damages might be allowed if defendant gave deceased intoxicating liquors when he was already "under the influence of liquor." *Buck v. Maddock*, 47 N. H. 208, 209, 167 Ill. 219.

"Under the influence of intoxicating drinks," within the meaning of a policy of accident insurance which excused the insurer from liability for injuries which happened while the insured was under the influence of intoxicating drinks, or in consequence of

having been under the influence of such drinks, means such influence as in reality amounts to intoxication. Insured must have drunk enough to have disturbed the action of the physical or mental faculties, so that they are no longer in their natural or normal condition, in order to excuse the company from liability. The fact that the insured had drunk some liquor, but not enough to overcome his faculties, would not excuse the insurer from liability under this clause of the policy. *Standard Life & Accident Ins. Co. v. Jones*, 10 South. 530, 532, 94 Ala. 434.

UNDERLEASE.

The ordinary distinction between an "assignment" and an "underlease" is that the former transfers the land for the whole term and the latter for only a part of it. When the transfer is of the whole of a term, the person taking is an assignee, and not an undertenant, though the transaction be in form an underletting. *Bedford v. Terhune* (N. Y.) 27 How. Prac. 422, 447.

In *Woodf. Landl. & T.* § 345, it is said that an assignment, as distinguished from an underlease, signified a parting with the whole term; and in 1 Hill. Abr. p. 126, § 55, it is said that the ordinary distinction between an assignment and an underlease is that the former transfers the land for the whole term and the latter for only a part of it. *Bedford v. Terhune*, 30 N. Y. 453, 458, 86 Am. Dec. 394.

UNDER LEGAL DISABILITY.

See "Legal Disability."

UNDERLESSEE.

As undertenant, see "Undertenant."

UNDER LIKE CIRCUMSTANCES.

The term "under like circumstances," as used in an instruction, called attention to the particular nature of the case, and coupled the instruction with the general instructions in such a manner as to make the former complementary to the latter, and removed any possible conflict in the instruction confusing the jury. *Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co.*, 60 N. W. 330, 332, 42 Neb. 105.

UNDER A PENALTY.

The term "under a penalty," as used in a covenant by the seller of a business not to engage in the same business within a certain distance under a penalty, are not conclusive as to the sum named being regarded as liquidated damages. *Smith v. Brown*, 42 N. E. 101, 102, 164 Mass. 584 (citing *Ropes v.*

Upton, 125 Mass. 258, 262; *Saintier v. Ferguson*, 7 C. B. 716).

UNDER PROCESS OF LAW.

Where a mortgagor voluntarily surrendered the premises after a decree of foreclosure, an entry by the mortgagee was not an entry under process of law. *Riddle v. George*, 58 N. H. 25, 28.

UNDER PROMISE OF MARRIAGE.

The words "under promise of marriage," in a statute punishing seduction under promise of marriage, mean "by means, by virtue, and by reason of a promise of marriage"; that is, the man makes a promise, and then, by using it as a means, he seduces and debauches the girl. *State v. Eckler*, 106 Mo. 585, 588, 17 S. W. 814, 27 Am. St. Rep. 372.

UNDER PROTEST.

See "Protest."

UNDER SAIL.

It is a general principle of maritime law that a vessel "under sail" must avoid one at anchor. A vessel propelled by steam is considered, in the application of this principle, as "under sail," and with the wind at all times, and must give place accordingly. *Knowlton v. Sanford*, 32 Me. 148, 157, 52 Am. Dec. 649.

UNDER SEAL.

A writing is not "under seal," unless the purpose to seal it is expressed or indicated in its body. The mere suffixing a scroll containing the word "Seal" or the letters "L. S." to the name of the subscriber of an instrument does not make it a writing under seal. *Breitling v. Marx*, 26 South. 203, 204, 123 Ala. 222.

UNDERTENANT.

An underlessee is an "undertenant," within the meaning of Civ. Code, § 2707, relating to the landlord's right of pledge. *University Pub. Co. v. Piffet*, 34 La. Ann. 602, 603.

UNDER THE UNITED STATES.

The words "under the United States," in Const. art. 4, § 7, providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this state, means under the federal government. *People v. Leonard*, 14 Pac. 853, 855, 73 Cal. 280.

UNDER WAY.

A vessel is "under way" when she is not at anchor, or made fast to the shore or aground. U. S. Comp. St. 1901, pp. 2863, 2876, 2886.

A vessel lying to in a fog, but having some of her sails up, is "under way," within the definition of the international navigation rules. *Burrows v. Gower* (U. S.) 119 Fed. 616 (citing *The Columbian* [U. S.] 100 Fed. 991, 41 C. C. A. 150).

UNDER A WILL.

Code Civ. Proc. § 277, providing that a person entitled to a legacy or any other pecuniary provision "under a will" may, after one year from the issuance of letters testamentary or of administration, file a petition and have a decree requiring the executor to pay his claim or show cause why he should not do so, does not apply to an assignee of a legacy. In re *Brewster*, 3 N. Y. Supp. 556, 557, 1 Con. Sur. 172 (citing *Peyser v. Wendt*, 2 Dem. Sur. 221).

UNDERFLOW.

"Underflow" is the subterranean volume of water which slowly finds its way through the sand and gravel constituting the beds of streams which traverse the country adjacent and to which rights by appropriation may attach. *Platte Valley Irr. Co. v. Buckers Irrigation Milling & Improvement Co.*, 53 Pac. 834, 336, 25 Colo. 77 (citing *McClellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280).

UNDERGROUND STREAM.

Underground streams are divided into two distinct classes: Those whose channels are known or defined, and those unknown or undefined. The word "defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word "known" refers to knowledge of the course of the stream by reasonable inference. Regarding the laws governing these two classes, it must be known that if underground waters flow in well-defined and known channels, the course of which can be distinctly traced, they are governed by the same rules of law that govern streams flowing upon the surface of the earth. But for this purpose the underground water must flow in known and well-defined channels, so that the riparian owner may invoke the same rules as are applied to surface streams. Subterranean waters, whose channels are unknown and undefined, although there are undoubtedly a great many underground streams whose waters flow in confined channels, but whose courses are not known, are all classed with percolat-

ing waters. *Deadwood Cent. R. Co. v. Barker*, 86 N. W. 619, 621, 14 S. D. 558.

UNDERGROWTH.

"Undergrowth" is a term applicable to plants growing under or below other greater plants, and does not embrace a tree, which is a woody plant, whose branches spring from and are supported upon a trunk or body, which may be old or young, great or small. *Clay v. Postal Telegraph Cable Co.*, 11 South. 658, 659, 70 Miss. 406.

UNDERLOOKER.

An "underlooker," or underground manager, is one whose duty it is to see that the roofs of a mine are propped and made secure. *Jones v. Florence Min. Co.*, 28 N. W. 207, 210, 68 Wis. 268, 57 Am. Rep. 269.

UNDERSTANDING.

See "Want of Understanding."

Webster defines "understanding" thus: "Intelligence between two or more persons; agreement of minds; union of sentiments. There is a good understanding between a minister and his people." *Allison v. Hagan*, 12 Nev. 38, 61.

As an agreement.

"Understanding" may in a sense be said to involve a conclusion, but is often used as synonymous with "agreement," when used in reference to an understanding between two parties. *Sykes v. City Sav. Bank*, 73 N. W. 369, 370, 115 Mich. 321, 69 Am. St. Rep. 562.

"Understanding," as used in a finding of a committee that it was the understanding of certain parties that a debt secured by a mortgage should be allowed to lie for a number of years, unless sooner enforced by a certain party, which is always a loose, ambiguous, word, unless accompanied with some expression to show that it constituted a meeting of the minds of parties upon something respecting which they intended to be bound, was employed, not to express anything which was the subject of an agreement or contract between the parties, but only that kind of expectation or confidence upon which parties are frequently willing to rely, without requiring any binding stipulation. *Camp v. Waring*, 25 Conn. 520, 529.

"Understanding," as used in testimony of a somewhat uneducated person to the effect that a deed was executed with a certain understanding, might safely be regarded as synonymous with "agreement." *Mitchell v. National Railway Building & Loan Ass'n* (Tex.) 49 S. W. 624, 628.

The word "understanding" may be used to express a valid contract engagement, but one of a somewhat informal character. *Winslow v. Dakota Lumber Co.*, 20 N. W. 145, 32 Minn. 237.

Webster defines the word "understanding" as anything mutually understood or agreed upon. An understanding between two parties to a contract as to what rights each shall have thereafter in the subject-matter thereof is an agreement. The words "understanding" and "agreement" may be used interchangeably, as synonymous. *Bar-kow v. Sanger*, 3 N. W. 16, 21, 47 Wis. 500.

An understanding is anything mutually understood or agreed upon, as to come to an understanding with another; and when a witness, speaking with reference to a contract between himself and the other party to the case on trial, says the understanding was so and so, the evidence tends to show that this was what was mutually agreed upon by the parties. *Bullock v. Johnson*, 35 S. E. 703, 705, 110 Ga. 486.

An action was brought against a telegraph company for failure to deliver a telegram, and it appeared that plaintiff had an arrangement with a Chicago firm to inform him by wire of any change in the cattle market. He delivered a message to his correspondent to defendant's agent, stating to the agent where he (plaintiff) could be reached by wire, which telegram was not sent, and plaintiff, relying on the silence of his correspondent, purchased cattle for the Chicago market on the basis of the price last named by it, which had fallen. On the trial of an action for damages, plaintiff was asked, "Now, had you any 'understanding' with them [plaintiff's correspondent]?" and an objection for incompetency and immateriality thereto was sustained. Held, that the word "understanding," as used in the question, was used in the sense of calling for facts as to the agreement between the parties, if any, and that the term "understanding" was practically synonymous with the word "agreement," and therefore the question was not objectionable as calling for a conclusion. *Garrett v. Western Union Tel. Co.*, 58 N. W. 1064, 1065, 92 Iowa, 449.

In an action of ejectment plaintiff on cross-examination was asked: "Was there an understanding between you and Wright that he should eventually have a deed of the 20 acres?" To this question his attorney objected, as tending to prove a verbal contract for the sale of land, which the statute requires to be in writing, and as leading and calling for the opinion of the witness as to the effect of a conversation which is not proven. The objection being overruled, the witness answered: "Yes." In considering this objection the court said: "While it must be admitted that the general rule is that the

facts within the knowledge of a witness must be given, and that he cannot testify to his understanding of or conclusion as to the facts, still in this case it is quite manifest that the word 'understanding' in the question asked was not employed or understood by the witness in the sense of calling for her understanding or conclusion as to the facts, but that it was used as a synonym of the word 'agreement,' and that the effect of the question was to inquire for a fact; i. e., whether there was an agreement between the plaintiff and Wright that he should eventually have a deed of the 20 acres. Thus construed, and we think such is a fair construction, the question was clearly proper." *House v. Howell*, 6 N. Y. Supp. 799, 801, 53 Hun, 638.

In an action against a city to recover as damages the value of a dwelling house, etc., destroyed by fire by reason of the failure on the part of the city to keep its water pipes, hydrants and fixtures in repair, so as to furnish a sufficient supply of water to enable the engines to extinguish fires, the plaintiff alleged that, "with the understanding that the plaintiff was to be furnished with an ample supply of water by means of such pipes and hydrants for the extinguishment of any fires that might occur, the plaintiff did agree to pay and did pay to such defendant the annual tax assessed and imposed for the use of such pipes." In considering this complaint, the court said: "It is certainly the general rule that the contract of a corporation should be evidenced by proper corporate proceedings, and nothing of that kind appears here. Neither the word 'contract' nor 'agreement,' as referring to the action of the corporation, is stated. As applied to the corporation, the strongest term used is 'understanding,' which is equivocal, or at least falls short of alleging a distinct and express contract between the parties." *Black v. City of Columbia*, 19 S. C. 412, 419, 45 Am. Rep. 785.

"Express understanding," as used in an averment in a pleading that all negotiations for the purchase of certain lands were with the express understanding that the land was bought for defendant, is an equivalent expression for "express contract" or "express agreement." *Spence v. Spence*, 17 Wis. 448, 454.

The words "understanding" and "agreement" import an oral agreement, when used in pleading. *Franklin v. Browning* (U. S.) 117 Fed. 226, 228, 54 O. C. A. 258.

As capacity of understanding.

In the statute, to the effect that a person entirely without understanding has no power to make a contract of any kind, it is held that the term "understanding" is used to denote, not the act of understanding, but

the capacity or faculty of doing so, and the expression "without understanding" as referring to persons without such capacity; nor is the expression to be understood in its literal and extreme sense, for hardly in any case can even the most insane persons be said to be without some degree of understanding, but rather it is to be understood as restricted to the subject-matter to which the section relates, which is that of contracts, executed and executory, and hence as applied to all persons who are entirely without the capacity of understanding or comprehending such transactions. *Jacks v. Estee*, 73 Pac. 247, 248, 139 Cal. 507.

As a guaranty.

An understanding that certain vessels should be loaded within a certain time does not amount to a guaranty. *Huron Barge Co. v. Turney* (U. S.) 71 Fed. 972, 975.

As knowledge.

"Understanding" is defined to mean the act of one who understands or comprehends; so that a person who does not know what he is doing does not "understand" what he is doing, within the meaning of Civ. Code, § 39, relating to the right of rescission on a contract where a person of unsound mind, but not entirely without understanding, has entered into a contract. *Abrahams v. Los Angeles Traction Co.*, 57 Pac. 216, 219, 124 Cal. 411, 418.

As realization of effect of acts.

The word "understand," so much used by lawyers and jurists in connection with the execution of deeds, wills, and such instruments, includes the realization of the practical effects and consequences in every direction of the proposed act, be it deed or will. *White v. White*, 45 Atl. 767, 771, 60 N. J. Eq. 104.

UNDERSTANDINGLY.

The word "understandingly," in a certificate to the deed of a married woman that she executed the same understandingly, means that she executed it with a knowledge of what she was doing. *Murdock v. Railroad Co.*, 86 Tenn. (7 Baxt.) 557, 560.

UNDERSTOOD.

The word "understood," when a witness states what he understood parties to say, may be used to mean what parties say in fact or substance, as the witness understood them, or merely his inference drawn from what was said. If used in the former sense, evidence of his understanding is admissible, but not if used in the latter sense. *Kingsbury v. Moses*, 45 N. H. 222, 225.

Where a witness testified that "he had understood" a certain party to be a member

of a firm, the court said: "'Understood' is the preterit of 'understand,' a verb of very extensive signification, and which, among other things, means to learn or to be informed. When the witness says, in effect, that he has learned, or been informed, that Mr. Dearing was a member of the firm, it cannot with propriety be assumed that his information was derived from rumor; but a jury might well infer that he had learned it from an authentic and satisfactory source, even from the party himself." *Dearing v. Smith*, 4 Ala. 432, 438.

As agreed.

"It is understood," in the ordinary sense in which the phrase is used in a written contract, has the same force and is of the same effect as "it is agreed," and the obligation of the parties is as absolute as if the latter phrase were employed. *Higginson v. Weld*, 80 Mass. (14 Gray) 165, 170.

The word "understood," as applied by a witness to his own apprehension of an agreement to which he was himself a party, is used in the sense of "agreement," and is direct proof in itself of what the agreement was. *Fraser v. Davie*, 11 S. C. 56, 68.

As intended.

"Understood," as used in a court's instruction on an issue as to whether the debt sued upon, which arose upon alleged sale of grain, was a gambling debt, that the jury should find that the debt was of that character if it was mutually agreed and "understood" between plaintiff and defendant that no grain should be delivered or received in settlement of the sale, but that settlement should be made merely by the payment of differences, was equivalent to the use of the word "intended," and so did not render the instruction erroneous. *Connor v. Heman*, 44 Mo. App. 346, 349.

UNDERTAKE.

The words "undertake" and "promise" are equivalent words, and a plea of general issue in assumpsit that defendant did not promise as alleged, omitting the words "undertake or," is good. *Eastman v. Anthony*, 93 Ill. 599.

"Undertook," as used in a complaint against a surgeon, charging malpractice, in that the defendant "undertook faithfully, skillfully, and diligently to treat and set, and endeavor to cure and heal, said arm and shoulder," is not synonymous with "promised, agreed, or contracted," but is used in the sense of "entered upon." *De Hart v. Haun*, 26 N. E. 61, 62, 126 Ind. 378, 382.

UNDERTAKER.

The terms "mechanics, undertakers, or journeymen," in a statute giving a lien to

a mechanic, undertaker, or journeyman who builds or repairs a house, does not include a person who merely furnishes the owner with lumber to be used in such building. *Stevens v. Wells*, 36 Tenn. (4 Sneed) 387.

The term "mechanic or undertaker," in a statute giving a mechanic's lien to any mechanic or undertaker who shall build or repair, either in whole or in part, a house, fixtures, or improvements, or who shall furnish materials or any part of the materials in such building or repairing, or who shall do any work upon said house, either by finishing off the same, painting, ornamenting, or otherwise, does not include one who furnishes machinery to be used in such a house for manufacturing purposes. *East Tennessee Iron Mfg. Co. v. Bynum*, 35 Tenn. (3 Sneed) 268, 269, 65 Am. Dec. 58.

The terms "mechanics" and "undertakers," in a statute giving a mechanic's lien for their services in the erection of buildings, includes mechanics and undertakers who are not residents of the state. *Greenwood v. Tennessee Mfg. Co. & Agricultural School*, 32 Tenn. (2 Swan) 130, 135.

UNDERTAKING.

As bond, see "Bond."

"An undertaking is defined by Bouvier to be an engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. It does not necessarily imply a consideration." *Alexander v. State*, 12 S. W. 595, 596, 28 Tex. App. 186.

"An undertaking is a promise. It may be made with or without consideration. If the promise is in writing, the consideration need not be expressed. It may be proved in all other cases by parol. The common law was satisfied if there was a consideration in fact to sustain the undertaking." *Thompson v. Blanchard*, 3 N. Y. 335, 337.

The word "undertaking," when used in statutes, means a promise or security in any form. *Code Iowa 1897*, § 48, subd. 20.

The word "undertaking," when used in statutes, means a promise or security in any form, where required by law. *Gen. St. Kan. 1901*, § 7342, subd. 20.

Laws 12th Sess. p. 9, provides that before issuing a writ of attachment the clerk shall require a written undertaking on the part of the plaintiff, with two or more sureties. Held, that this means an undertaking for him or on his behalf, and it is not necessary to the validity of such an undertaking that it be signed by the plaintiff. *Pierce v. Miles*, 6 Pac. 347, 348, 5 Mont. 549.

The term "undertaking," in Act Feb. 22, 1867, c. 64, 14 Stat. 403, providing: "No ap-

peal shall be allowed upon a judgment of a justice of the peace, unless the appellant * * * enters into an undertaking to satisfy and pay all intervening damages and costs arising on the appeal"—is used in this statute as the equivalent of an appeal bond, or as a substitute therefor. Unlike the ordinary appeal bond, which is an obligation under seal, with a fixed penalty and a definite condition, limited to become effective or otherwise by the determination of the appeal, the undertaking is without seal or fixed penalty and without condition, and is simply a promise or assumption of liability to perform a judgment or to pay damages and costs. While it differs in form from the bond, its essential purpose and effect are the same as those of the bond, to give the guaranty of an additional person as security for the costs that might be incurred and the damages that might result to an appellee by the prosecution of an appeal that prevents him from realizing his claim as speedily and as effectively as he might otherwise have done. *Tenney v. Taylor*, 1 App. D. C. 223, 228, 229 (quoting *Webst. Dict.*).

Under Act March 3, 1875, c. 137, § 4, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511], providing that all bonds, undertakings, or securities given by either party in the suit prior to its removal shall remain valid and effectual, notwithstanding such removal, and *St. Mass. c. 161, § 24*, providing that original writs, in which the plaintiff is not an inhabitant of the commonwealth, shall, before entry thereof, be indorsed by some sufficient person who is such inhabitant, who shall be liable for costs, it is held that the word "undertakings" in the federal statute is sufficient to include the indorsement required by the Massachusetts statute; the court observing that no term could be more sweeping in this connection than the word "undertakings." *Pullman's Palace Car Co. v. Washburn* (U. S.) 66 Fed. 790, 791.

A memorandum on a justice docket, required by *Rev. St. §§ 3782, 3783*, to be signed by sureties for costs in an action, is not an undertaking, bond, or recognizance, within *Rev. St. § 2590*, providing that no attorney practicing in the state shall be taken as bail or security on an undertaking, bond, or recognizance. *Stark v. Small*, 39 N. W. 359, 72 Wis. 215.

Plant distinguished.

In the case of *In re Panama N. Z. & A. Royal Mail Co.*, 5 Ch. App. 318, it was held that where a company owning a fleet of vessels borrowed money, charging it on the "undertaking and all sums of money arising therefrom and all the estate of the company therein," the word "undertaking" had reference to all the property of the company, not only which existed at the time of the debenture, but which might afterwards

be acquired. From this it was argued that the word "plant," used in a mortgage, covered all the property of the company; but the court held that holding did not apply. "Undertaking" being defined as any business, work, or project which a person engages in or attempts to perform, an enterprise, while "plant" is defined as the fixtures and tools necessary to carry on any trade or mechanical business, they are not equivalent, and do not assimilate. *Maxwell v. Wilmington Dental Mfg. Co.* (U. S.) 77 Fed. 938, 941.

Undertaking of an architect.

The "undertaking of an architect" implies that he possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily and reasonably well, and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect; but the undertaking does not imply or warrant a satisfactory result. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the businesses of life. *Coombs v. Beede*, 36 Atl. 104, 105, 89 Me. 187, 56 Am. St. Rep. 406.

Undertaking of bail.

An "undertaking of bail" in criminal cases is in definition and purpose a recognizance. It is an undertaking had before a competent court or magistrate by the persons who engage as sureties for a defendant that he will appear according to the conditions of the undertaking, or, in default thereof, that they will pay a specified sum. It is an obligation acknowledged and entered of record, and, when made absolute by forfeiture judicially declared by reason of a default or failure to appear according to its terms, it partakes more of the nature of a judgment than a contract, and is in principle and effect the same as a recognizance at common law. *Colvig v. Klamath County*, 19 Pac. 86, 89, 16 Or. 244.

UNDERWRITER.

See "Board of Fire Underwriters."

Being borrowed from the early method of obtaining marine insurance, "underwriter" has now acquired the meaning of any one who insures another on life or property in a policy of insurance; and hence, when the Legislature used the term "board of fire underwriters," the presumption is that they meant a board composed exclusively of fire insurers—that is, of those engaged in the business of insuring others on property against loss by fire. *Childs v. Firemen's Ins. Co.*, 69 N. W. 141, 142, 66 Minn. 393, 35 L. R. A. 99.

UNDISPOSED OF.

A testator, in devising real and personal property to his wife, to have during her life, and providing that at her death "all the personal property that may remain unused or undisposed of by her" shall go to testator's grandchildren, did not give the testator's wife an unqualified title to the personalty, but only the right of disposition during her life. *Logue v. Bateman*, 11 Atl. 259, 261, 43 N. J. Eq. (16 Stew.) 434.

As residue.

"Undisposed of," as used in a will providing that, at the death of testator's wife, such of his real estate as remained "undisposed of" and the proceeds of the sale of such as might have been sold should descend to his children, simply means the residue. *Stickel v. Crane*, 59 N. E. 595, 597, 189 Ill. 211.

"Undisposed of," as used in a will giving to the testator's wife certain property for life, and providing that, if any such property should remain undisposed of by my wife at her death, it should go to certain persons, should be construed to mean undisposed of by any sale or otherwise that she as owner in her lifetime might see fit to make. *Perry v. Cross*, 132 Mass. 454, 456.

UNDISPUTABLE TITLE.

A covenant to make an "undisputable title" to land means a complete, connected paper title, and not an inferential title, one which might be deduced, in a course of dispute, from possession and facts which existed in presumption of law, etc. An undisputable title, free from all incumbrances, means not only that it shall be free from actual existing, but from probable, and even potential, incumbrances. *Courcier v. Graham*, 1 Ohio (1 Ham.) 830, 840.

UNDIVIDED.

"Undivided," when used in a grant of land by the proprietors of common and "undivided" lands, to be used for a certain purpose forever, and to lie undivided, "implies land set apart from the proprietor's general domain, and not subject to partition, and not to be divided, set off, and allotted to individual proprietors to hold in severalty." *In re Wellington*, 33 Mass. (16 Pick.) 87, 98, 26 Am. Dec. 631.

Code 1876, providing that the person who offers to pay the amount of taxes due on any parcel of land or town lot for the smallest portion of the same shall be considered the purchaser, and when he shall designate the portion for which he will pay the whole amount of taxes such portion shall be considered "an undivided portion," means that

the land shall be contiguous and in one portion, and not that the part taken shall be undivided; that is, that he shall take say four acres in one part of the land, and four or any number of acres of land in another part. *Brundige v. Maloney*, 2 N. W. 1110, 1111, 52 Iowa, 218.

Where a deed described the property conveyed as "the north one-half of the southwest undivided quarter," etc., and it appeared that the quarter, as divided by the government lines, would consist of two unequal fractions, it was held that the word "undivided" was used with reference to a division of the quantity of the land, so as to give the grantee but one-half in quantity. *Kinsey v. Satterthwaite*, 88 Ind. 342, 348.

UNDUE CONCEALMENT.

"Undue concealment," which means a fraud in the sense of a court of equity, and for which it will grant relief, is the nondisclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate, and which the other party has a right not merely in foro conscientiae, but juris et de jure, to know. *Young v. Bumpass* (Miss.) *Freem. Ch.* 241, 249 (citing 1 Story, *Eq. Jur.* § 207); *Paul v. Hadley* (N. Y.) 23 Barb. 521, 524.

UNDUE INFLUENCE.

Undue influence has been described as that which overpowers the will without convincing the judgment. In *re Halbert's Will*, 37 N. Y. Supp. 757, 762, 15 Misc. Rep. 308.

There can be no fatally undue influence without a person incapable of protecting himself as well as a wrongdoer to be resisted. *Latham v. Udell*, 38 Mich. 238, 241.

The term "undue influence" means an influence which acts to the injury of the person who is swayed by it, or of those whom he would if left to himself have benefited. In *re Coleman's Estate*, 40 Atl. 69, 71, 185 Pa. 437.

"Undue influence" consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. *Civ. Code Mont.* 1895, § 2120; *Rev. St. Okl.* 1903, § 746; *Civ. Code Cal.* 1903, § 1575; *Rev. Codes N. D.* 1899, § 3851; *Civ. Code S. D.* 1903, § 1204.

As deprivation of free agency.

"Undue influence" is the exercise of sufficient control over the person the validity of

whose act is brought in question to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised. *Bennett v. Bennett*, 28 Atl. 573, 576, 50 N. J. Eq. 439; *Hampton v. Westcott* (N. J.) 25 Atl. 254, 256, 49 N. J. Eq. (4 Dick.) 522; *Trumbull v. Gibbons*, 22 N. J. Law (2 Zab.) 117, 136; *Stoutenburgh v. Hopkins*, 12 Atl. 689, 691, 43 N. J. Eq. 577; *Dumont v. Dumont*, 19 Atl. 467, 470, 46 N. J. Eq. 223; *Lomerson v. Johnston*, 13 Atl. 8, 14, 44 N. J. Eq. 93; *Brick v. Brick*, 18 Atl. 58, 59, 44 N. J. Eq. 282; *Elkinton v. Brick*, 15 Atl. 391, 397, 44 N. J. Eq. 154, 1 L. R. A. 161; *Dorsey v. Wolcott*, 50 N. E. 1015, 1018, 173 Ill. 539; *Biggerstaff v. Biggerstaff*, 54 N. E. 333, 180 Ill. 407; *Francis v. Wilkinson*, 35 N. E. 150, 153, 147 Ill. 370; *Burt v. Quisenberry*, 24 N. E. 622, 624, 132 Ill. 385; *Conley v. Nailor*, 6 Sup. Ct. 1001, 1005, 118 U. S. 127, 30 L. Ed. 112; *Ormsby v. Webb*, 10 Sup. Ct. 478, 485, 134 U. S. 47, 33 L. Ed. 805; *Martin v. Bowdern*, 59 S. W. 227, 231, 158 Mo. 379; *Dingman v. Romine*, 42 S. W. 1087, 1088, 141 Mo. 466; *Tibbe v. Kamp*, 54 S. W. 879, 889, 154 Mo. 545; *Riley v. Sherwood*, 144 Mo. 354, 366, 45 S. W. 1077, 1080; *Jackson v. Hardin*, 83 Mo. 175, 185; *Sehr v. Lindemann*, 54 S. W. 537, 541, 153 Mo. 276; In *re Woodward's Will*, 65 N. Y. Supp. 405, 52 App. Div. 494; In *re Eller's Will*, 8 N. Y. Supp. 419, 420, 55 Hun. 607 (citing *Marx v. McGlynn*, 88 N. Y. 357, 370); In *re Douglass' Estate*, 29 Atl. 715, 716, 162 Pa. 567; *Pennypacker v. Pennypacker* (Pa.) 8 Atl. 634, 635; *Herster v. Herster*, 16 Atl. 342, 343, 122 Pa. 239, 9 Am. St. Rep. 95; *Eckert v. Flowry*, 43 Pa. (7 Wright) 46, 51; *Trost v. Dingler*, 12 Atl. 296, 298, 118 Pa. 259, 4 Am. St. Rep. 593; *Caven v. Agnew*, 40 Atl. 480, 481, 186 Pa. 314; In *re Logan's Estate*, 45 Atl. 729, 732, 195 Pa. 282; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650, 653; *Frush v. Green*, 39 Atl. 863, 866, 86 Md. 494; *Somers v. McCready*, 53 Atl. 1117, 1118, 96 Md. 437; *Hiss v. Welk*, 78 Md. 439, 28 Atl. 400, 401; *Grover v. Spiker*, 20 Atl. 144, 72 Md. 300; *Farr v. Thompson*, 1 Speers, 93, 108; *Pressley v. Kemp*, 16 S. C. 334, 344, 42 Am. Rep. 635; *Pritchard v. Henderson* (Del.) 50 Atl. 217, 223, 3 Pennewill, 128; *Sutton v. Sutton* (Del.) 5 Har. 459, 461; *Duffield v. Robeson* (Del.) 2 Har. 375, 384; *Schmidt v. Schmidt*, 50 N. W. 598, 600, 47 Minn. 451; *Mitchell v. Mitchell*, 44 N. W. 885, 886, 43 Minn. 73; In *re Nelson's Will*, 39 N. W. 143, 39 Minn. 204; *Powell v. Plant* (Miss.) 23 South. 399, 400; *Dean v. Phillips* (Ky.) 61 S. W. 10, 11; *Barlow v. Waters* (Ky.) 28 S. W. 785, 786; *Johnson's Adm'r v. Johnson* (Ky.) 45 S. W. 458, 458; *Patterson v. Lamb*, 52 S. W. 98, 99, 21 Tex. Civ. App. 512; In *re Disbrow's Estate*, 24 N. W. 624, 629, 58 Mich. 96; *Appeal of Turner*, 44 Atl. 310, 315, 72 Conn. 305; In *re Jackman's Will*, 26 Wis. 104, 113; *Mooney v. Olson*, 22 Kan. 69, 79; *Smith's Ex'r v. Smith*, 32 Atl. 255, 67 Vt. 443; In *re Tittel's Estate* (Cal.) *Myr. Prob.* 12, 16; In *re Crittenden's Estate*, Id. 50, 53.

"Undue influence," sufficient to invalidate a will, "is that kind of influence which prevents the testator from exercising his own judgment, and substitutes in the place thereof the judgment of another." In *re Black's Estate* (Cal.) Myr. Prob. 24, 31; In *re Low's Estate* (Cal.) Myr. Prob. 143, 147; *Stockton v. Thorn*, 39 N. W. 143, 39 Minn. 204; *Schmidt v. Schmidt*, 50 N. W. 598, 600, 47 Minn. 451; *Mitchell v. Mitchell*, 44 N. W. 885, 886, 43 Minn. 73; In *re Murray's Estate*, 11 Pa. Co. Ct. R. 263, 264; *Tawney v. Long*, 76 Pa. (26 P. F. Smith) 106, 115; In *re Pennsylv's Will*, 27 Atl. 669, 673, 157 Pa. 465; In *re Logan's Estate*, 45 Atl. 729, 732, 195 Pa. 282; In *re Shannon's Will*, 42 N. Y. Supp. 670, 673, 11 App. Div. 581; *Ethridge v. Bennett* (Del.) 31 Atl. 813, 815, 9 Houst. 295; *Bulger v. Ross*, 98 Ala. 267, 271, 12 South. 803; *Gordon v. Burris*, 54 S. W. 546, 551, 153 Mo. 223; In *re Slinger's Will*, 37 N. W. 236, 238, 72 Wis. 22; In *re Jackman's Will*, 26 Wis. 104, 113.

"Undue influence" which invalidates a will is such as deprives the testator of the free exercise of his intellectual powers. *Iverson v. Iverson*, 80 N. Y. Supp. 1011, 1012 (citing *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *Gardiner v. Gardiner*, 34 N. Y. 155).

To establish undue influence, it must appear that the influence was such as to deprive testator of the free exercise of his will. Undue influence is such as to impose a restraint on the will of the testator so as to prevent him from doing what he wishes to do or forces him to do what he does not wish to do. *Booth v. Kitchen* (N. Y.) 3 Redf. Sur. 52, 67.

"Undue influence" means influence brought to bear by others, and is a term used in contradistinction to proper influence. It means where a person influences a man against his will, or by resorting to means and methods to overcome his will, to get him to do that which he might not do and probably would not do. *Price v. Richmond & D. R. Co.*, 17 S. E. 732, 737, 38 S. C. 199.

As fraud.

Strictly speaking, "fraud" and "undue influence" are not synonymous expressions. Undue influence is in one sense a species of fraud, and while there are sometimes, perhaps usually, present elements of fraud, undue influence may exist without any positive fraud being shown. In *re Shell's Estate*, 63 Pac. 413, 28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181.

"Undue influence" is such an influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person. Citing In *re Jackman's Will*, 26 Wis. 104.

Manifestly, it is a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices, or other species of circumvention. In *re Slinger's Will*, 37 N. W. 236, 238, 242, 72 Wis. 22.

Undue influence is a fraud; but fraud may exist without any undue influence. Undue influence need not be attended at all with deception or circumvention. *Gordon v. Burris*, 54 S. W. 546, 551, 153 Mo. 223.

"Undue influence" is closely allied to actual fraud, and, like the latter, when resorted to by an adroit and crafty person in his presence, often becomes extremely difficult to detect. *Grove v. Spiker*, 20 Atl. 144, 72 Md. 300; *Frush v. Green*, 39 Atl. 863, 866, 86 Md. 494.

How exercised.

"In order that a will may be avoided because of 'undue influence,' it must be an influence exercised by coercion, imposition, or fraud." In *re Read's Will*, 40 N. Y. Supp. 974, 975, 17 Misc. Rep. 195; In *re Carroll's Will*, 7 N. W. 434, 435, 50 Wis. 437; *Boggs v. Boggs*, 87 N. W. 39, 42, 62 Neb. 274; *Seguine v. Seguine*, *42 N. Y. (3 Keyes) 663, 669; *Trost v. Dingler*, 12 Atl. 296, 298, 118 Pa. 259, 4 Am. St. Rep. 593; In *re Halbert's Will*, 37 N. Y. Supp. 757, 762, 15 Misc. Rep. 308; *Brick v. Brick*, 18 Atl. 58, 59, 44 N. J. Eq. 282; In *re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340, 343; *Eckert v. Flowry*, 43 Pa. (7 Wright) 46, 51; *Stockton v. Thorn*, 39 N. W. 143, 39 Minn. 204.

The phrase "undue influence," as used with reference to wills, has been defined to be "that which compels testator to do that which is against his will from fear, a desire for peace, or some feeling which he is unable to restrain." In *re Read's Will*, 40 N. Y. Supp. 974, 975, 17 Misc. Rep. 195 (citing *Schouler, Wills* [2d Ed.] par. 22); *Seebrook v. Fedawa*, 46 N. W. 650, 653, 30 Neb. 424; *Patterson v. Lamb*, 52 S. W. 98, 99, 21 Tex. Civ. App. 512; In *re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340, 343; *McFadin v. Catron*, 38 S. W. 932, 935, 138 Mo. 197; *Riley v. Sherwood*, 45 S. W. 1077, 1080, 144 Mo. 354; *Carl v. Gabel*, 25 S. W. 214, 217, 120 Mo. 233; *Jackson v. Hardin*, 83 Mo. 175, 185; *Mooney v. Olsen*, 22 Kan. 69, 79; *Trumbull v. Gibbons*, 22 N. J. Law (2 Zab.) 117, 136; In *re Low's Estate* (Cal.) Myr. Prob. 143, 147.

The influence which will avoid the will of a testator must have been exerted on him to such a degree as to have amounted to force and coercion, destroying his free agency, or by importunities that could not be resisted, so that the motive was equal to force or fear. *Somers v. McCreedy*, 53 Atl. 1117, 1118, 96 Md. 437; *Elkinton v. Brick*, 15 Atl. 391, 397, 44 N. J. Eq. (17 Stew.) 154, 1 L. R. A. 161; *Duffield v. Robeson* (Del.) 2 Har.

375, 384; *Pressley v. Kemp*, 16 S. C. 334, 344, 42 Am. Rep. 635; *Sehr v. Lindemann*, 54 S. W. 537, 541, 153 Mo. 276; *Tibbe v. Kamp*, 54 S. W. 879, 889, 154 Mo. 545; *Jackson v. Hardin*, 83 Mo. 175, 185; *McFadin v. Catron*, 38 S. W. 932, 935, 138 Mo. 197; *Riley v. Sherwood*, 144 Mo. 354, 366, 45 S. W. 1077, 1080; *Williams v. Goude*, 3 Eng. Ecc. R. 252, 261; *Appeal of Turner*, 44 Atl. 310, 315, 72 Conn. 305; *In re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340, 343; *Mooney v. Olsen*, 22 Kan. 69, 79.

In order to establish undue influence, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy free agency in the testator. *In re Murray's Estate*, 11 Pa. Co. Ct. R. 263, 264; *Tawney v. Long*, 76 Pa. (26 P. F. Smith) 106, 115; *In re Pensyl's Estate*, 27 Atl. 669, 673, 157 Pa. 465; *In re Logan's Estate*, 45 Atl. 729, 732, 195 Pa. 282; *Herster v. Herster*, 16 Atl. 342, 343, 122 Pa. 239, 9 Am. St. Rep. 95; *Pennypacker v. Pennypacker* (Pa.) 8 Atl. 634, 635; *Trumbull v. Gibbons*, 22 N. J. Law (2 Zab.) 117, 136.

In order that it may be said that an act was done under undue influence, the influence must be equivalent to moral coercion. *In re Carroll's Will*, 7 N. W. 434, 435, 50 Wis. 437; *Boggs v. Boggs*, 87 N. W. 39, 42, 62 Neb. 274; *In re Blair*, 16 N. Y. Supp. 874, 876, 16 Daly, 540; *Elkinton v. Brick*, 15 Atl. 391, 397, 44 N. J. Eq. 154, 1 L. R. A. 161; *Patterson v. Lamb*, 52 S. W. 98, 99, 21 Tex. Civ. App. 512; *Trumbull v. Gibbons*, 22 N. J. Law (2 Zab.) 117, 136.

"Undue influence" exists wherever through weakness, dependence or implicit reliance on one of the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. *Caven v. Agnew*, 40 Atl. 480, 481, 186 Pa. 314; *In re Douglass' Estate*, 29 Atl. 715, 716, 162 Pa. 567.

All that can be said in the way of formulating a general rule on this subject is that whatever destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself, is "undue influence," whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial; for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another, rather than the expression of the will and mind of the actor? *Dumont v. Dumont*, 19 Atl. 467, 470, 46 N. J. Eq. (1 Dick.) 223; *Stoutenburgh v. Hopkins*, 12 Atl. 689, 691, 43 N. J. Eq. (16 Stew.) 577.

"Undue influence" may be exercised by physical coercion or threats of personal harm and duress. There is another kind of undue influence more common, and that is where the mind and will of the testator have been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed a will yet it was really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working on the fears or hopes of a weak-minded person by artful and cunning contrivances, by constant pressure, persuasion, and effort, so that the mind of the testator is not left free to act intelligently and understandingly. *Marx v. McGlynn*, 88 N. Y. 357, 370; *In re Brunor's Will*, 43 N. Y. Supp. 1141, 1143, 19 Misc. Rep. 203.

Influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by any art which would give dominion over the mind to such an extent as to destroy free agency, is undue influence. *Ormsby v. Webb*, 10 Sup. Ct. 478, 485, 134 U. S. 47, 83 L. Ed. 805; *Dean v. Phillips* (Ky.) 61 S. W. 10, 11; *Webber v. Sullivan*, 12 N. W. 319, 58 Iowa, 260.

"Undue influence" sufficient to set aside a will "is any kind of influence, either from fear or coercion or importunity, by which the testator is prevented from expressing his true mind. It must be an influence adequate to control the free agency of a testator. A testator should enjoy full liberty and freedom in making his will, and possess the power to withstand all contradiction and control. That degree of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free or unconstrained act, is sufficient to invalidate it." *In re Tittel's Estate* (Cal.) Myr. Prob. 12, 16; *In re Crittenden's Estate* (Cal.) Myr. Prob. 50, 53.

Undue influence is a coercion produced by importunity, or by a silent, resistless power, which the strong will often exercise over the weak and infirm, and which could not be resisted so that the motive was tantamount to force or fear. *Stockton v. Thorn*, 39 N. W. 143, 39 Minn. 204.

Undue influence does not imply the use of physical force. Any influence, however exercised, which destroys the free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done, is undue and wrongful. *Dingman v. Romine*, 42 S. W. 1087, 1088, 141 Mo. 466.

Undue influence consists in the application of some extrinsic power to control the disposing mind of the testator, so as to exhibit as his testament what was not his

free will. Bacon calls it "by fear, fraud, or flattery." 7 Bac. 303. In this state fear, fraud, or flattery, when applied to constrain, circumvent, or cajole the testator, has been called "undue influence." *Farr v. Thompson* (S. C.) 1 Speers, 93, 108.

Importunity which cannot be resisted or which is yielded to for the sake of peace amounts to coercion and the destruction of free agency. But the mere suggestion to a testator that an indicated testamentary provision would be productive of justice among the natural objects of his bounty cannot be said to destroy the freedom of the will. To attempt to persuade a testator, however, is treading on dangerous ground; for it is impossible to distinguish by rule between actions which are within the bounds of legitimate influence and acts which make the influence undue. Their effect must depend upon the relations between the parties, and the character, strength, and condition of each, and must be determined by the application of sound sense to the facts in each given case. Under these principles, undue influence was not established where it appeared that only a part of the suggestions made by the person alleged to have unduly influenced the testator were carried out by him, and that such person was excluded from the room while the will was made, and that the suggestion itself, so far as carried out, was in line with the desires of the testator. *Elkinton v. Brick*, 15 Atl. 391, 397, 44 N. J. Eq. (17 Stew.) 154, 1 L. R. A. 161.

A pressure which does not amount to duress at common law may be considered in equity as sufficient to set aside or rescind a contract. Whenever a contract is procured by such influences as overcome the free agency by the contracting party, whether parent or child, husband or wife, such influences afford an equitable defense. When the creditor of a husband induces a wife to join with her husband on a mortgage of her real estate to secure his debt, by telling her that her husband has been guilty of the crime of embezzlement and can be imprisoned for it, and that another who was interested had just said he would see him in jail before he would do anything to relieve him, and where it appears that such statements created fear or just apprehension, the reasonable conclusion is that the free agency of the wife was overcome, and that the execution of the mortgage was obtained by undue pressure. *Lomerson v. Johnson*, 13 Atl. 8, 14, 44 N. J. Eq. (17 Stew.) 93.

Influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever, that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator, to such an extent as to destroy the free agency, or constrain him to do against his will what he is unable to refuse,

is such an influence as the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another. In *re Disbrow's Estate*, 24 N. W. 624, 629, 58 Mich. 98.

To constitute "undue influence" in procuring execution of a will, the mind of the testator must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influence of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but becomes subject to the will or purposes of another. *Mitchell v. Mitchell*, 44 N. W. 885, 886, 43 Minn. 73.

"Undue influence" and importunity sufficient to invalidate a will may be exercised without the existence of fraud. A testator may entertain an unreasonable and unjust prejudice against one nearly connected with him, as a daughter who has married against his will, or a son who has offended him by neglecting his advice in a matter in which a child is not necessarily obliged to yield his convictions. In such a case undue influence may be exerted by an interested person simply by the mention of the facts of the case, and that, too, under the guise of remonstrance against leaving a smaller portion to the object of the testator's displeasure. The suggestion itself may suffice to rouse the sleeping hostility, and result in the disinheritance of the child in favor of the suggestor, and yet it would be difficult to find in such facts evidence sufficiently strong to the apprehension of the jury to induce them to denounce the influence thus exerted as fraudulent. *Stewart v. Elliott* (U. S.) 2 Mackey, 307, 319.

Gratitude, affection, etc.

The influence of gratitude, affection, or attachment, or the desire of gratifying the wishes of another, do not amount to undue influence. *Jackson v. Hardin*, 83 Mo. 175, 185; *McFadin v. Catron*, 38 S. W. 932, 935, 138 Mo. 197; *Riley v. Sherwood*, 45 S. W. 1077, 1080, 144 Mo. 366; *Tibbe v. Kamp*, 54 S. W. 879, 889, 154 Mo. 545; *Sehr v. Lindemann*, 54 S. W. 537, 541, 153 Mo. 276; *Campbell v. Carlisle*, 63 S. W. 701, 704, 162 Mo. 634; *Williams v. Goude*, 3 Eccl. R. 252, 261; *Duffield v. Robeson* (Del.) 2 Har. 375, 384; In *re Disbrow's Estate*, 24 N. W. 624, 629, 58 Mich. 96; *Patterson v. Lamb*, 52 S. W. 98, 99, 21 Tex. Civ. App. 512; *Seguini v. Seguini*, *42 N. Y. (3 Keyes) 663, 669; In *re Halbert's Will*, 37 N. Y. Supp. 757, 762, 15 Misc. Rep. 308; In *re Gleespin's Will*, 20 N. J. Eq. (11 C. E. Green) 523, 526; In *re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340, 343.

Solicitations, however importunate, cannot of themselves constitute undue influ-

ence, for, though these may have a constraining effect, they do not destroy testator's power to freely dispose of his estate. *Patterson v. Lamb*, 52 S. W. 98, 99, 21 Tex. Civ. App. 512; *Trost v. Dingler*, 12 Atl. 296, 298, 118 Pa. 259, 4 Am. St. Rep. 593.

Mere solicitation will not be sufficient to vitiate a will made by a person having a knowledge of what he was doing, and intending to do it, though his act may be brought about by solicitation, or that kind of influence which a disposition to gratify another may produce. *Sutton v. Sutton* (Del.) 5 Har. 459, 461.

Mere advice, persuasion, or entreaty do not constitute "undue influence"; certainly not where there is no fraud, no deceit, no duress, or other improper or prohibited means. In *Yoe v. McCord*, 74 Ill. 33, 34, the court said: "To avoid a will, the influence which is exercised must be undue, and this, in the legal sense, is something wrongful; a species of fraud." *Bowdoin College v. Merritt* (U. S.) 75 Fed. 480, 511.

Mere kindness of treatment of testatrix by the legatee would not, nor would moderate and reasonable solicitation and entreaty or persuasion, when yielded to intelligently, from a sense of duty, and without constraint, vitiate a will in other respects valid, on the ground of undue influence. *Appeal of Turner*, 44 Atl. 310, 315, 72 Conn. 805.

Appeals to the affection, modest persuasion, or arguments addressed to the understanding which do not destroy his free agency, but leave the testator to act in accordance with his own will, do not constitute "undue influence." *Barlow v. Waters* (Ky.) 23 S. W. 785, 786.

A person has a perfect right, by kindness, by attentions—even though that may be the ulterior motive which governs him—to prevail upon a person to devise to him what perhaps, without the appeals of kindness and the manner towards him, he would not have done. That is proper and lawful, and a will would be perfectly legal made under those circumstances; but if that will were made by reason of any person being taken advantage of by reason of weakness, of disease, of threats, so that the party is not able to avoid this influence, and is prevented from freely exercising his own will, then that would be undue influence. *Ethridge v. Bennett* (Del.) 81 Atl. 813, 815, 9 Houst. 295.

"Undue influence" means wrongful influence, but influence secured through affection, and though a deed be made to a child at his solicitation and because of partiality and affection for him, it will not be undue influence. *Burt v. Juisenberry*, 24 N. E. 622, 624, 132 Ill. 385.

Merely urging gratitude, love, esteem, affection, or charity, so that the mind of the testator is left free to act and arrive at its own conclusions, is legitimate. These motives are entitled to their proper weight, and it is for the testator to determine how far they shall influence him in disposing of his property. *Stockton v. Thorn*, 39 N. W. 143, 39 Minn. 204.

"Undue influence" implies something more than mere advice, argument, or persuasion; but if the advice, argument, and persuasion be so importunate and persistent or otherwise so operates as to subdue and subordinate the will of the testator to the will of another, until the testamentary instrument speaks, not his own mind and purpose, but the wish and purpose of another, such advice, argument, and persuasion constitutes undue influence. In *re Blair*, 16 N. Y. Supp. 874, 876, 16 Daly, 540.

Influence gained by kindness and affection will not be regarded as undue if no imposition or fraud be practiced, even though it induces the testator to make unequal and unjust disposition of his property in favor of those who had contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Mackall v. Mackall*, 10 Sup. Ct. 705, 707, 135 U. S. 167, 34 L. Ed. 84.

Purpose of influence.

The undue influence which will invalidate a will must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. *Pennypacker v. Pennypacker* (Pa.) 8 Atl. 634, 635; *Seebrock v. Fedawa*, 46 N. W. 650, 653, 30 Neb. 424.

Relation to and capacity of person influenced.

There is no rule which discourages the exercise by a wife of any such wifely influence over a husband as does not indicate that he is incapable of protecting himself adequately from her compulsion, and is practically not a free agent. *Latham v. Udell*, 38 Mich. 238, 241 (cited in *Pierce v. Pierce*, Id. 412).

The mere fact that a son to whom his father willed practically all his property had lived with and taken care of his parents in their old age is not evidence of "undue influence." *Aylward v. Briggs*, 47 S. W. 510, 513, 145 Mo. 604.

Where it is shown that a will was written by an attorney in his office in the form suggested by the husband of the testatrix, who was the sole devisee therein, with a direction that he should educate their grandson, but as thus written was read over to the testatrix, and assented to by her in the presence of the attorney and the parties who wit-

nessed it before execution, in the absence of any affirmative proof of want of mental capacity on the part of testatrix, or evidence of undue influence on the part of the husband, the mere fact that the husband gave directions for the drawing of the will will not be grounds sufficient for refusing to admit it to probate. *Armstrong v. Armstrong*, 23 N. W. 407, 410, 411, 63 Wis. 162.

As bearing on the question of undue influence, the relationship of the parties to each other, the mental condition of the person whose act is in question, and the character of the transaction should be taken into consideration. If the relation of confidence and trust between the parties to the transaction exists, if the mind of the one nominally acting is weak and susceptible, and if the transaction results beneficially to the party charged and detrimental to the person in whose name the act was done, a presumption of undue influence is raised. Indeed, the presence of the relation of confidence and trust is generally sufficient to raise a presumption of undue influence; and if the party acting be of weak mind, and there is either no consideration or a very inadequate one, a presumption against its validity arises. *Dingman v. Romine*, 42 S. W. 1087, 1088, 141 Mo. 466.

The influence of a wife or child, if exerted in a fair and reasonable manner, is not unlawful. In order to be unlawful, it must be exerted to produce a result which the party, as a reasonable person, was bound to know was unreasonable and unjust, and it must have the effect of producing illusion or confusion in the mind of the testator. In re *Jackman's Will*, 26 Wis. 104, 113.

Taking advantage of one's position or the good opinion of the party confiding in one to the disadvantage of some other or his estate amounts to undue influence. *O'Neil v. O'Neil*, 14 N. W. 89, 60 Iowa, 57; *Hanna v. Wilcox*, 5 N. W. 717, 719, 53 Iowa, 547; *Watkins v. Brant*, 1 N. W. 82, 86, 46 Wis. 419.

The use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him, taking an unfair advantage of another's weakness of mind, or taking a grossly oppressive or unfair advantage of another's necessities or distress, constitutes undue influence. Civ. Code, § 1575; *Dolliver v. Dolliver*, 30 Pac. 4, 5, 94 Cal. 642.

"Undue influence" is defined in Civ. Code, § 1575, subd. 1, to consist in the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over the other, of such confidence or authority for the purpose of obtaining an unfair advantage over him. *Dimond v. Sanderson*, 37 Pac. 189, 191, 103 Cal. 97.

Confidential relations existing between testator and beneficiary do not alone furnish any presumption of undue influence. *Mackall v. Mackall*, 10 Sup. Ct. 703, 707, 135 U. S. 167, 34 L. Ed. 84.

Where a testator had taken great interest in his church and contributed liberally to its support, expressing an intention to secure it an annual income equal to his subscription, the fact that he had already in his will given the church money for a new building, and was advanced in years and feeble in body and mind, does not justify the setting aside, on the ground of undue influence, of a codicil executed long after the will, and just before testator's death, bequeathing to the church an additional sum sufficient to produce an income equal to testator's annual subscription. In re *Shannon's Will*, 42 N. Y. Supp. 670, 673, 11 App. Div. 581.

"Undue influence," in the legal and proper sense of the term, cannot be exerted over an insane or unconscious person. Undue influence presupposes testamentary capacity if the testator were left free from such undue influence. *Stirling v. Stirling*, 21 Atl. 273, 275, 64 Md. 138.

There may be undue influence without absolute imbecility or other testamentary incapacity. A person may possess some mind, and yet be at the mercy of designing persons. In re *Rollwagen* (N. Y.) 48 How. Prac. 289, 310.

It is not necessary, in order to prove undue influence, that the mind shall be shown to be so weak as to render the person upon whom the influence is exercised incapable of attending to ordinary business. *Ormsby v. Webb*, 10 Sup. Ct. 478, 485, 184 U. S. 47, 33 L. Ed. 805.

The degree of influence necessary to control the mind of the testator must depend upon, and be proportionate to, the mental and physical strength or weakness of the testator. *Pritchard v. Henderson* (Del.) 50 Atl. 217, 223, 3 Pennewill, 128.

Those of feeble mind being more easily subjected to improper influence, the condition of the mind of the testator is always a proper subject of inquiry in connection with the allegation of undue influence. In re *Douglass' Estate*, 29 Atl. 715, 716, 162 Pa. 567.

Inducing an old and feeble person to do that which is for his own good is not undue influence, even though an advantage results therefrom to the one exercising such influence. *Dailey v. Kastell*, 14 N. W. 635, 56 Wis. 444.

If from age or imbecility, a testator could be induced to change his will contrary to his intentions and against his own wishes, that would be undue influence, and its effect

upon doubtful or fluctuating capacity would invalidate the will. *Sutton v. Sutton* (Del.) 5 Har. 459, 461.

While the extreme age, helplessness, and consequent susceptibility of the testator are important factors in the ascertainment of the undue influence, yet it is not to be inferred from either age, sickness, or debility of body, if sufficient intelligence remains. *Jackson v. Hardin*, 83 Mo. 175, 185.

Where a conveyance was made by a weak and sickly young man to a woman older than himself, and who had been to him as a mother, a presumption arose that such conveyance was obtained by means of undue influence. *Appeal of Worrall*, 1 Atl. 380, 385, 110 Pa. 349.

The law does not permit undue influence to be inferred from the mere fact that one who is to profit by the instrument had an opportunity to impress his will upon the mind of the testator. There must be some evidence tending to show that an undue influence was actually exerted. *Smith's Ex'r v. Smith*, 32 Atl. 255, 67 Vt. 443; *Riley v. Sherwood*, 144 Mo. 354, 366, 45 S. W. 1077, 1080.

It is not evidence of undue influence that testator's son, who was the preferred beneficiary under the will, arranged for the execution of the will without the knowledge of his sister. In *re Logan's Estate*, 45 Atl. 729, 732, 195 Pa. 282.

Time of exerting influence.

Undue influence, to affect a will, must destroy the free agency, and operate on the mind of the testator at the time of making the will. *Herster v. Herster*, 16 Atl. 342, 343, 122 Pa. 239, 9 Am. St. Rep. 95; *Smith's Ex'r v. Smith*, 32 Atl. 255, 67 Vt. 443; In *re Shepardson's Estate*, 18 N. W. 575, 578, 53 Mich. 106; *Schmidt v. Schmidt*, 50 N. W. 598, 600, 47 Minn. 451; In *re Nelson's Will*, 39 N. W. 143, 39 Minn. 204; *Ivison v. Ivison*, 80 N. Y. Supp. 1011, 1012, 80 App. Div. 599; *Gardiner v. Gardiner*, 34 N. Y. 155; *Eckert v. Flowry*, 43 Pa. (7 Wright) 46, 51; In *re Logan's Estate*, 45 Atl. 729, 732, 195 Pa. 282; In *re Pensyl's Will*, 27 Atl. 669, 673, 157 Pa. 465; *McMahon v. Ryan*, 20 Pa. (8 Harris) 329; In *re Douglass' Estate*, 29 Atl. 715, 716, 162 Pa. 567; In *re Low's Estate* (Cal.) Myr. Prob. 143, 147; *Trost v. Dingler*, 12 Atl. 296, 298, 118 Pa. 259, 4 Am. St. Rep. 593. But the pressure may have been brought to bear previously, and if it remained so as to coerce the mind of the testator at the time the will was executed it cannot be upheld as his act. In *re Shepardson's Estate*, 18 N. W. 575, 578, 53 Mich. 106.

UNDUE PREFERENCE.

Under the prison bounds act, providing that no person shall be entitled to relief who

shall, within three months prior to his arrest, have paid any part of his estate to one creditor in preference to another, and that, on the trial of an accusation of the violation of the act, where any person is charged with an undue preference, it may be tried by a jury, a preference, to be undue, must be fraudulent, and a confession of judgment cannot amount to undue preference. *Robinsons v. Amy* (S. C.) 1 Rich. Law, 289, 292, 293.

The expression "undue or unreasonable preference or advantage," as used in Ky. St. § 818, making it unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality in the transportation of a like kind of traffic, is too indefinite and uncertain in its meaning to constitute a valid regulation of internal commerce. *Commonwealth v. Louisville & N. R. Co.* (Ky.) 46 S. W. 700, 701.

UNDUE PREJUDICE.

In *Cavanah v. State*, 56 Miss. 299, 307, it was said that the undue prejudice meant by the statute authorizing a change of venue in a criminal case for such a cause, was such as was likely to be so felt in the jury box as to prevent the accused from having a fair and impartial trial by the evidence and the law. *Owens v. State*, 33 South. 722, 723, 82 Miss. 31.

UNDUTIFUL WILL.

The civil law defines an inofficious and undutiful will to be such as substantially departs from the disposition of the estate as it would be distributed in case of intestacy; but such a definition is entirely inconsistent with the law of wills as recognized and established in this country, for the authority to make a will implies the power to discriminate between or disinherit next of kin. *Stein v. Wilzinski* (N. Y.) 4 Redf. Sur. 441, 450.

UNEARNED PREMIUMS.

The term "unearned premiums" intends the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by the established rules of valuation. *Rev. Laws Mass. 1902*, p. 1120, c. 118, § 1.

The term "unearned premiums" intends the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by other provisions of the act. *Shannon's Code Tenn. 1896*, § 3274.

The terms "unearned premiums," and "reinsurance reserved," and "liability reserved," and "net value of policies," or "pre-

mium reserved," as used in the article of the Code relating to the Department of Insurance, severally intend the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by section 2583. Civ. Code Ala. 1896, § 2575.

UNEMBARRASSED.

The idea of the word "unembarrassed," as used by the judge in reference to the property of a debtor, is not that property may not be at all incumbered by mortgage. It imports, rather, property of which the debtor's title is not invalid or seriously questionable, or is not so subject to equitable claims, or is not so incumbered by mortgage as to render the attachment and levy on it fruitless of substantial benefit to the creditor. *Moore v. Quint*, 44 Vt. 97, 110.

UNEMPLOYED.

A bequest in a will of "money left unemployed" included a sum of trust moneys in which the testatrix had a vested reversionary interest at the time of her death, subject to be divested by the appointment of her mother. *Ommanney v. Butcher*, 1 Turn. & R. 260, 266.

UNEQUAL

"Unequal," as used in Organic Act, § 6, providing that there shall not be any unequal discrimination in taxing different kinds of property, is synonymous with the word "unfair." *Pryor v. Bryan*, 66 Pac. 848, 852, 11 Okl. 357.

UNEQUIVOCALLY.

"Unequivocally" means without doubt; without room to doubt. Webster. An instruction that the intent to dedicate "must be unequivocally and satisfactorily proven" is a stronger expression than "beyond all reasonable doubt"; much stronger than "clear conviction." *Shugart v. Halliday*, 2 Ill. App. 45, 51.

UNEXECUTED WRIT.

Unexecuted writs, within Revision, p. 1105, § 35, requiring that a sheriff must turn over to his successor in office all "unexecuted writs," are those on which nothing has been done. *Hunt v. Swayze*, 25 Atl. 850, 852, 55 N. J. Law (26 Vroom) 83.

UNEXPENDED.

"Unexpended," as used in Gen. St. c. 73, § 21, as amended by Act March 20, 1876, § 1,

providing that commissioners of lunatic asylums shall report to the State Auditor any "unexpended balance" in their hands, means undisposed of. One of the meanings given by all lexicographers of "expend" is "to dispose of," and where the board had exercised the power which they possessed, and had set apart the money then on hand for a specific purpose, it was no longer unexpended, within the fair meaning of the statute. *Norman v. Central Kentucky Lunatic Asylum*, 17 S. W. 150, 152, 92 Ky. 16.

Acts 1883, § 4, providing that "any unexpended balance" that may be in the state treasury to the credit of the military fund on the 1st day of July, 1883, shall be transferred, on the warrant of the Auditor of Public Accounts, to the general revenue fund, should not be construed to include every part of the fund which has not been actually paid out of the treasury prior to the 1st day of July, without regard to existing claims against it, however just and well founded, but it means whatever may remain of the fund after the payment of all proper and just claims against it which accrued during the year ending on, and including the whole of, the 30th day of June, and the fact that a part of these claims had not been actually paid on the 1st of July will make no difference in this respect. *People v. Swigert*, 107 Ill. 494, 499.

UNEXPIRED TERM.

An unexpired term, within the meaning of Const. art. 4, § 6, declaring that, whenever during a recess of the Senate a vacancy shall occur in any office which is by law one which the Governor has a right of appointment, he shall appoint some one who shall hold the office for the unexpired term of the person whose place he is appointed to fill, means during the time which the latter would have continued in the office if a vacancy had not occurred. *People v. Osborne*, 4 Pac. 1074, 1077, 7 Colo. 605.

In a by-law providing that, in case of vacancy in the board of directors, the directors shall fill the vacancy for the "unexpired term," the reference to an unexpired term presupposes a previous incumbent. In re A. A. Griffing Iron Co., 41 Atl. 931, 933, 63 N. J. Law, 168.

UNFAIR.

The epithets "unfairly and secretly computed," "unjustly and unfairly attempted," and "artfully and purposely framed," used in regard to the official acts of the cashier of a bank, did not necessarily imply moral obliquity, and therefore are not slanderous per se. *Kerr v. Force* (U. S.) 14 Fed. Cas. 386, 387, 396.

"Unfair use," in connection with the right of the owner of a mill privilege, who has improved the same, to construe the law as protecting him against any unfair use by any other owner who may establish a mill above him, is equivalent of "unreasonable use." *Mason v. Hoyle*, 14 Atl. 786, 788, 56 Conn. 255.

UNFAIR COMPETITION.

With respect to articles placed upon the market for sale, it is only when the one article is dressed so as to represent the other, and to deceive a proposing purchaser as being that other, that there can be said to be a case of "unfair trade." *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.* (U. S.) 80 Fed. 105, 108, 25 C. C. A. 314.

The doctrine of unfair competition in trade rests on the proposition that equity will not permit any one to palm off his goods on the public as those of another. Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of trade-marks or symbols. The word may be purely descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and, as such, open to the public. Yet there may be unfair competition in trade by an improper use of such mark or symbol. *Dennison Mfg. Co. v. Thomas Mfg. Co.* (U. S.) 94 Fed. 651, 656.

The term "unfair competition in trade" includes the simulation by defendant of the packages of plaintiff, putting up and selling packages of the same general appearance as those of the plaintiff. The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition, when "the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer, making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates." *T. B. Dunn Co. v. Trix Mfg. Co.*, 63 N. Y. Supp. 833, 835, 50 App. Div. 75.

UNFAIR PROCEEDINGS.

The meaning of "proceedings unfair," in Code Civ. Proc. § 1552, providing for the confirmation of a sale by an administrator, but, if the proceedings were unfair, the court may vacate the sale, means evidently some irregularity as to the notice, or fraud or collusion among bidders. In *re Leonis' Estate* (Cal.) 71 Pac. 171, 173 (citing *In re Sprigg's Estate*, 20 Cal. 121).

UNFAITHFULNESS.

Within Gen. St. 1894, § 2600, providing that any officer, director, or member of a

corporation is liable for corporate debts when he is guilty of any fraud, unfaithfulness, or dishonesty in the discharge of the official duty, the word "unfaithfulness" was intended to include negligence as well as bad faith, and will be construed according to the doctrine of *nosctur a sociis*, in connection with the words "fraud or dishonesty." *First Nat. Bank v. Harper*, 63 N. W. 1079, 1083, 61 Minn. 375.

Unfaithfulness in the transaction of the business of a corporation by an officer, director, or stockholder, for which he may be held liable for corporate debts, as provided by the statute, does not mean mere neglect arising out of a failure to carefully oversee and superintend corporate affairs on strict business principles—such a failure as may really and solely be attributable to incompetency or lack of business qualifications. *Rice v. Madelia Farmers' Warehouse Co.* (Minn.) 92 N. W. 225, 226.

UNFENCED.

A petition alleging that a railroad was "unfenced" at the place where plaintiff's cattle were killed means that no fence existed at the time the cattle were killed, and describes the condition of the absence of the fence caused by the removal or destruction of one existing before. *Fritz v. Kansas City, C. B. & St. J. R. Co.*, 16 N. W. 144, 145, 61 Iowa, 323.

UNFINISHED BUSINESS.

Const. art. 11, par. 7, providing that the books, papers, and proceedings of the county courts, and the "unfinished business" thereof, shall be transferred to the superior courts, and shall be finished and performed by the latter courts, will be construed to include a case in which a verdict has been returned, but in which no judgment has been rendered, and hence such cause should be transferred to the superior courts. *Foster v. Daniels*, 39 Ga. 39, 40.

UNFIT FOR CULTIVATION.

Act Cong. March 7, 1857, confirming to the several states the swamp and overflowed lands "unfit for cultivation," refers to land that has not the capacity to produce a staple crop as the result of cultivation. *Keeran v. Allen*, 33 Cal. 542, 547.

Act June 3, 1878 (Supp. Rev. St. 328, § 1), providing for the sale of lands in California, Nevada, Oregon, and Washington Territory which are valuable chiefly for timber, but "unfit for cultivation," cannot be construed as meaning incapable of being made fit for cultivation. *United States v. Budd* (U. S.) 43 Fed. 630, 631.

UNFORESEEN CAUSE.

A charter party, by which the owner of the ship agreed that she should proceed direct to a certain place, and there load a complete cargo of guano, the charterers to ship bags and other materials requisite for loading the ship, and to supply stores, but, in the event of the vessel being lost, or any other "unforeseen causes" preventing the completion of the charter party, the owner agreed to pay the charterers the amount of their disbursements for stores. Held, that the fact of no guano being found was not an unforeseen cause preventing the completion of the charter party, within the meaning of the agreement. The parties contemplated that the freight might possibly never become payable, and therefore made this stipulation in regard to the repayment of advances by the charterers, but this clause had no reference to the positive contract to load a full cargo. *Hills v. Sughrue*, 15 Mees. & W. 253, 262.

UNFORESEEN EVENT.

The words "unforeseen event," as used in the Louisiana statutes in reference to the abatement of rent in the case of an unforeseen event, are synonymous with the words "fortuitous event." *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 973, 120 U. S. 707, 30 L. Ed. 776.

The term "unforeseen event," in a clause of a lease entitling the lessee to credit for the unexpired term of the lease on the destruction of the property by fire, or the deprivation of the use by some other unforeseen event, does not apply to the passage of a Sunday law which forbids the use of the property rented to the particular use to which the lessee applies it. *Abadie v. Berges*, 6 South. 529, 530, 41 La. Ann. 281.

UNFORESEEN PERIL.

The words "unforeseen peril" do not describe a peril recklessly incurred. *Schwannewede v. North Hudson County Ry. Co.*, 51 Atl. 696, 67 N. J. Law, 449.

UNFUNDED.

The Dictionary Britannica, under the title of "National Debt," in drawing the distinction between a funded debt, which term is said to apply to a debt which is recognized at least as quasi permanent, and for the payment of the interest on which legal provision is made, says that unfunded or floating debt, on the other hand, means strictly loans for which no permanent provision is required to be made, which have been obtained for temporary purposes, with the intention of paying them off within a brief pe-

riod. Exchequer and treasury bills are included in this category, and such other moneys in the hands of a government as it may be required to reimburse at any moment. *People v. Carpenter*, 52 N. Y. Supp. 781, 783, 31 App. Div. 603.

UNGOVERNABLE PASSIONS.

The expression in an instruction, "excite ungovernable passions," is substantially the same as the expression "excite the passions beyond control," for, if ungovernable passions have been excited, they are necessarily beyond control. *Cook v. Commonwealth (Ky.)* 72 S. W. 283, 284.

UNIFORM.

"Uniform" means unvariable; resembling itself at all times; conforming to one rule or mode. *Attorney General v. Winnebago Lake & F. R. Plankroad Co.*, 11 Wis. 35, 40.

UNIFORM OPERATION OF LAWS.

The constitutional provision that general laws shall be of uniform operation throughout the state requires that laws shall operate in all parts of the state where are found the conditions which are the subject of the legislation. *State v. Bargus*, 41 N. E. 245, 247, 53 Ohio St. 94, 53 Am. St. Rep. 628.

"Uniform operation" does not mean universal, but simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; that is, all the facts of whose cases are substantially the same. *Hellman v. Shoulters*, 44 Pac. 915, 918, 114 Cal. 136.

The constitutional requirement is complied with when the law operates uniformly on all persons who are brought within the relations and circumstances provided by it. *Crovatt v. Mason*, 28 S. E. 891, 893, 101 Ga. 246.

"Uniform operation" means an operation which is equal in its effect on all persons or things on which the law is designed to operate at all. *Brooks v. Hyde*, 37 Cal. 366, 375 (citing *Bourland v. Hildreth*, 26 Cal. 162; *French v. Teschemaker*, 24 Cal. 544).

The constitutional provision that all laws of a general nature shall be uniform in their operation means that all laws of this character shall, as near as possible, affect persons and property alike. *People v. Coleman*, 4 Cal. 46, 55, 60 Am. Dec. 581.

"Uniform operation" does not mean operation on every person in the state, but on every person who is brought within the relations and circumstances provided for. The operation is uniform when it affects alike

all persons in a like situation, and the fact of uniform operation is not affected by the number of persons within the scope of such operation. *McAulich v. Mississippi & M. R. Co.*, 20 Iowa, 338, 342.

"Uniform operation" means that the same rule shall apply to all persons placed in the same circumstances. It does not prescribe one rule for one citizen or soldier, and another for his neighbor, if they are in the same situation. We have a statute regulating continuances on account of the absence of witnesses which gives a uniform right to all litigants, and yet one may be entitled to a continuance, and another not. This results not because a different rule is prescribed for each, but because one brings himself within its terms, and the other does not. *Laws 1862, c. 109, § 1*, providing that all actions now pending shall be continued on a showing that the defendant is in the actual military service of the United States or of the state during the actual continuance of the defendant in such service, is not invalid as not being of uniform operation. *McCormick v. Rusch*, 15 Iowa, 127, 129, 83 Am. Dec. 401.

The constitutional provision that general laws shall be uniform in their operation is to be construed to mean that such laws shall bear equally in their burdens and benefits upon persons standing in the same category, but this category depends upon the facts which characterize the offense. Every defendant is not entitled to the same privileges or subject to the same burdens as every other. For instance, some are entitled to bail, and others are not, and this depends upon the particular facts characterizing the imputed crime. When we speak of uniformity in the operation of a law, we speak of that operation which is equal under the same facts, for what justice or uniformity would there be in applying the same rigor of remedy or the same measure of punishment to all conditions of fact or degrees of criminality merely because there existed a similarity or identity in the general charge? To treat one man different from another man, to deny one man a privilege extended to another man, is not partiality. It may be a just discrimination. To constitute partiality and the invidious discrimination against which the Constitution aims, the denial to another of what is given to one must be made upon substantially the same facts, or, to express the idea differently, the denial must be of the same claim before accorded. *People v. Judge of Twelfth Dist.*, 17 Cal. 547, 554.

The constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state is violated by a general statute to restore to the court of common pleas the jurisdiction of minor offenses in certain counties of the state. *Kelley v. State*, 6 Ohio St. 269, 271.

The test of a statute as to uniform operation, and with respect to the required conformity to the law of the land and to the requirement of due process of law, seems to be that if the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are or may be in like situation and circumstances, and the designation of a class is reasonable—not unjust or capricious or arbitrary, but based upon a real distinction—the law does not operate uniformly; and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to due process of law is satisfied. *State v. Hogan*, 58 N. E. 572, 573, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626.

"Uniform operation" does not involve, as an essential, identity of time, so as to make it necessary that it take effect at the same time upon all subjects to be governed by it. If a law operates equally on all the objects embraced within it, when they come within the circle or scope of its authority, the uniform operation contemplated by the Constitution is attained. A general law to fill vacancies in office cannot be void for want of uniformity in operation because such vacancies must occur at different periods. *People v. Henshaw*, 18 Pac. 413, 416, 76 Cal. 436.

Laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person that is brought within the relations and circumstances provided for is within the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation. *Arms v. Ayer*, 61 N. E. 851, 855, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357.

The term "uniform operation throughout the state" means universal operation as to territory. It takes in the whole state, and, as to persons and things, it means universal operation as to all persons and things in the same condition or category. Where a law is available in every part of the state as to all persons in the same condition or category, it is of universal operation throughout the state. *State v. Spellmire*, 65 N. E. 619, 622, 67 Ohio St. 77.

A law is general and uniform if all persons in the same circumstances are treated alike. *D. H. Davis Coal Co. v. Polland*, 62 N. E. 492, 496, 158 Ind. 607, 92 Am. St. Rep. 319.

UNIFORM RATE OF TAXATION.

If the rate of assessment and taxation be equal, it is conceived it will be uniform; that is, that no meaning can be attached to

the word "uniform" that is not conveyed by the word "equal." If the rate is everywhere equal, it will be uniform, necessarily. If the rate is varying, so that property of different kinds or in different localities is valued or taxed at different rates, the rate will be unequal, and so not uniform; but, so far as it is equal, it will also be uniform. *Crawford v. Linn County*, 5 Pac. 738, 739, 11 Or. 482.

The words "uniform rate of assessment and taxation," in the constitutional provision that the Legislature shall provide by law for a uniform and equal rate of assessment and taxation, mean that all ad valorem taxes shall be of a uniform rate or percentage, and that one species of taxable property shall not pay a higher rate of taxes than other kinds of property. *State v. Estabrook*, 8 Nev. 173, 177.

UNIFORM RULE OF TAXATION.

The constitutional requirement that property shall be assessed for taxes under general laws and by uniform rules, according to its true value, means that the same regulations shall be applied to every member of each class which the general laws recognized or established. The expression "uniform rules" is not of wider import than the expression general laws, and, if the latter may be confined to a class, with equal propriety may the former. Indeed, strictly speaking, a prescript may be a uniform rule without prevailing over even a class, for it would be a rule if designed for the government of a single individual, and, if designed for the government of more than one, could be called a uniform rule, but such an interpretation would be too narrow for this constitutional phrase. This signification of the word "uniform" is common. Thus the laws of nature are uniform, although none of them is universal, and many operate on single classes only. The federal Constitution provides that all duties imposed and excises shall be uniform throughout the United States, yet these taxes have always been levied in diverse methods and amounts upon the different classes of property and business. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 590, 48 N. J. Law (19 Vroom) 146.

Uniform rules for taxation are rules which fix a common standard for the assessment of taxes for the state and all its political subdivisions. *Vreeland v. Jersey City*, 43 N. J. Law, 135, 138.

Taxing is required to be by a uniform rule; that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation.

Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it is applied. If a state tax, it must be uniform over all the state. If a county, town, or city tax, it must be uniform throughout the extent of the territory to which it applies. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to all property subject to taxation, so that all property may be taxed alike, equally, which is taxing by a uniform rule. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, 15 (cited in *Attorney General v. Winnebago Lake & F. R. Plank Road Co.*, 11 Wis. 42); *Gilman v. City of Sheboygan*, 67 U. S. (2 Black) 510, 517, 17 L. Ed. 305.

"Taxing by uniform rule" means by one and the same unvarying standard; uniformity not only in the rate of taxation, but uniformity in the mode of assessment by which the value is ascertained. There must be an equality of burden. This uniformity must be coextensive with the territory to which it applies. If a state tax, it must be uniform all over the state. If a county, township, city, town, or district tax, it must be uniform throughout the extent of the territory to which it applies. *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408, 429 (citing *Fletcher v. Oliver*, 25 Ark. 289).

The words "uniform rule," in Const., art. 12, § 2, declaring that laws shall be passed taxing by a uniform rule all moneys and real and personal property, refer to all laws levying taxes for general revenue, whether for state, county, township, or corporation purposes. *Hill v. Higdon*, 5 Ohio St. 243, 246, 67 Am. Dec. 289.

The provision in Const. art. 8, § 1, that the "rule of taxation shall be uniform," means that the course or mode of proceedings in levying or laying taxes shall be uniform; it shall in all cases be alike. *Knowlton v. Rock County Sup'rs*, 9 Wis. 410, 420.

The constitutional provision that the rule of taxation shall be uniform extends to taxation of cities, towns, and counties, exercising, as they do, a portion of the sovereign power delegated to, them by the state. It extends to all taxes by the state, whether acting directly or by delegating its authority to political corporations. *Weeks v. City of Milwaukee*, 10 Wis. 242, 256. It means that, if a certain class of property is made taxable at all, it must not only be taxed at a uniform rate, but all of it must be taxed without partiality or discrimination, and at such rate. *Wisconsin Cent. R. Co. v. Taylor County*, 8 N. W. 833, 856, 52 Wis. 37. It requires that all property taxed for

the purpose of revenue, whether general or local, shall be taxed equally, according to its just and true value, and that no one species of property from which such taxes may be collected shall be taxed higher than any other species of equal value. *State v. Hastings*, 12 Wis. 47, 50.

A rule taxing horses at one rate, cattle at another, and land at a third, would not be a uniform rule. The fact that all horses were taxed alike would not make it so, because the mode of taxing horses would be only a part of the rule. That part might be uniform with itself, but, the moment a change was made to other property, there the rule changed, and the uniformity ceased. *Attorney General v. Winnebago Lake & F. R. Plankroad Co.*, 11 Wis. 35, 40.

The provision of the state Constitution is not applicable to the taxation of national banks within the state, since it is provided by the Constitution of the United States that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land; and since Congress has, in the exercise of its supreme authority, prescribed a rule or mode of taxation of national banks different from that prescribed by the Constitution of the state, and therefore the Legislature of the state must be governed by the rule prescribed by Congress, instead of that fixed by the Constitution of the state. *Van Slyke v. State*, 23 Wis. 655, 667.

An act which undertakes to compel one town to levy a tax for the payment of a certain bounty, and all the costs and expenses of certain unsuccessful suits therefor, which does not impose a like obligation upon other towns, is in violation of the constitutional requirement that the rule of taxation shall be uniform. *State v. Tappan*, 29 Wis. 664, 677, 9 Am. Rep. 622.

UNIFORM SYSTEM OF COMMON SCHOOLS.

The word "uniform," as used in Const. art. 6, § 2, providing that the Legislature shall establish a uniform system of common schools, requires uniform educational facilities. Such facilities may be maintained with great simplicity of organization in sparsely settled regions, while the most elaborate machinery is necessary to meet the requirements of dense populations in cities. The system of schools, however, is uniform. Divisions and classifications of children in various respects may be necessary in the city, and not in the country, in order to obtain the best results from the facilities afforded. The facilities themselves, however, remain uniform. The system of educational opportunities, advantages, and accommodations is uniform, constant, and equal, whether availed of by children in a rural district or a

city ward, whether by males or females, whether by blacks and whites commingling or by them separately, and whether race classification be made in one grade or department or city or county, or in many. In *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738, it was held that the uniformity of the school system was not broken by the establishment of separate schools for colored and for white children; and it was held that the classification of schools on the basis of race or color, and the education of the races in separate schools, involved questions of domestic policy, which are within the legislative discretion or control, and did not amount to an exclusion of either class, nor a denial of equal privileges required by the Constitution. The supreme judicial tribunal of Massachusetts, through Chief Justice Shaw, in 1849, declared that the principle of equality was in no wise violated by the establishment of separate race schools. *Reynolds v. City of Topeka* (Kan.) 72 Pac. 274, 277 (citing *Roberts v. City of Boston*, 59 Mass. [5 Cush.] 198, 208, 209).

A system of common schools that grants to all the various subdivisions of the state equal and uniform rights and privileges, leaving only to the local authorities the right to govern the local affairs, is a general and uniform system within the statute providing that the Legislature shall provide by law for a general and uniform system for the common schools. *Robinson v. Schenck*, 102 Ind. 807, 320, 1 N. E. 698.

UNIFORM TAXATION.

See, also, "Equal and Uniform Taxation."

A tax is uniform when it operates with the same force and effect in every place where the subject of it is found. Perfect uniformity or perfect equality of a tax, in all the aspects in which the human mind can view it, is a baseless dream. *State Railroad Tax Cases*, 92 U. S. 575, 595, 612, 23 L. Ed. 363, 373. The words "uniform throughout the United States," as required of a tax by the Constitution, do not signify an intrinsic, but simply a geographical, uniformity, and such uniformity is therefore the only uniformity which is prescribed by the Constitution. *Patton v. Brady*, 22 Sup. Ct. 493, 498, 184 U. S. 608, 46 L. Ed. 713.

A tax is uniform, within the constitutional requirement, when it operates with the same force and effect in every place where the subject of it is found. *Edye v. Robertson*, 5 Sup. Ct. 247, 252, 112 U. S. 580, 28 L. Ed. 798.

"Uniformity," as applied to the constitutional provision that all taxes shall be uniform, means that all property belonging to the same class shall be taxed alike, so

that all horses shall be taxed at the same rate, and all lands or stock or merchandise. There is to be no discrimination between property of the same class, and it shall not be competent to levy one rate upon country lands and another upon city lands, or one rate upon horses of one breed and another upon horses of a different breed. *Adams v. Mississippi State Bank*, 23 South. 395, 396, 75 Miss. 701 (citing *Mississippi Mills v. Cook*, 56 Miss. 40).

Const. art. 10, § 3, providing that all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax, means a uniformity of taxes, and not a uniformity of rules or regulations governing the levy. *People v. Henderson*, 21 Pac. 144, 147, 12 Colo. 369.

The provision in the Constitution for uniformity of taxation has no reference to the power to exempt or to remit taxes. Its design was to secure to every portion of the state and to every class of property taxed a uniform rate; to secure equality, so that property in one quarter should not be taxed at a higher rate than in another, or the same kind taxed unequally. *People v. Auditor General*, 7 Mich. 84, 90.

UNIFORM TEXT-BOOKS.

The term "uniformity," as used in the general school law, providing that all text-books used in any school district shall be uniform in any one subject, does not mean that all the text-books of one author in grammar, arithmetic, history, physiology, etc., for the different grades of scholars, must be used. Boards of education are at liberty, under this law, to adopt the book of one author for use in all the primary departments, and the books of another author on the same subject in all the grammar or higher departments. All the law requires is that they be uniform in the same grade. *Attorney General v. City of Detroit* (Mich.) 95 N. W. 746, 749.

UNIFORMITY.

Uniformity indicates consistency, resemblance, sameness, a conformity to one pattern. *McConihe v. State*, 17 Fla. 238, 270; *Town of Enterprise v. State*, 10 South. 740, 746, 29 Fla. 128.

UNILATERAL CONTRACT.

"Unilateral contracts" mean contracts that lack mutuality. "Mutuality of contracts" means an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of another; that is, neither party is bound unless both are bound. *Laclede Const.*

Co. v. Tudor Ironworks (Mo.) 69 S. W. 384, 388.

UNILATERAL MISTAKE.

The words "unilateral mistake," when used in speaking of a unilateral mistake in making a contract, mean a mistake on the part of one of the parties only. A court of equity may rescind a contract for a unilateral mistake, but reformation cannot be granted by reason of such a mistake, but only for a mutual mistake. *Green v. Stone*, 34 Atl. 1099, 1102, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

UNILATERAL RECORD.

Records are unilateral when offered to show a particular fact, as a *prima facie* case, either for or against a stranger. In such a case even parol testimony may be used to explain their applicability. *Colligan v. Cooney*, 64 S. W. 31, 33, 107 Tenn. 214.

UNIMPROVED.

"Unimproved," when used in an assessor's return relating to land, means uncultivated and unseated. *Holloway v. Jones*, 22 Atl. 710, 713, 143 Pa. 564.

The word "unimproved," when used with reference to land, expresses an idea opposite to that conveyed by the word "cleared"; the word "cleared" conveying the idea of cultivation, and the word "unimproved" the absence of it—that is, a state of nature. When the word "unimproved" is employed in describing an entire tract of land, it has the same meaning as it has when describing the condition of a portion of a tract. It means uncultivated and unseated. *Hathaway v. Elsbree*, 54 Pa. (4 P. F. Smith) 498, 506.

A devise of testatrix's unimproved real estate applies to land leased by her to tenants who built thereon under such circumstances that the buildings remained their personal property. As to testatrix, such land was unimproved. It is true that a stranger knowing nothing of the facts would, on looking at the property, assert that it was improved real estate; but this assertion would be based upon want of knowledge, or, to speak more accurately, upon the contemplation of the property as one undivided whole—as being nothing but land. With knowledge of all the facts, he would admit that, in so far as it was real property, it was unimproved. *Coles v. Coles* (N. J.) 37 Atl. 1025.

"Unimproved real estate," as used in a will giving to a certain person all testator's "unimproved real estate" in the city of Philadelphia, cannot be construed to include real estate upon which there were three dwelling houses, besides suitable farm buildings, with

constant annual cultivation by a farmer, with actual money rents received for its occupancy to the amount of more than \$12,000 in 18 years, besides the share of the tenant in the growing crops, whether the expression be regarded in its strict legal sense, or in the ordinary and popular sense. In the open country, mere fencing and cultivation are sufficient to constitute improved lands; and when this is accompanied by the erection and occupancy of dwelling houses, barns, and outhouses, there is nothing left for discussion. *Robb v. Robb*, 34 Atl. 237, 238, 173 Pa. 620.

UNINCLOSED LAND.

A public highway is not a public common nor an "uninclosed piece of land," within Burns' Ann. St. 1894, § 2833, authorizing any resident of the township to take up and impound domestic animals found running at large or pasturing thereon. *McManaway v. Crispin*, 53 N. E. 840, 841, 22 Ind. App. 368.

A public highway is not "uninclosed land or public common," within the meaning of Burns' Ann. St. 1894, § 2833 (*Horner's Ann. St. 1896*, § 2639), authorizing the impounding of animals found pasturing in such places. *Beeson v. Tice*, 45 N. E. 612, 613, 17 Ind. App. 78.

UNINCORPORATED PLACE.

"Unincorporated place," as used in Rev. St. c. 1, declaring that, when an attachment is made in an "unincorporated place," it shall be recorded in the oldest adjoining town in the county, refers to places in which there is no clerk's office in which attachments could be filed or recorded, and would not include an organized plantation, having a clerk and other plantation officers. *Parker v. Williams*, 1 Atl. 138, 139, 77 Me. 418; *Parker v. Williams*, 77 Me. 418, 422, 1 Atl. 138.

UNINCUMBERED.

"Unincumbered," as used when speaking of an unincumbered title to property, means not bound by or subject to anything in the nature of a lien or burden upon it. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 375.

The word "unincumbered," used in a covenant of renewal in a lease, means exempt from all liens, charges, and provisions which tend to diminish the value of the lot. A lot under an unexpired lease at a particular rent is not unincumbered. *Borrowe v. Milbank* (N. Y.) 5 Abb. Prac. 28, 30.

UNINHABITED.

A special verdict finding that the defendant willfully and maliciously burned a dwelling house, which was at the time unin-

habited, means a house fitted for habitation, but unoccupied at the time. *State v. Clark*, 52 N. C. 167, 168.

An insurance policy providing that if the premises became "vacant, unoccupied, or uninhabited," the policy shall be void, means that, if the house ceases to be used as a place of human habitation or for living purposes, the policy shall be void. *Home Ins. Co. v. Boyd*, 49 N. E. 285, 287, 19 Ind. App. 173.

UNINTERRUPTED.

Rev. St. 1858, c. 34, § 2, subd. 7, relating to the relief and support of the poor, and providing that every settlement once legally acquired should continue until lost or defeated by acquiring a new one in this state, "or by voluntary and uninterrupted absence" from the town in which such legal settlement had been granted, for one year or upward, did not include an absence during which the town in which the person had a legal settlement supported the absentee as a pauper in some other town in the state. *Town of Scott v. Town of Clayton*, 8 N. W. 171, 173, 51 Wis. 185.

UNINTERRUPTED COURSE.

"Uninterrupted course," as used in Laws 1889, c. 19, regulating the practice of dentistry, and exempting from its provisions students in attendance upon "a regular uninterrupted course" in a dental college, does not mean that the course of study shall be without vacation, such as all schools have. *State v. Vandersluis*, 43 N. W. 789, 791, 42 Minn. 129, 6 L. R. A. 119.

UNINTERRUPTED POSSESSION.

The term "uninterrupted possession," in a statement, admitted in evidence, that a certain person had been in the uninterrupted possession of real estate, was construed to be equivalent to the term "continuous possession." *Wilson v. Purl*, 34 S. W. 884, 887, 133 Mo. 367.

UNINTERRUPTED USE.

An instruction that "20 years of uninterrupted adverse use of a right of way" will raise a presumptive right to the ground of such right of way is equivalent to stating that the use must have been continuous for the required period. If the use was uninterrupted, it must have been continuous. One of the definitions of the word "uninterrupted" is to destroy continuity of. *Davidson v. Nicholson*, 59 Ind. 411, 414.

Uninterrupted and continuous enjoyment, when used in reference to an easement, does not mean that the person shall use the way every day for 20 years, but

simply that he exercises the right more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objection on the part of the owner of the land, and after such circumstances as exclude the presumption of a voluntary abandonment on the part of the person claiming it. *Cox v. Forrest*, 60 Md. 74, 80.

The term "free and uninterrupted use," in a conveyance of a farm, providing that the grantee shall have the free and uninterrupted use and privilege of passing over other land of the grantor by a usual passageway, was considered, in view of evidence that such way had been used with gates and bars for 40 years, and up to the time of the grant, and that such gates and bars were necessary to the convenient use of the grantor's remaining land, to mean the free and uninterrupted use and privilege of passing and repassing over the ways as then existing, subject to gates and bars, and to convey a right to use the way without other or further impediment. *Garland v. Furber*, 47 N. H. 301, 303.

UNION.

"Union," as used in St. 1895, c. 462, § 3, entitled "An act to protect manufacturers from the use of counterfeit labels and stamps, authorizing suits to prevent fraudulent use and counterfeiting of labels by any person, association or union," includes a voluntary trade union. *Tracy v. Banker*, 49 N. E. 308, 170 Mass. 263, 39 L. E. A. 508.

UNION DEPOT COMPANY.

The term "union depot company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association, or corporation, wherever organized or incorporated, when engaged in the business of operating a union depot or station for railroad purposes. *Bates' Ann. St. Ohio 1904*, § 2780-17.

UNION ELASTIC WEBBING.

Union elastic webbing is that made of rubber, silk, and cotton, as distinguished from wool elastic webbing, made of rubber, wool, and cotton, and cotton elastic webbing made of rubber and cotton. *Beard v. Nichols*, 7 Sup. Ct. 548, 120 U. S. 260, 30 L. Ed. 652.

UNION JACK.

The usual signal by which an offer of pilot service is made in the daytime is a flag at the masthead. This, of course, will be the flag of the country in which the offer is made, or that modification or portion of it called the

"Jack." In the United States it is a blue flag, charged with a star for every state in the Union, and called the "Union Jack." *The Ullock (U. S.)* 19 Fed. 207, 210.

UNION SHOP.

A union shop is one in which none but members of an association are engaged as workmen. *People v. Fisher*, 3 N. Y. Supp. 786, 788, 50 Hun, 552.

UNIPOLAR MACHINE.

A unipolar or homopolar electrical machine is one in which currents are generated continuously in the windings in one direction. It is a machine in which the lines of force are cut in one direction only, as distinguished from alternating current machines, in which the lines of force are cut in alternating opposite directions, and which require the use of commutators to straighten out the current. *General Electric Co. v. Winsted Gas Co. (U. S.)* 110 Fed. 963.

UNITARIANS.

Unitarians are a religious sect believing in the unity of God. In the *Encyclopædia of Religious Knowledge*, Unitarians are designated as a class of religionists who hold to the personal unity of God, in opposition to the doctrine of the Trinity. Unitarians profess to derive their views from Scripture, and to make it the arbiter in all religious questions. *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

UNITE.

In Laws 1875, c. 606, § 26, subd. 3, authorizing any corporation formed thereunder to join or unite its railroad with another railroad before constructed at any point on its route, "unite" is used synonymously and interchangeably with "join" and "connect." *Gallagher v. Keating*, 58 N. Y. Supp. 366, 370, 27 Misc. Rep. 131.

The power to "unite" given by Act Ky. March 7, 1854, providing that a railroad company may unite its road with other roads connecting therewith, on such conditions as the companies may agree, does not include a consolidation of roads, but merely a mechanical union of roads running into the same town. *Louisville & N. R. Co. v. Commonwealth of Kentucky*, 16 Sup. Ct. 714, 717, 161 U. S. 677, 40 L. Ed. 849.

UNITED STATES.

As a person, see "Person."

As corporation, see "Corporation."

The United States is the union of the separate states under a common Constitution.

Texas v. White, 74 U. S. (7 Wall.) 700, 721, 19 L. Ed. 227.

The United States is the union under one Constitution of the various states, each of which is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. *Texas v. White*, 74 U. S. (7 Wall.) 700, 721, 19 L. Ed. 227.

The term "United States" has a broader meaning in dealing with a foreign sovereignty than when used in the Constitution, and includes all territory subject to the jurisdiction of the federal government. *Downes v. Bidwell*, 21 Sup. Ct. 770, 777, 182 U. S. 244, 45 L. Ed. 1088.

In construing the constitutional provision authorizing Congress to lay and collect taxes, duties, imposts, and excises, and holding that Congress had authority to impose and direct taxes on the District of Columbia, Chief Justice Marshall said that "'United States' is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of the imposts, duties, and excises should be observed in the one than in the other." Later in the case, however, he says, "If the general language of the Constitution should be confined to the states, still the sixteenth paragraph of the eighth section gives to Congress the power of exercising exclusive legislation in all cases whatsoever within this district." *Loughborough v. Blake*, 18 U. S. (5 Wheat.) 317, 5 L. Ed. 98.

"In dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations, this government is a unity. This is so, not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations. The term in Const. art. 1, § 8, requiring all duties, imposts, and excises to be uniform throughout the United States, does not include the Island of Porto Rico, which by the treaty of cession became territory appurtenant to the United States, but not a part of the United States, within the meaning of the section of the Constitution, though it is a part of the United States as to foreign affairs." *Downes v. Bidwell*, 21 Sup. Ct. 770,

772, 182 U. S. 244, 45 L. Ed. 1088 (*Insular Case*).

"We do not regard the government of the United States as a foreign government. It is true, it is a government independent of the state government, moving in a different sphere from that of the state government, and having a different class of powers, distinct, but not antagonistical, and operating upon, and within the circle of its powers supreme over, the same constituents." *Gilmer v. Lime Point*, 18 Cal. 229, 255.

The term "United States," within the meaning of the revenue laws, imposing duties on goods imported into the United States, does not include a portion of the territory of the United States which by conquest and military occupation is in the possession of a public enemy; and therefore goods imported into such territory, while in such possession, are not subject to duty. *United States v. Rice*, 17 U. S. (4 Wheat.) 246-253, 4 L. Ed. 562.

When the Constitution declares that the duties shall be uniform throughout the United States, we understand the states whose people united to form the Constitution, and such as have since been added to the Union upon an equality with them. *Downes v. Bidwell*, 21 Sup. Ct. 770, 783, 182 U. S. 244, 45 L. Ed. 1088.

In considering an indictment charging forgery of a receipt in July, 1777, with intent to defraud the United States, the court said: "The first exception was that, at the time of the offense charged, the United States were not a body corporate, known in law, but the court is of a different opinion. From the moment of their association, the United States became a body corporate, for there was no superior from whom that character could otherwise be derived." *Respublica v. Sweers* (Pa.) 1 Dall. 41, 44, 1 L. Ed. 29.

The words "United States," when used in a statute shall be construed to include the District of Columbia and the several territories. *Ky. St.* 1903, § 446; *Rev. St. Wis.* 1898, § 4971; *Code N. C.* 1883, § 3765, subd. 11; *Pub. St. R. I.* 1882, p. 77, c. 24, § 7; *Pub. St. N. H.* 1901, p. 63, c. 2, § 4; *Code W. Va.* 1899, p. 133, c. 13, § 17; *Comp. Laws Mich.* 1897, § 50, subd. 15; *Code Miss.* 1892, § 1517; *Rev. Code Del.* 1893, c. 5, § 1, subd. 12; *Horner's Rev. St. Ind.* 1901, § 240, subd. 7; *Code Va.* 1887, § 5; *Rev. Laws Mass.* 1902, p. 89, c. 8, § 5, subd. 21; *Gen. St. Minn.* 1894, § 255, subd. 17; *Rev. St. Mo.* 1899, § 6140; *Pol. Code Mont.* 1895, § 16, subd. 10; *Civ. Code Ala.* 1896, § 7; *Pol. Code Cal.* 1903, § 17, subd. 10; *Shannon's Code Tenn.* 1896, § 65; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 16.

The words "United States," when used in a statute, may include the District of Columbia and the territories. *Civ. Code Mont.*

1895, § 4662, subd. 5; Pen. Code Mont. 1895, § 7, subd. 19; Code Civ. Proc. Mont. 1895, § 3463, subd. 6; Code Civ. Proc. Cal. 1903, § 17, subd. 7; Hurd's Rev. St. Ill. 1901, p. 1720, c. 131, § 1, subd. 14; Rev. St. Utah, 1898, § 2498; Rev. Codes N. D. 1899, § 5152; Code Civ. Proc. S. D. 1903, § 8; Pen. Code Cal. 1903, § 7, subd. 19; Gen. St. Kan. 1901, § 7342, subd. 15; Code Iowa 1897, § 48, subd. 15; Mills' Ann. St. Colo. 1891, § 4185, cl. 12.

The words "United States" embrace every state in the Union, all of the territories, and the District of Columbia. Sand. & H. Dig. Ark. 1893, § 7216.

The words "United States" shall be construed to include the several territories created or organized by Congress. Gen. St. N. J. 1895, p. 3195, § 36.

The term "United States," as used in an act to regulate the immigration of aliens into the United States, shall be construed to mean the United States, and any waters, territory or other place held subject to the jurisdiction thereof. U. S. Comp. St. Supp. 1903, p. 185.

UNITED STATES BANK NOTES.

An indictment charging the theft of \$50 in "United States money, currency and bank notes," sufficiently describes the money taken, for there are no bank notes in circulation as money but those of national banks, which are sufficiently alleged. No other bank notes are known as "United States bank notes." Bailey v. Commonwealth (Ky.) 58 S. W. 425.

UNITED STATES BONDS.

As property, see "Property."

A certificate of deposit recited that the owner had deposited with the maker \$535.75 in treasury notes to the credit of themselves, and payable to their order in United States 6 per cent. interest bearing bonds. Held, that the term "in United States bonds" was clearly understood to mean bonds of the United States to the nominal value of \$535.75; the value of the bonds being measured by the dollar; and, without specific provision in the contract, it could not be held that the bonds were received at any other than their nominal value. Easton v. Hyde, 13 Minn. 90 (Gil. 83).

UNITED STATES COMMISSIONER.

A United States commissioner is a judicial officer, and exercises—it is true, within very narrow limits—the functions of a United States judge. In re Wong Fock (U. S.) 81 Fed. 558, 561.

UNITED STATES COURTS.

See "Courts of the United States."

UNITED STATES CURRENCY.

"United States currency" is a general term which may include gold, silver, treasury notes, or bank notes. Ex parte Prince, 9 South. 659, 660, 27 Fla. 196, 205, 26 Am. St. Rep. 67.

"United States currency" includes the gold and silver coin of the United States, the notes issued by the banks organized under the laws of the United States, the treasury notes commonly known as "greenbacks," and the certificates of deposit, generally called "gold and silver certificates," issued by the United States. State v. Oakley, 10 S. W. 17, 51 Ark. 112.

The term "United States currency" means the currency authorized by the United States government. State v. Gasting, 23 La. Ann. 609, 610.

UNITED STATES GOLD COIN.

"United States gold coin," as used in an application to pay in United States gold coin, means money of a certain weight of standard gold, ascertained by a kind of count made legal tender by statute. Belford v. Woodward, 41 N. E. 1097, 1101, 158 Ill. 122, 29 L. R. A. 593.

UNITED STATES JUDGE.

The expression "a United States judge," as used in Act Cong. May 5, 1892, 27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319], which provides that a Chinese laborer within the limits of the United States, who shall neglect to comply with the provisions of the Chinese exclusion act, may be arrested and taken before a United States judge, is a general one, and refers to those judicial officers, such as justice, judge, or commissioner, previously and specifically enumerated in preceding sections of the act, and so includes a United States commissioner. In re Wong Fock (U. S.) 81 Fed. 558, 560.

UNITED STATES LANDS.

See "Lands of United States."

UNITED STATES MARINERS.

See "Mariners of the United States."

UNITED STATES MARSHAL.

A United States marshal is a ministerial officer, whose duties in territories are similar in each judicial district to those of a sheriff in a county. Beebee v. United States, 11 N. W. 505, 507, 2 Dak. 292.

UNITED STATES NOTES.

"United States notes" are not private, but are public, obligations, provided for by

acts of Congress. That the term "United States notes," in an indictment for counterfeiting, is sufficiently specific, and refers to a well-known and defined obligation of the government, is made clear by Rev. St. U. S. § 5413 [U. S. Comp. St. 1901, p. 3662], reading: "The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national currency coupons, United States notes," etc. *United States v. Howell* (U. S.) 64 Fed. 110, 113.

UNITED STATES OFFICER.

Strictly speaking, a person in the service of the government is not an officer of the United States unless he holds his place by virtue of the appointment of the President, or by one of the courts of justice, or by the head of the department authorized by law to make such appointment. *United States v. Mouat*, 8 Sup. Ct. 505, 506, 124 U. S. 303, 31 L. Ed. 463.

Act Cong. April 30, 1790 (1 Stat. 117) § 22, providing for the punishment of any person willfully resisting an "officer of the United States" in the execution of the process, should be construed to include deputies of a United States marshal authorized to serve process, for they are not merely agents or servants of the marshal. *United States v. Tinklepaugh* (U. S.) 28 Fed. Cas. 193, 195.

An officer of the United States can only be appointed by the President by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the government, who does not derive his position from one of these sources, is not an "officer of the United States" in the sense of the Constitution. A clerk of a collector of customs is not an officer of the United States. *United States v. Smith*, 8 Sup. Ct. 595, 597, 124 U. S. 525, 31 L. Ed. 534.

Attorneys and counselors are not officers of the United States. They are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378, 18 L. Ed. 366.

A pension agent of the United States is not, in the legal sense, an "officer" of the federal government, and he is not disqualified from holding office in the state wherein he resides. *Lindsey v. Attorney General*, 33 Miss. 508, 529.

A retired officer of the army is an "officer of the United States," within the meaning of Rev. St. U. S. § 5498 [U. S. Comp. St. 1901, p. 3707], prohibiting every officer of the United States from acting as an agent or attorney in prosecuting any claim against the United States. *In re Tyler* (U. S.) 18 Ct. Cl. 25, 29.

A sailmaker at the Washington navy yard, appointed by warrant under the hand of the Secretary of the Navy and seal of the department, is an officer of the United States and exempt from militia duty. *Sanford v. Boyd* (U. S.) 21 Fed. Cas. 358.

A clerk appointed by the direction and the approbation of the Secretary of the Treasury for the fractional currency counter of the treasury department at Louisville is an "officer of the United States," within the meaning of the Constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe-keeping of public money. *United States v. Bloomgart* (U. S.) 24 Fed. Cas. 1180.

The phrase "officers of the government of the United States," as used in Act Cong. May 18, 1792, exempting from military duty the officers of the government of the United States, is synonymous with the phrase "officers of the United States," and is not limited to officers of the government in high departments. *Wise v. Withers*, 7 U. S. (3 Cranch) 331, 336, 2 L. Ed. 457.

UNITED STATES PAPER CURRENCY.

United States paper currency money includes treasury notes, commonly called "greenbacks," silver certificates, and gold certificates. *Rucker v. State* (Tex.) 26 S. W. 65, 66.

The term "United States paper currency money," as used in an indictment to describe the property stolen, embraces that character of paper currency issued and allowed to be used as a medium and to circulate as money under the authority of the laws of the United States. *Wilson v. State* (Tex.) 72 S. W. 862, 864 (citing *Kimbrough v. State*, 28 Tex. App. 367, 13 S. W. 218).

UNITED STATES PROPERTY.

See "Property of United States."

UNITED STATES VESSELS.

See "Vessels of the United States."

UNITED STATES WATERS.

See "Waters of the United States."

UNIVERSAL

"Universal" is said by Webster to be that which pertains to all, without exception. *Koen v. State*, 53 N. W. 595, 596, 35 Neb. 676, 17 L. R. A. 821.

"Universal" is not equivalent to "general," which means extensive. *Blair v. Howell*, 23 N. W. 199, 200, 68 Iowa, 619.

UNIVERSAL AGENT.

A universal agent is one authorized to transact all the business of his principal of every kind. *Baldwin v. Tucker*, 65 S. W. 841, 842, 112 Ky. 282, 57 L. R. A. 451; *Gibson v. Snow Hardware Co.*, 10 South. 304, 307, 94 Ala. 346; *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.*, 52 N. W. 866, 867, 3 S. D. 205 (citing *Mechem on Agencies*, § 6).

"Universal agents are such as may be appointed to do all the acts which the principal can personally do, and which he can lawfully delegate the power to another to do. Such a universal agency may potentially exist, but it must be of the rarest occurrence, and indeed it is difficult, says Mr. Justice Story, to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal." Such agents are distinguished from general agents. *Wood v. McCain*, 7 Ala. 800, 803, 42 Am. Dec. 612.

UNIVERSAL LEGACY.

See "Legacy under a Universal Title."

"A universal legacy is a testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease." *Civ. Code* 1900, La. art. 1606.

UNIVERSAL PARTNERSHIP.

Universal partnership is a contract by which the parties agree to make a common stock of all the property they respectively possess. They may extend it to all property, real or personal, or restrict it to personal only. They may, as in other partnerships, agree that the property itself shall be common stock, or that the fruits only shall be such. But property which may accrue to one of the parties after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void. *Civ. Code* 1900, La. art. 2829.

UNIVERSITY.

State university as municipal corporation, see "Municipal Corporation."

A "university" is, in common parlance and in legal acceptation, as the word imports, "a place where all kinds of literature are universally taught." *Academy of Fine Arts v. Philadelphia County*, 22 Pa. (10 Harris) 496, 498 (citing *Jac. Law Dict.*; *Webst. Dict.*).

A short but comprehensive definition of the word "university" is "an aggregation or union of colleges." It is an institution in which the education imparted is universal, embracing many branches, such as the arts, sciences, and all manner of learning, and possessing power to confer degrees which indicate proficiency in the branches taught. In the collegiate department, or "department of arts," as it has been called, the ordinary and scholastic education is imparted upon which the degrees of bachelor of arts and master of arts are conferred; in the medical department the degree doctor of medicine is conferred; and in the law department the degree of bachelor of laws. *Commonwealth v. Banks*, 48 Atl. 277, 278, 198 Pa. 397.

The term "universities," in Act April 16, 1837, exempting universities and colleges from taxation, includes the State University of Pennsylvania in all of its parts that may properly be embraced within the term "university," and therefore includes its medical department. *City of Philadelphia v. Trustees of University of Pennsylvania*, 44 Pa. (8 Wright) 360, 362.

UNJUST.

An affidavit reciting that a refusal of debtors to apply certain assets in payment of the demand of the creditors was "unjust" is a mere conclusion of law, and hence amounts to nothing. *In re Prime* (N. Y.) 1 Barb. 340, 352.

UNJUSTLY.

"Unjustly," as used in an allegation, in an action to recover realty, that the defendant had unjustly entered and holds the plaintiff out, means "without right" or "wrongfully," and is an allegation of a disseisin—a wrongful deprivation of the demandant's seisin. *Roberts v. Niles*, 49 Atl. 1043, 1044, 95 Me. 244.

The expressions "unjustly and unfairly attempted," "unfairly and secretly computed," and "artfully and purposely framed," used in a plea of justification in regard to the official act of a cashier, do not necessarily imply moral obliquity. *Kerr v. Force* (U. S.) 14 Fed. Cas. 386, 396.

Illegally distinguished.

"Unjustly" is that which is against the established law; that which is opposed to a law which is the test of right and wrong. "Unjustly" is not synonymous with "illegally," so as to render one of the words sufficient under Rev. St. 1895, art. 3241, requiring that the plaintiff in a distress warrant for rent shall give a bond conditioned to pay the defendant such damages as he may sustain in case such warrant has been illegally and unjustly sued out. *McTeer v. Young* (Tex.) 44 S. W. 194, 196.

Surreptitiously distinguished.

The word "surreptitiously," as used in Rev. St. U. S. § 4920 [U. S. Comp. St. 1901, p. 3395], requiring one who contests the validity of a patent on the ground of prior conception to show that the patentee has surreptitiously or unjustly obtained the patent, is not synonymous with the word "unjustly" as used in the statute, and therefore it is not necessary that actual fraud and theft of the idea by the patentee should be shown, for, though the word "unjustly" may include the idea of a thing done fraudulently and secretly, its ordinary meaning is contrary to justice or that which is right. *Yates v. Huson* (U. S.) 8 App. Cas. 93, 99.

UNKNOWN.

See "Contents Unknown"; "Value Unknown"; "Weight and Contents Unknown."

"Unknown," in Code Civ. Proc. § 2747, enacting that a legacy shall be paid to the State Treasurer when the person entitled to it is unknown, presupposes the existence of such a person. In re Lane's Estate, 20 N. Y. Supp. 78, 79, 2 Con. Sur. 263.

An assessment of property as belonging to an unknown owner is not an assessment against the owner thereof, but is rather an assessment on or against the property. *Cary v. Holmes*, 19 South. 723, 724, 109 Ala. 217.

An assessment on property for street work, made by the superintendent of streets of a municipality to unknown owners, amounts to an official certificate by the proper officer that the owner of the particular lot designated is unknown to him. *Chambers v. Satterlee*, 40 Cal. 497, 518.

UNLADEN.

"Unladen," as used in U. S. Rev. St. § 4347, permitting merchandise brought from a foreign port in a vessel belonging in whole or in part to a foreigner, and not unladen, to be transported therein from one port of the United States to another, meant a real physical unloading, and not a constructive or fictitious one. *Laidlaw v. Abraham* (U. S.) 43 Fed. 297, 299.

UNLAWFUL

That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals. Rev. Codes N. D. 1899, § 3920; Civ. Code S. D. 1903, § 1271; Civ. Code Mont. 1895, § 2240.

When a transaction is voided by the statute without respect to the motive which

induced it, but on considerations of policy only, it is unlawful, and not fraudulent. To style it "fraudulent," whether the fraud be legal or otherwise, may fix an unmerited stigma on the party to the transaction. A more just and appropriate appellation to apply to conveyances of the former class would be simply "unlawful," while the term "fraudulent" would still be applicable to the latter class of cases. *Hagerman v. Buchanan*, 17 Atl. 946, 947, 45 N. J. Eq. 292, 14 Am. St. Rep. 732.

The failure, in a count charging the construction of a boom in a negligent, unskillful, and unlawful manner, to use the word "wrongful," does not render the count defective, as the words "negligent" and "unlawful" fully supply its place. *Pickens v. Coal River Boom & Timber Co.*, 41 S. E. 400, 401, 51 W. Va. 445, 90 Am. St. Rep. 819.

As illicit.

The term "unlawful," as used in Laws 1891, c. 2, § 1, prohibiting unlawful sexual intercourse, is used in the sense of illicit. *State v. Whealey*, 59 N. W. 211, 212, 5 S. D. 427.

As in violation of law.

"Unlawful," means in violation of or contrary to law. *Tatum v. State*, 66 Ala. 465, 467.

The word "unlawful," in criminal jurisprudence, means the violation of some prohibitory law. *Johnson v. State*, 63 N. E. 607, 609, 66 Ohio St. 59, 61 L. R. A. 277, 90 Am. St. Rep. 564.

An allegation in a complaint charging that intoxicating liquors were kept and deposited and intended for sale by the person named, in violation of a law within the state, is an allegation that such keeping and depositing were unlawful, making the complaint sufficient. *State v. Erskine*, 66 Me. 358, 359.

As unauthorized by law.

"Unlawful" means without authority of law. *Pinder v. State*, 8 South. 837, 840, 27 Fla. 370, 26 Am. St. Rep. 75.

That is unlawful which is not justified or warranted by law. *Surles v. Sweeney*, 4 Pac. 469, 470, 11 Or. 21.

"Unlawful" is defined by Webster as "not lawful; not legal; not permitted by law." Every act must be either lawful or unlawful. *State v. Frazier*, 39 Pac. 819, 821, 54 Kan. 719.

"Unlawful" does not necessarily mean contrary to law. "Un" is a preposition, and may mean simply not, and "unlawful" may mean not authorized by law. Congress has not only not authorized matter concerning a lottery business to be sent through the mails, but has prohibited and excluded it from the

mails, so it is not only unlawful, but criminal, to carry on the lottery business by using United States mails for this purpose. *MacDaniel v. United States* (U. S.) 87 Fed. 321, 324, 326, 30 C. C. A. 670.

In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 803, 8 L. R. A. 497, 17 Am. St. Rep. 319, it was said: "The word unlawful, as applied to corporations, is not used exclusively in the sense of *malum in se*, but *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; in other words, such acts, powers, and contracts as are *ultra vires*." In *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, it was said all contracts made by a corporation beyond the scope of powers granted are unlawful and void. *National Home Building & Loan Ass'n v. Home Sav. Bank*, 54 N. E. 619, 620, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245.

As unenforceable.

The courts sometimes call contracts in general restraint of trade "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense merely of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon a contract a sufficient protection to the public. *Bohn Mfg. Co. v. Hollis*, 55 N. W. 1119, 1121, 54 Minn. 223, 21 L. R. A. 837, 40 Am. St. Rep. 319.

UNLAWFUL ACT.

The words "unlawful act," as used in the statutory definition of involuntary manslaughter, are not technical words. Therefore they are to have their plain and usual meaning. Webster defines the word "unlawful" as follows: "Not lawful; contrary to law; illegal; not permitted by law;" and the word "act" as follows: "That which is done or doing; the exercise of power to the effect of which power exerted is the cause; a performance; deed." The word "unlawful," as defined by Bouvier in his *Law Dictionary*, is: "That which is contrary to law." Another definition is: "Unlawful implies that an act is done or not done as the law allows or requires." *Abb. Law Dict.* "Lawful, unlawful, and illegal refer to that which in its substance is sanctioned or prohibited by law." *And. Law Dict.* "The reader should bear in mind that unlawful signifies contrary to law, and many things are contrary to law, while not subjecting the doer to a criminal prosecution." 2 *Bish. Cr. Law*, § 178. A lawful act done in an unlawful or negligent manner is in law an unlawful act. *State v. Dorsey*, 20 N. E. 777, 778, 118 Ind. 167, 10 Am. St.

Rep. 111 (citing *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346.

Rev. St. U. S. § 5512, providing punishment in case any person does an unlawful act to secure registration as a voter, is not limited to acts punishable as crimes or misdemeanors, or such that an individual could maintain a civil suit in consequence thereof, but includes all acts which by necessary inference are opposed to the policy of the law, or such as would defeat its purpose or the object had in view by the Legislature. *United States v. O'Connor* (U. S.) 31 Fed. 449, 451.

Within the meaning of an "unlawful act," as used in the chapter relating to homicide by negligence, are included (1) such acts as by the penal law are called "misdemeanors"; and, (2) such acts, not being penal offenses, as would give just occasion for a civil action. *Pen. Code Tex.* 1895, art. 694.

UNLAWFUL ARREST, RESTRAINT, ETC.

A policy of marine insurance insuring against "unlawful arrest, restraint, and detainment of all kings, princes," etc., means unlawful restraints and detainments of kings and princes as well as unlawful arrests. The qualification of unlawful must be annexed to them all; and hence the detainment of the vessel by force, lawfully blockading a port, was not a peril insured against. *McCall v. Marine Ins. Co.*, 12 U. S. (8 Cranch) 59, 66, 3 L. Ed. 487.

UNLAWFUL ASSEMBLY.

A meeting attended with circumstances calculated to excite alarm is an unlawful assembly. *Regina v. Neale*, 9 Car. & P. 431, 435.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of a neighborhood, is an unlawful assembly. *Regina v. Vincent*, 9 Car. & P. 91, 109.

An unlawful assembly is where three or more persons assemble with an intent to "commit violence upon person or property, to resist the execution of the laws, to disturb public order, or for the perpetration of acts inspiring public terror or alarm." *People v. Judson* (N. Y.) 11 Daly, 1, 83.

"The common-law offense of unlawful assembly is defined to be a disturbance of the peace by persons assembling together with an intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution." *People v. Most*, 27 N. E. 970, 972, 128 N. Y. 108, 26 Am. St. Rep. 458 (quoting 1 *Russell on Crimes*, 275).

Blackstone defines "unlawful assemblage" as, "When one or more persons assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren for the game therein, and fall, without doing it, or making any motion toward it." *People v. Judson* (N. Y.) 11 Daly, 1, 58.

Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly. Pen. Code Cal. 1903, § 407.

An unlawful assembly is the meeting of two or more persons with intent to aid each other by violence or by any other manner, either to commit an offense, or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof. Pen. Code Tex. art. 279; *Blackwell v. State*, 30 Tex. App. 672, 673, 18 S. W. 676.

An "unlawful assembly," within Pen. Code, art. 289, providing that if the purpose of an unlawful assembly be to prevent any person from pursuing any labor, occupation, or employment, or to intimidate any person from following his daily avocation, the punishment shall be a fine not exceeding \$500, consists in illegally depriving any person of any right, or disturbing him in the enjoyment of a right, or preventing him from pursuing any labor, occupation, or employment, or interfering in any manner with the labor or employment of another. *McGehee v. State*, 5 S. W. 222, 224, 23 Tex. App. 330.

Under Rev. St. § 4511, an "unlawful assembly" is defined as a meeting by three or more persons in a violent manner to do an unlawful act, or who shall make any attempt toward doing an unlawful act. A distinguished text writer, adopting the definition taken from the brief report of the English commissioners of 1879, says: "An unlawful assembly is an assembly of three or more persons, who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously." *Aron v. City of Wausau*, 74 N. W. 354, 355, 98 Wis. 592, 40 L. R. A. 733.

Pen. Code, § 451, provides that when three or more persons, being assembled, attempt or threaten any act tending toward a breach of the peace or an injury to person or property or any unlawful act, such assembly is unlawful, and the parties participating therein are guilty of a misdemeanor. At a meeting held to protest against the execution of the Chicago anarchists, defendant made a speech in which he glorified their deeds, sympathized with their fate, denounced and threatened with death the officers connected with their case, stated that those present had

a more powerful weapon than the officers of the law possessed, and called on them to resist the authorities. This was sufficient to sustain a conviction of defendant under this statute. *People v. Most*, 7 N. Y. Cr. R. 376, 8 N. Y. Supp. 625.

To constitute an "unlawful assembly," within the meaning of Sanb. & B. Ann. St. § 938, providing that any three or more persons who shall assemble in a vile or tumultuous manner to do an unlawful act, or, being together, shall make any attempt or motion towards doing a lawful or unlawful act in a violent or unlawful manner, shall be deemed an unlawful assembly. The three or more persons must have a common purpose to do the act complained of. The complaint which alleges that plaintiff was injured by a fire cracker thrown by some one in crowd of 30 or more people engaged in exploding fireworks in the evening of July 4th does not state a cause of action under the statute. *Aron v. City of Wausau*, 98 Wis. 592, 597, 74 N. W. 354, 40 L. R. A. 733.

UNLAWFUL CALLING.

The words "unlawful calling," in Crim. Code, § 368, making it criminal to keep gambling houses, etc., or to engage in any unlawful calling whatever, includes the operating or carrying on of a lottery. In re *Smith*, 39 Pac. 707, 54 Kan. 702.

UNLAWFUL COHABITATION.

Clandestine acts of sexual intercourse, no matter how often repeated, do not constitute unlawful cohabitation, unless the parties openly and notoriously live together as paramour and concubine, habitually assuming and exercising toward each other the rights and privileges which belong to the matrimonial relation. No continuance of illicit intercourse makes out the crime so long as it is secret or attempted to be made so, but whenever secrecy is abandoned, and the concubinage is open, the offense is complete. The parties need not pass themselves off upon the community as husband and wife, but need only openly and notoriously consort and live together as if they were husband and wife—that is to say, as husbands and wives usually live. *Kinard v. State*, 57 Miss. 132, 134.

"Unlawful cohabitation," as used in Code 1880, § 2700, prohibiting unlawful cohabitation, etc., is not constituted by the acts of a teacher who, during a short period of time, commits a few acts of sexual intercourse with a pupil. *Brown v. State* (Miss.) 8 South. 257.

UNLAWFUL CONSPIRACY.

An "unlawful conspiracy" is defined to be a confederacy by two or more persons to

accomplish some unlawful purpose, or a lawful purpose by some unlawful means. *Blue v. Peters*, 20 Pac. 442, 446, 40 Kan. 701 (quoting 2 Bish. Crim. Law, 173).

The word "unlawful," as used in the definition of a conspiracy as a combination of two or more persons to do an unlawful act, is not confined to criminal acts, but includes all willful, actionable violations of civil rights. *Martens v. Reilly*, 84 N. W. 840, 843, 109 Wis. 464.

It is a criminal and indictable offense for two or more to confederate and combine together by concerted means to do that which is unlawful or criminal, to the injury of the public or portions or classes of the community, or even to the rights of individuals. A court of equity will interfere by injunction to restrain a combination of persons from boycotting one's business by intimidating and coercing his customers to leave, and endeavoring by abusive and threatening language to drive away their employes. The persons engaging in such a boycotting are engaged in an unlawful conspiracy. *Beck v. Railway Teamsters' Protective Union*, 77 N. W. 13, 20, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421.

UNLAWFUL CONTRACT.

An unlawful contract is an agreement to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is nonenforceable. There is no provision, either by statute or common law, which enjoins on any person the duty to marry, nor can any one be punished for not marrying. To marry or not to marry is left to the free choice of all who are eligible to marry. Hence to omit to marry is not illegal, though the promise to marry is one which the law will not enforce. *King v. King*, 59 N. E. 111, 112, 63 Ohio St. 363, 52 L. R. A. 157.

UNLAWFUL DETAINER.

An unlawful detainer is where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent or attorney. *McDevitt v. Lambert*, 2 South. 438, 440, 80 Ala. 536.

The expression "unlawful detainer" includes a peaceable entry and a forcible turning out or frightening by threats. *Sheehy v. Flaherty*, 20 Pac. 687, 688, 8 Mont. 365.

Unlawful detainer is where the defendant enters by contract, either as tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and in either case

willfully and without force, holds over the possession from the landlord, or the assignee of the remainder or reversion. *Shannon's Code Tenn. 1896*, § 5093.

Unlawful detainer by a tenant of real property is defined in Code Civ. Proc. § 1161, subd. 1, as when a tenant continues in possession in person or by subtenant of the property, or any part thereof, after the expiration of the term for which it is let, without the permission of the landlord. *Silva v. Campbell*, 24 Pac. 316, 317, 84 Cal. 420.

Ejectment distinguished.

The action of unlawful detainer and that of ejectment are not the same action or the same kind of action, either in substance or in form. The first is by a person who claims the possession not only of the real property, and founds his right to recover the possession solely upon a prior possession, constructive or actual, in himself or grantor, and against a person who cannot or has not the right to set up any right of possession as against the plaintiff, and no question of title or estate can be litigated in the case, while the second action is to recover an estate, legal or equitable, in the real property, with the title and the incidental right of possession; and the two cases must be brought in different forms, and presented to the courts by very dissimilar pleadings; and hence the pendency of an action of unlawful detainer will not cause an action of ejectment as to the same land to abate. *Buettinger v. Hurley*, 9 Pac. 197, 199, 84 Kan. 585.

Forcible entry and detainer compared.

When an entry upon lands is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offense committed is a forcible entry and detainer; but wherever the original entry is lawful, and the subsequent holding forcible and tortious, then the offense is an unlawful detainer only. *Pullen v. Boney*, 4 N. J. Law (1 Southard) 125, 129.

UNLAWFUL ENTRY.

An "unlawful entry," within Wood's Dig. p. 467, prohibiting an unlawful entry into the lands, tenements, and other possessions, is a peaceable entry, by fraud or without color of title. It is not every peaceable entry, when the right of entry does not, in fact, exist, that constitutes an unlawful entry, within the meaning of the statute. There must be some ingredient of fraud or willful wrong on the part of the party making the entry. *Dickinson v. Maguire*, 9 Cal. 46, 48.

To maintain an action for forcible entry and detainer for an unlawful entry, there must be some ingredient of fraud or willful wrong on the part of the party making the

entry. Every unlawful entry on land is not necessarily a forcible entry within the meaning of the statute. *Romero v. Gozales*, 1 Pac. 171, 172, 3 N. M. 35.

"Unlawful," as used in Code Civ. Proc. § 1019, giving the action of forcible entry and detainer against those who make unlawful and forcible entry in lands or tenements, or who, having a lawful and peaceable entry, unlawfully and by force hold the same, should be construed in its ordinary sense, and is not of the same import as "force." An act may be unlawful, and no force, as the word is generally understood, be exerted. So, too, the exertion of force may or it may not be unlawful. *Blaco v. Haller*, 1 N. W. 978, 9 Neb. 149.

UNLAWFUL GAME.

Other unlawful gaming, see "Other."

Rev. St. Mass. c. 50, § 17, providing for the punishment of any person not licensed as an innholder, etc., who for hire, gain, or reward suffers persons from time to time to resort to a house, etc., by him used and occupied, for the purpose of playing any unlawful game, means that such person shall be liable for each offense. By "unlawful game," as used in this statute, is not meant a continuing offense, which may be repeated from day to day and in connection with different individuals, and the proprietor is liable for each and every offense. *Commonwealth v. Stowell*, 50 Mass. (9 Metc.) 572, 575.

The game of bowls and ninepins is an "unlawful game," within Rev. St. Mass. c. 50, § 17, which makes it penal for any unlicensed person for hire or reward to suffer persons to resort to any house or building used and occupied by him for the purpose of playing at billiards, cards, or dice or any other unlawful game. "The object of the statute was to suppress open gaming houses of common resort, and we think that the Legislature intended to include the game of bowls and ninepins in the terms 'unlawful game.'" *Commonwealth v. Goding*, 44 Mass. (3 Metc.) 130, 131.

It is not necessary that there should be gaming or betting in order to render the game of ninepins unlawful, under Rev. St. c. 50, § 17, forbidding unlawful games, including ninepins. *Commonwealth v. Stowell*, 50 Mass. (9 Metc.) 572, 573.

The words "unlawful games at cards," in an indictment for keeping a gambling house, which charges the keeping of a house where unlawful games at cards were played, is a sufficient specification of the kind of games permitted. *Commonwealth v. Crupper*, 33 Ky. (3 Dana) 466.

A statute which imposes a penalty upon any person who shall suffer faro or any

other unlawful game or games, at which money or any other thing is won or lost, to be played in his house, cannot be restricted in its construction and operation to such games as have been specially prohibited or designated as unlawful, but applies to and includes all games at which money or property is lost and won, all such games being unlawful. *Vicaro v. Commonwealth*, 35 Ky. (5 Dana) 504, 505.

UNLAWFUL IMPRISONMENT.

An imprisonment is not unlawful, in the sense of the rule that habeas corpus is the proper remedy for any unlawful imprisonment, merely because the process or order under which the party is held has been irregularly issued or is erroneous. *Ex parte McCullough*, 35 Cal. 97, 100.

UNLAWFUL INJURY.

The phrase "unlawful injury," in a statute making it a misdemeanor to send any letter threatening to do an "unlawful injury" to the person or property of another, is held to mean an injury resulting from an act prohibited by the law of the state, whether common or statutory. *People v. Loveless*, 84 N. Y. Supp. 1114, 1115.

"Unlawful injury," as used in Pen. Code, § 553, declaring that fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury to the personal property of the individual threatened, should be construed to include a threat, by one representing himself to have control of certain striking employes, that unless the employer paid him a certain amount the employes would not return to work, whereby the employer's business would continue to be suspended. *People v. Barondess*, 81 N. E. 240, 241, 133 N. Y. 649.

UNLAWFUL INTERCOURSE.

The words "unlawful intercourse" must be held in a criminal case to be equivalent to the words "adultery" and "fornication"; and it would add nothing to the charge in an indictment under U. S. Comp. St. 1901, p. 3636, providing a punishment for the commission of adultery, if the words "sexual" or "carnal" were used in connection with the words "unlawful intercourse." *United States v. Griego* (N. M.) 72 Pac. 20, 21.

UNLAWFUL MEANS.

The expression "unlawful means," as used in Rev. St. U. S. § 5511, which provides that it shall be an offense for any person, by force, threats, intimidation, bribery, or reward, or by any other unlawful means, to induce any officer of election, etc., to violate or refuse to comply with his duty, or any law regulating the same, means any fraudu-

lent means, as well as the means expressed in the statute as unlawful. Any unlawful means used to induce an officer to make a false count of the votes cast at an election constitute an offense against the United States under this statute. The phrase "unlawful means" does not embrace arguments of counsel or statements made by parties in good faith, believing them to be true, and which will leave the mind of the officer free to exercise his unbiased judgment. *United States v. Watson* (U. S.) 17 Fed. 145, 149.

UNLAWFUL PURPOSE.

A building is "occupied or used for unlawful purposes," within the meaning of a policy of insurance by the owner containing a proviso that it should be void if occupied or used for unlawful purposes, where the tenant stored a number of barrels of intoxicating liquors within the building with intent to sell such liquors in it, and did in fact from time to time sell the same there by retail without license, in violation of Gen. St. c. 86, §§ 28-34, and did not sell or keep for sale on the premises any other property. *Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284, 287.

UNLAWFULLY.

"Unlawfully" means contrary to law. *Anderson v. Territory*, 18 Pac. 21, 24, 4 N. M. 108.

The word "unlawfully" is held to be the exact equivalent of the phrase "contrary to the form of the statute"; so that the word "unlawfully" need not be used when the equivalent phrase is used. *State v. Tibbetts*, 29 Atl. 979, 86 Me. 189.

"Unlawfully" is defined by Webster to mean "in an unlawful manner; in violation of law and right; illegally." *Whitman v. State*, 22 N. W. 459, 460, 17 Neb. 224.

The word "unlawfully" always means without legal justification. *Terrell v. State*, 86 Tenn. (2 Pickle) 523, 531, 8 S. W. 212, 214.

The term "unlawfully" implies that the act is not done as the law allows or requires. *State v. Lightfoot*, 78 N. W. 41, 42, 107 Iowa, 344 (citing *State v. Massey*, 97 N. C. 465, 2 S. E. 445).

"Unlawfully detained," as used in a statute giving a right to maintain the action of replevin for goods unlawfully detained, implied merely a detention contrary to law, and would not extend the right of action to goods held under color of authority of law, as by levy of execution. *Hilton v. Osgood*, 49 Conn. 110, 112.

The adverb "unlawfully," used in an indictment charging defendant with unlaw-

fully and feloniously, with intent to defraud, appropriating certain moneys belonging to the state, is equivalent to, synonymous with, and fully takes the place of the adverbial phrase "without authority of law," employed in Comp. Laws, § 6698, subd. 1, providing a punishment for such an offense. *State v. Taylor*, 64 N. W. 548, 552, 7 S. D. 533.

The word "unlawfully," as used in Cr. Code, § 3888, providing for the conviction and punishment of any person who unlawfully, maliciously, or negligently throws down or breaks any fence or inclosure of another, means that the act was not done by authority of law, or that the act was an act which the law prohibits. It is the converse of "lawful." *Wheeler v. State*, 19 South. 995, 111 Ala. 218.

The word "unlawfully," as used in an indictment, does not vitiate the indictment, though the word "unlawfully" is not used in the statute defining the offense. *State v. Robbins*, 66 Me. 324, 327.

The word "unlawfully" is not indispensable in an indictment against a railroad corporation for erecting a nuisance. The words "wrongfully" and "injuriously" are sufficient. *State v. Vermont Cent. R. Co.*, 27 Vt. 103, 110.

The insertion of the word "unlawfully" in an indictment or complaint is necessary when the statute uses it in describing the offense, but not necessary when the statute omits the word; but the word "unlawfully" need not be used when the offense is one at common law. Still, it is wise always to employ the word in charging the elements of an offense, because it negatives all legal cause of excuse for the act committed. *State v. Skolfield*, 29 Atl. 922, 923, 86 Me. 149.

When the word "unlawfully" is not made a part of the statutory description of an offense, the use of the word "unlawfully" in a criminal pleading asserts only a conclusion of law, and, if the conclusion arises out of the facts set forth, its express averment is unnecessary; if not, its omission leaves the indictment insufficient. If the language of the indictment describes acts in themselves unlawful, it adds nothing to their unlawfulness to say they were unlawfully done. *State v. Concord R. R.*, 59 N. H. 85, 86.

An indictment under Code, § 985, subsec. 6, prohibiting the wanton and willful burning of a stable, is not affected by the use therein of the words "unlawfully, maliciously, or feloniously" in addition to the words "wantonly and willfully," since the latter words might be regarded as surplusage. *State v. Battle*, 35 S. E. 624, 628, 126 N. C. 1036.

The word "unlawfully," as used in an indictment for assault, is a mere conclusion

of the pleader, and is confined in its application to the charge that the accused did commit an assault and battery. *State v. Smith*, 74 Ind. 557, 559.

"Unlawfully," as used in Code, § 1062, making it a misdemeanor to unlawfully and willfully deface, damage, or injure any house, may be properly applied to the acts of one who forcibly enters a house legally in the possession of another, even though he have a better title thereto. "One does not unlawfully destroy, deface, or injure his own property ordinarily when he has the same in his possession and complete control, but it is otherwise when it is in the possession of and claimed by others." *State v. Howell*, 12 S. E. 569, 107 N. C. 835.

Where the only specification of an offense in an affidavit was that accused "unlawfully" used a certificate of citizenship, knowing that the certificate had been unlawfully issued, the word did not give any information as to the nature of the offense. Whether the use was unlawful or not is a conclusion of law, and to allege that the use was unlawful is not to allege a fact. *In re Coleman* (U. S.) 6 Fed. Cas. 49, 53.

The insertion of the word "unlawfully" in a complaint for the sale of intoxicating liquors does not dispense with the necessity of specifically alleging the elements required by the state to constitute the crime charged against the defendant. *Commonwealth v. Byrnes*, 126 Mass. 248, 249 (citing *Commonwealth v. Hart*, 65 Mass. [11 Cush.] 180; *Same v. Tuttle*, 66 Mass. [12 Cush.] 502).

The term "unlawful," used in the description of an offense, is unnecessary whenever the crime existed at common law and is manifestly illegal. It is not necessary for the indictment to charge that an offense was unlawfully done, if the statute describing the offense does not use the word "unlawful." *State v. Murphy*, 43 Ark. 178, 179.

Battle's Revisal, c. 32, § 116, provides that no person, after being forbidden to do so, shall enter on the premises of another without a license, and that if any person, after being forbidden, so enter, he shall be guilty of a misdemeanor. Held, that the omission of the words "unlawfully" or "willfully" in a justice's warrant charging defendant with a violation of the statute in entering on another's land after being forbidden is a fatal defect, the title of the act being to prevent willful trespasses to land. *State v. Whitaker*, 85 N. C. 568, 568.

Falsely compared.

The words "willfully, unlawfully, and feloniously," when used in an indictment for forgery, though not words of the same import, have a broader and more extensive signification than the word "falsely," and are

more than its equivalent, so that the word "falsely" is not essential to the validity of the indictment. *State v. McKiernan*, 30 Pac. 831, 832, 17 Nev. 224.

Feloniously distinguished.

The use of the word "unlawfully" in an instruction relative to embezzlement will not supply the place of the word "feloniously" or "fraudulently," since, while defendant may have unlawfully converted the money to his own use, it does not necessarily follow that he did so with a felonious or fraudulent intent, and unless he did so with such intent he is not guilty of embezzlement, although the statute does not in express terms require that there should be a criminal intent. *State v. Cunningham*, 55 S. W. 282, 287, 154 Mo. 161.

"Feloniously" is a word of far broader and more criminal meaning than the word "unlawfully." An act cannot be feloniously and not unlawfully done, but it may be unlawfully done without being feloniously done. *Weinzorpflin v. State* (Ind.) 7 Blackf. 186, 195; *Shinn v. State*, 68 Ind. 423, 425.

In *Territory v. Miera*, 1 N. M. 387, Chief Justice Benedict says: "By using the word 'unlawfully' in Act 1897, c. 30, relating to felonious assault, the Legislature intended to discriminate between acts of violence which may be lawful and those which are not. The word 'feloniously' in an indictment cannot be used to supply the omission of the word 'unlawfully,' because the statute specially provides that assaults may be committed in defense of persons or property." *Territory v. Armijo*, 37 Pac. 1117, 1119, 7 N. M. 571.

Illegally synonymous.

The word "unlawfully" is synonymous with the word "illegally." *State v. Haynorth*, 35 Tenn. (3 Sneed) 64, 65.

Knowingly distinguished.

See, also, "Knowingly."

Where a statute provides that to constitute an offense the act must be done knowingly, an indictment charging the act as done unlawfully is insufficient, inasmuch as the word "unlawfully" neither comprehends nor is equivalent in meaning to the word "knowingly." *Tynes v. State*, 17 Tex. App. 123, 126.

Maliciously, wantonly, and willfully compared.

An act may be unlawful, and so involve legal responsibility, without being either willful or malicious, or it may be both unlawful and willful, without being malicious. The three terms are frequently found in statutes, and often all together. They constitute an ascending scale in culpability—a legal climax. Malicious imports an additional aggravation in guilt, and ill desert,

in the law's regard, beyond the other two combined. *State v. Alexander* (S. C.) 14 Rich. Law, 247, 253.

The words "unlawfully," "willfully," and "maliciously," in a statute punishing malicious trespass, are not synonymous, and were not intended to express the same idea. They each have a different signification, and import different degrees of guilt. An act may be unlawful, and so involve legal responsibility, without being either willful or malicious, or it may be both unlawful and willful without being malicious. *State v. Toney*, 15 S. C. 409, 412.

The word "unlawfully" does not import wanton and malicious manner. *State v. Harwell*, 40 S. E. 48, 129 N. C. 550.

The use of the words "willfully and unlawfully" in an indictment is not sufficient to charge malice. *State v. Lightfoot*, 78 N. W. 41, 42, 107 Iowa, 344.

"Unlawfully," as used in *Crim. Code Neb.* § 17, providing for the punishment of any person who shall unlawfully assault or threaten another, is equivalent to "willfully and maliciously," as used in an information alleging that defendant did willfully and maliciously make an assault upon another. *Hodgkins v. State*, 54 N. W. 86, 36 Neb. 160.

"Unlawfully" is not synonymous with "willfully." "Unlawfully doing a thing is not synonymous with willfully doing it. A man may do many things willfully which are not unlawful, and he may do many things unlawfully which are not willfully done." *State v. Hussey*, 60 Me. 410, 411, 11 Am. Rep. 206; *State v. Townsell*, 50 Tenn. (3 Heisk.) 6, 7; *Jones v. State*, 9 Tex. App. 178, 179.

The term "unlawfully," as used in an indictment charging that an act was unlawfully done, does not mean that it was wantonly and willfully done. *State v. Massey*, 2 S. E. 445, 446, 97 N. C. 465.

An indictment charging that one did unlawfully and willfully resist an officer in serving process is not sufficient under Code, § 4899, declaring a punishment if one knowingly and willfully make such resistance; "knowingly" not being synonymous with "willfully," and its omission not being supplied. *Seymour v. C. Aultman & Co.*, 80 N. W. 401, 109 Iowa, 297.

"Unlawfully," as used in an indictment charging that the defendant feloniously and unlawfully did set fire to, burn, and consume a certain barn, is not equivalent to the words "willfully and maliciously," as used in the statute on which the prosecution is based, which makes it criminal to willfully and maliciously burn, etc. *State v. Gove*, 34 N. H. 510, 516.

The words "unlawfully, maliciously, and feloniously," in an indictment for wounding less than mayhem, are not equivalent to "willfully and maliciously," employed in the statute relating to the offense, and the words "unlawfully and feloniously" will not supply the place of "willfully." *State v. Robinson*, 28 South. 1002, 1003, 104 La. 224.

The words "unlawfully and feloniously," as used in an indictment charging that the defendant unlawfully and feloniously did set fire to, burn, and consume a certain barn, are not equivalent to the words "willfully and maliciously," as used in the statute on which the prosecution is based, which makes it criminal to "willfully and maliciously" burn, etc. *State v. Gove*, 34 N. H. 510, 516.

Wrongfully distinguished.

The words "wrongfully" and "unlawfully" are not synonyms or equivalents of each other, nor convertible terms; so that, under a statute authorizing an action for personal property which has been wrongfully taken or unlawfully detained, it is held that an allegation that the property was wrongfully detained was not sufficient. *Louisville, E. & St. L. Ry. Co. v. Payne*, 2 N. E. 582, 584, 103 Ind. 188; *Hilton v. Osgood*, 49 Conn. 110, 112.

UNLAWFULLY CARRYING.

The Texas statute prohibiting the carrying of a pistol refers only to a carrying for purposes other than transportation, and where the owner of a pistol merely carries it home from the place where it was purchased, or from a shop where it had been repaired, such action did not constitute an unlawful carrying. *Pressler v. State*, 19 Tex. App. 52, 53, 58 Am. Rep. 883.

UNLESS.

"Unless it appears," as used in *Gen. St. c. 92, § 25*, declaring that, when a testator omits to provide for any of his children, they shall take a share, unless otherwise provided for, or "unless it appears" that the omission was intentional, implies that the burden of proof is on those who would make such intention appear. *Ramsdill v. Wentworth*, 106 Mass. 320.

The words "unless other damage occur," as contained in a provision of a tornado insurance policy that the company shall not be liable for loss from hail or blowing down of chimneys, shingles, etc., unless other damage occurs, refer to damage occurring from the thing insured against, namely, windstorms, and are operative when the wind has damaged the building over and above the blowing down of chimneys, etc. *Holmes v.*

Phoenix Ins. Co. (U. S.) 98 Fed. 240, 241, 89 C. C. A. 45, 47 L. R. A. 308.

An oil lease, which required certain wells to be completed within a stated time, contained the following: "In case no well is completed within 30 days from this date, then this grant shall become null and void, unless the second party shall pay the first party \$30.00 each and every month in advance while such completion is delayed." It was held that this clause beginning with "unless" gave the lessee the option by making such payment to continue the lease in force to the end of the term without completing the first well, or, upon failure to make such payment, allow the lease to become null and void at the end of 30 days after the date of the lease; that it did not constitute a promise or obligation to pay rental, and no action would lie for its breach. *Van Etten v. Kelly*, 64 N. E. 560, 562, 66 Ohio St. 605.

As except.

The primary meaning of "unless" is "unloosened from"; it has the force of "except"; so what follows in the sentence after the word "unless" is excepted or unloosened from what went before it. As used in Code, § 216, providing that the officer shall not be bound to keep the property levied upon unless the plaintiff, on demand, shall indemnify him, though negative in form, conveys an affirmative meaning, namely, that, if the claim is made as provided, it shall be valid against him. *Manning v. Keenan*, 73 N. Y. 45, 56, 57.

It is said in *Manning v. Keenan*, 73 N. Y. 45, 56, that the word "unless" has the force of the word "except"; its primary meaning is unloosened from; so what follows in the sentence after the word "unless" is excepted or unloosened from what went before it. Such a form of expression in a statute sometimes amounts to an affirmative enactment, and in fact, proprio vigore, confers all that is excepted from a negative or restrictive provision. Nor are instances lacking in enactments where it is manifest that by the expression of matter under the lead of the word "unless" it was meant to affirm the contrary of what was previously stated. As used in the constitutional provision that no county seat shall be removed unless a majority of the qualified electors of the county vote therefor, the lawmaking power is directed that it may not authorize by law the thing to be done upon a less vote than of a majority. *Alexander v. People*, 2 Pac. 894, 899, 7 Colo. 155.

The word "unless" means the same as "except," so that the words as used in a policy free from average, unless general, can never mean to leave the insurers liable to any particular average. *Wilson v. Smith*, 3 Burr. 1550, 1556.

"Unless" has the same force as "except," as used in Rev. Laws, pp. 395, 396, § 4, concerning promissory notes, providing that a plaintiff shall allow all just set-offs or discounts, not only against himself, but against the assignor of such note, before notice of such assignment shall have been given to the defendant, unless it shall be expressed in said note that the said sum therein mentioned shall be paid without defalcation or discount; and the meaning of the whole member is the same as if it read, "excepting from the operation of this provision such notes as are drawn payable without defalcation or discount." *Youngs v. Little*, 15 N. J. Law (3 Green) 1, 15.

"Unless," as used in Civ. Code, § 1395, providing that the kindred of the half blood inherit equally with those of the whole blood unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance, is equivalent to "except," and is here used to introduce an exception to the right of the half blood. In *re Pearson's Estate*, 42 Pac. 980, 962, 110 Cal. 524; In *re Smith's Estate*, 63 Pac. 729, 730, 131 Cal. 433, 82 Am. St. Rep. 358.

Rev. St. c. 92, § 4, enacts that kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. Held, that the word "unless" did not establish a general rule of inheritance, but meant merely to provide for a particular exception to the right of children of the half blood in the previous clause, and the person who is next of kin of the full blood of the intestate takes the inheritance, though not of the blood of the ancestor from whom it came to such intestate. *Cramer's Appeal*, 43 Wis. 167, 178.

UNLIQUIDATED.

Not ascertained in amount; not determined; remaining unassessed or unsettled; as unliquidated damages. *Black, Law Dict.*

UNLIQUIDATED ACCOUNT.

"There is no element of an open or unliquidated account in the indebtedness of one tenant in common to his co-tenant for rents collected. It is more in the nature of an action for money had and received by one person to the use of another, or that of an implied trust rather than an express trust." *Hairston v. Sumner*, 17 South. 709, 106 Ala. 381.

UNLIQUIDATED CLAIM.

"An unliquidated claim is one which one of the parties to the contract cannot alone render certain." *Ives v. Supervisors of Jefferson Co.*, 18 Wis. 166, 168.

The term "unliquidated claim" may be properly used to designate a claim in reference to which the holder, in order to obtain a settlement, must bear some further burden in order to have the amount so fixed that the debtor is bound thereby. This is always the case when a creditor's claim rests upon a quantum meruit. *Chicago, M. & St. P. R. Co. v. Clark* (U. S.) 92 Fed. 968, 975, 35 C. C. A. 120.

Rev. St. 1899, § 5854, provides that no costs shall be recovered in any action against a city of the third class on any unliquidated claim unless there has been presented to the council a statement in writing with full account of the items and verified as correct, reasonable, and just. Held, that the phrase "unliquidated claim," in the connection in which it is used in the statute, does not include actions *ex delicto*. *Haggard v. City of Carthage*, 67 S. W. 567, 168 Mo. 129.

Where a defendant rightfully received, but wrongfully retained, money belonging to the plaintiff, the claim therefor is neither uncertain nor unliquidated. It can be precisely ascertained by a mathematical calculation, and does not depend upon the evidence of witnesses. Therefore, under a statute providing that, if the plaintiff's cause of action be a claim for unliquidated or uncertain damages, the defendant shall not be permitted to set off any debt due him by the plaintiff, such a claim is subject to set-off. *Jones v. Hunt*, 12 S. W. 832, 833, 74 Tex. 657.

UNLIQUIDATED DAMAGES.

The term "unliquidated damages" applies to cases of tort and to cases upon a quantum meruit for goods sold and delivered or services rendered. The damages in such a case are an uncertain quantity, depending upon no fixed standard. While it is said a demand is unliquidated if one party alone cannot make it certain and when it cannot be made certain by mere calculation, yet the allowance of interest as damages is not dependent on this rigid test. *Cox v. McLaughlin*, 18 Pac. 100, 104, 76 Cal. 60, 9 Am. St. Rep. 164.

As the amount of damages liable for breach of a contract to sell a note at less than its face value is presumptively the difference between such face value and the agreed price, a claim based on such a breach is not one for unliquidated damages, for which an attachment can issue under the statute. *Dirickson v. Showell*, 28 Atl. 896, 897, 79 Md. 49.

UNLIQUIDATED DEBT.

An unliquidated debt is one which one of the parties alone can render certain as to what is due and how much is due. *Clark v. Dutton*, 69 Ill. 521, 523 (citing *Bouvier*).

UNLIQUIDATED DEMAND.

A demand is not liquidated, even though it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is "unliquidated," within the meaning of that term, as applied to the subject of accord and satisfaction. *Nassoly v. Tomlinson*, 42 N. E. 715, 716, 148 N. Y. 326, 51 Am. St. Rep. 695.

UNLIVERY.

"Unlivery" is a term used in the maritime law to designate the delivery of the cargo at the place where it is to be properly delivered. *The Two Catherine* (U. S.) 24 Fed. Cas. 424, 429.

UNLOAD.

A contract for the carriage of cattle, which recited that plaintiff should "load and unload" the cattle at his own risk, meant unloading at the terminus of transportation; and hence, where the cattle were detained by a snowstorm, and could have been unloaded by constructing a platform, which the carrier declined to do, and they remained in the cars 24 hours and were injured, the carrier was liable, if the injury was attributable to the failure to construct the platform and unload the cattle. *Penn v. Buffalo & E. R. Co.*, 49 N. Y. 204, 209, 10 Am. Rep. 355.

UNMANUFACTURED.

The term "raw or unmanufactured article not enumerated or provided for," in the McKinley tariff act, fixing a duty on such articles at 10 per cent., was construed not to include natural gas, which was held to be a "crude mineral," within the meaning of the latter term in the Free List. *United States v. Buffalo Natural Gas Fuel Co.*, 78 Fed. 110, 112, 24 C. C. A. 4.

Staves for pipes, hogsheds, and other casks were not free from duty, under the reciprocity treaty of 1854 between the United States and Great Britain, by which timber and lumber of all kinds, round, hewed, or sawed, unmanufactured in whole or in part, were to be admitted free of duty. *United States v. Hathaway*, 71 U. S. (4 Wall.) 404, 408, 18 L. Ed. 395.

UNMARRIED.

The term "any unmarried woman," as used in the statute providing that such a woman may institute a bastardy proceeding, is broad enough to include idiots and lunatics. But it is evident from the language employed in the same connection that only rational beings were within the contemplation of the Legislature. She is to begin the prosecution only by making a complaint on oath, so that only those who understand the binding force of an oath and are capable of giving testimony are within the spirit and intent of the act. *State v. Jehlik* (Kan.) 71 Pac. 572, 573, 61 L. R. A. 265.

The word "unmarried," as used in Comp. St. 37, § 1, declaring that on complaint made before a justice of the peace by an unmarried woman who shall hereafter be delivered of a bastard child, or being pregnant with a child which, if born, may be a bastard, accusing on oath any person of being the father of said child, the justice shall issue his warrant, etc., does not refer to the mother's status at the time of making the complaint in bastardy, but refers only to the status at such time as will affect the question of the legitimacy of the child or the liability of the husband to support it. *Parker v. Nothomb*, 91 N. W. 395, 396, 65 Neb. 306.

As never having married.

"Unmarried" means not married; having no husband or wife; and as used in 2 Rev. St. p. 64, § 44, providing that a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage, is a woman not in the state of marriage and does not apply to a woman who was divorced after the execution of the will, and subsequently married again. In *re Burton's Will*, 25 N. Y. Supp. 824, 826, 4 Misc. Rep. 512 (citing In *re Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292).

The ordinary meaning of the word "unmarried" is never having been married; so that a legacy to the unmarried daughters of the testator cannot be claimed by a daughter who was a widow at the death of the testator. *Hall v. Robertson*, 21 Eng. Law & Eq. 504; *Maberly v. Strode*, 3 Ves. 450, 454.

"Unmarried," as used in a will wherein the testator gave to a daughter, if she should survive her mother and be still unmarried, a certain unity, etc., means never having been married. In *re Thistlethwayte's Estate*, 31 Eng. Law & Eq. 547, 548.

"Unmarried," as used in a will devising realty to several devisees jointly, which on the death of either unmarried should go to the survivor or survivors of them, means without ever having been married. *Frail v. Carstairs*, 58 N. E. 401, 403, 187 Ill. 310.

Rev. St. c. 61, § 5, provides that a married woman should not be a competent witness, "except in cases where the wife would, if unmarried, be plaintiff or defendant." Held, that the words of the exception did not have reference to cases where the wife was subsequently divorced, or where her husband had died, but simply to cases where the proposed witness has never been married, where the controversy does not concern a right resulting from the marriage. *Smith v. Long*, 106 Ill. 485, 486.

"Unmarried" does not necessarily mean that the person was never married, and an examination to show a settlement by hiring service, stating that the pauper was "single and unmarried," but not stating that he had no child or children, was not sufficient. *Regina v. Wyondham*, 2 Adolph. & E. 541, 544.

The word "unmarried" originally and ordinarily means never having been married. But the term is a word of flexible meaning, and slight circumstances will be sufficient to give the word its other meaning of not having a husband or wife at the time in question. *Peters v. Balke*, 48 N. E. 1012, 1014, 170 Ill. 304; *Muller v. Balke*, 47 N. E. 355, 357, 166 Ill. 150; *Frail v. Carstairs*, 58 N. E. 401, 403, 187 Ill. 310.

"Unmarried," as used in Rev. St. c. 6, art. 3, tit. 1, providing that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," refers to a woman who is not in a state of marriage, and includes a widow. In *re Kaufman's Will*, 80 N. E. 242, 243, 180 N. Y. 620, 15 L. R. A. 292 (affirming 16 N. Y. Supp. 113, 61 Hun, 331).

The term "unmarried," in a will providing that, if at any time there should be but one unmarried daughter of testator, she should receive the whole income of certain property, was construed to include a widowed daughter. In reaching such conclusion the court said: "The appellants contend that the ordinary meaning of the word 'unmarried'—i. e., never having been married—should be given, and our attention has been called to the case of *Dalrymple v. Hall*, 16 Ch. Div. 717, wherein it was held, as stated in the headnote, that, in the absence of context showing a contrary intention, the word 'unmarried' must be considered according to its ordinary or primary meaning, as never having been married, and therefore a gift to the children of B. did not take effect, he being a widower. That case, however, is equal in authority for holding that, where the context does show a different intention, the word 'unmarried' should not be defined as never having been married." It was held in the case at bar that the will showed a clear intention on the part of testator that the term included widowed daughters as well as daughters who had never been married. In

re Oakley, 74 N. Y. Supp. 206, 208, 67 App. Div. 493.

The word "unmarried," as used in a will whereby the testator bequeathed his residuary estate to his unmarried nieces, includes nieces who had been married, but who were widows at the time of the testator's death. In re Conway's Estate, 5 Pa. Dist. R. 332, 334.

UNMARRIED PERSON.

"Person" meaning human being, as including body and mind, a man, woman, or child, an individual, the use of the words "unmarried person" in an indictment does not show whether the unmarried person was man or woman; but as used in an indictment for seduction it will be held to mean an unmarried woman. State v. Olson, 77 N. W. 332, 333, 108 Iowa, 667.

UNMOLESTED.

In an instruction in relation to the acquisition of a right of way by prescription, the court charged that "if you conclude that this way has been traveled unmolested for 20 years in one place, then the public has acquired the right to use or travel it." The word "unmolested" is about tantamount to the idea of an adverse use, especially when used in connection with the words "continuously for 20 years." Earle v. Poat, 41 S. E. 525, 530, 63 S. C. 439.

UNNECESSARILY.

An act is "unnecessarily" done when done outside of the usual course of business pertaining to the subject. Purdy v. Lynch, 40 N. E. 232, 235, 145 N. Y. 462.

UNNECESSARY.

"Unnecessary" is equivalent to "needlessly." Beopple v. Illinois Cent. R. Co., 58 S. W. 231, 234, 104 Tenn. 420.

UNNECESSARY DELAY.

A delay by a common carrier, in transporting freight, of 24 hours, at a station on the way, is an unnecessary delay, unless explained and excused by something which the law recognizes as sufficient. The excuse that the company needed its rolling stock for the purpose of carrying passengers is not a sufficient excuse. Ormsby v. Union Pac. R. Co. (U. S.) 4 Fed. 706, 707.

UNNECESSARY FORCE.

"Unnecessary force," as used when speaking of a course of conduct by one person

toward another which would constitute a cause of civil action, is generally synonymous with wanton or malicious force. Atchison, T. & S. F. R. Co. v. Ganta, 17 Pac. 54, 64, 38 Kan. 608, 5 Am. St. Rep. 780.

UNNECESSARY LOSS.

The term "unnecessary loss," in a contract whereby one party was to harvest defendant's grain in a thorough and farmerlike manner, without waste or unnecessary loss, cannot be construed to mean any loss which it would be possible to avoid by the greatest possible care and diligence and by the best possible appliances. The contract, in providing that one or more harvesters should be used, provided the test of due diligence; and if the condition of the grain made the use of more than one harvester necessary for its proper preservation, an obligation to use more than one arose. Turner v. Kearney, 116 Cal. 62, 66, 47 Pac. 866, 867.

UNNECESSARY NOISE.

"Unnecessary noise," as used in a complaint alleging that, while the plaintiff was detained by a train at a railroad crossing, another train came up suddenly behind the first train and to the crossing, and, by making a great and "unnecessary noise" from a concealed position, caused plaintiff's horse to run away and injure him, is equivalent to saying noise was needlessly made. Beopple v. Illinois Cent. R. Co., 58 S. W. 231, 234, 104 Tenn. 420.

Quietly working within a closed church on the Sabbath day, on the benches therein, is not making an "unnecessary noise within the corporate limits * * * calculated to disturb the peace, quiet or good order of the city," within the municipal ordinance penalizing such offense, the work in question not being itself of such a character or causing such noise as would ordinarily disturb any citizen, the only disturbance occasioned arising from the fact that it was done on the Sabbath. Keck v. City of Gainesville, 25 S. E. 559, 98 Ga. 423; McCutcheon v. Same, Id.

UNNECESSARY PROLIXITY.

In construing the statute permitting all matters of defense to be given in evidence under the general issue on the defendant's filing a notice of all matters in avoidance and of any defense, "stating in general terms, and without unnecessary prolixity, and in a manner intelligible to a person of ordinary understanding, the true ground and substance of the defense relied upon," the court said: "The expression 'in general terms' (concisely; comprehensively) and the expression 'without unnecessary prolixity' (i. e., unnecessary minuteness of detail), is unmeaning, for that is equally a fault in a special plea, although

not demurrable in either; and the expression 'intelligible to a person of ordinary understanding' evidently refers to the kind of language, and was doubtless intended to prevent the use of technical phrases. They all refer to the manner of stating the defense, and do not excuse an omission of substance." *Merrill v. Everett*, 38 Conn. 40, 48.

UNOBSTRUCTED.

"Unobstructed" means free from obstacles or impediments which check, hinder, or retard passage; and a patent specification calling for an ink reservoir "open and unobstructed" at the lower end is not infringed by the use of a penholder, in the bottom of the reservoir of which is screwed a perforated nozzle, through which the ink is conducted to the pen. *Sackett v. Smith* (U. S.) 42 Fed. 846, 852.

UNOCCUPIED.

As commonly used and understood, the word "occupation" is synonymous with "possession." According to Webster, occupancy is the act of taking or holding possession, and "occupy" means to take possession; to hold or keep for use; and a dwelling house will be deemed unoccupied, within an insurance policy providing that the same should be void if the premises became unoccupied, where the tenant commenced to move out, and had removed most of his furniture and all of his family from the house, leaving no one in it at the time the fire took place. *Walt v. Agricultural Ins. Co.* (N. Y.) 13 Hun, 371, 373.

"Unoccupied," as used in Act March 3, 1854, § 6, providing that every person shall be assessed in the township or ward where he resides when the assessment is made, for all lands then owned by him within the said township or ward, either occupied by him or wholly unoccupied, means untenanted. *State v. Reinhardt*, 31 N. J. Law (2 Vroom) 218, 219.

The word "unoccupied," as used in a fire policy providing that it shall become void if the house insured becomes unoccupied, means when no one lives therein. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 188, 37 Am. Rep. 488.

"Unoccupied," as contained in an insurance policy providing for the annulment of the same "if the premises shall become vacant and unoccupied," is not synonymous with "vacant," but is that status where no one has the actual use or possession of the thing or property in question. *Herrman v. Merchants' Ins. Co.*, 44 N. Y. Super. Ct. (12 Jones & S.) 444, 453.

The words "unoccupied premises" mean vacant premises; that is, that there is no

one in actual possession, exercising any acts of control over the premises, or any part of them. *Hill v. Warrell*, 87 Mich. 135, 138, 49 N. W. 479, 480.

Barn.

"Occupying" means using, but the occupation of a barn means a very different use than that of a house or an outbuilding. *Fritz v. Home Ins. Co.*, 44 N. W. 139, 140, 78 Mich. 565.

Where insured was engaged in carrying on the farm contiguous to the insured buildings, and he and his servants took their meals in the house, and the barn was used for the usual purposes of a farm barn, for storing hay and farm tools, but cattle were not kept in it, the barn will be considered unoccupied within the meaning of a policy providing that buildings unoccupied are not covered by the policy unless insured as such. *Johnson v. Norwalk Fire Ins. Co.*, 56 N. E. 569, 570, 175 Mass. 529; *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 424, 17 Am. Rep. 117.

Church.

The term "occupied," as applied to a building insured against fire, always implies the substantial and practical use of the building for the purpose for which it is intended, and as contemplated by the policy (*Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law [15 Vroom] 220, 223, 43 Am. Rep. 365). As to a dwelling house, it being designed for occupancy by human beings, it is occupied when human beings actually reside in it, and unoccupied when no one lives or dwells in it (*Hartshorne v. Agricultural Ins. Co.*, 50 N. J. Law [21 Vroom] 427, 430, 14 Atl. 615). The definition of "occupied" as applied to a dwelling will not, of course, cover a barn, a mill, a sawmill, a factory, music halls, theaters, or churches. If church buildings are kept for use for the purposes for which they are designed, and used as occasion presents and as the convenience of the congregation requires, and there is no intent shown to abandon them for the purposes of their use by the temporary period of nonuser, even though those periods may exceed the 10-day limit in a policy, such act is not per se a leaving of a church building vacant and unoccupied, within the forfeiture clause of a policy. Where services had been held in a church until there was no minister, and the building was in charge of trustees, the president of the board having the key, and acting, as he always had, as the sexton, visiting it frequently, caring for it, and going in it as often as five times a week, the furniture being in the church, as well as the organ used in worship, and there was no change in the use of the property, or determination to nonuse it as a church, but it remained ready to be opened as soon as any one could be secured to preach—one minister having been secured to preach on a certain Sunday, the church being opened, and

the congregation gathered—the church is occupied, though the minister did not appear. *Hampton v. Hartford Fire Ins. Co.*, 47 Atl. 433, 434, 65 N. J. Law, 265, 52 L. R. A. 344.

Dwelling.

The word "occupancy," as used in insurance policies in relation to dwelling houses, implies an actual use as a dwelling place. *Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 290, 19 Ind. App. 173; *Bonenfant v. American Fire Ins. Co.*, 43 N. W. 682, 683, 76 Mich. 653; *Cook v. Continental Ins. Co.*, 70 Mo. 610, 614, 35 Am. Rep. 438; *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 43, 93 Mo. App. 111; *Agricultural Ins. Co. v. Hamilton*, 33 Atl. 429, 430, 82 Md. 88, 30 L. R. A. 633, 51 Am. St. Rep. 457.

"Unoccupied," as used in an insurance policy providing that the insurance shall be void if the dwelling house remains unoccupied, means not used by human beings as their customary place of abode. *Weidert v. State Ins. Co.*, 24 Pac. 242, 250, 19 Or. 261, 20 Am. St. Rep. 809; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644.

"Unoccupied," as used in an insurance policy on a dwelling, making the same void so long as it shall be unoccupied, means when no one lives or dwells in it. In such contracts the word is to be construed with reference to the nature and character of the building, the purpose for which it is designed, and the uses contemplated by the parties as expressed in the contract; and a dwelling house, being designed as the abode of mankind, is occupied when human beings habitually reside in it, and unoccupied when no one lives or dwells in it. *Hartshorne v. Agricultural Ins. Co.*, 14 Atl. 615, 617, 50 N. J. Law (21 Vroom) 427; *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law (15 Vroom) 220, 223, 43 Am. Rep. 365.

The term "vacant or unoccupied," in a policy of fire insurance, providing that it shall become void if the building "herein described be or become vacant or unoccupied," etc., means that the house is without an occupant; that is, no one is living in it. *Schuermann v. Dwellinghouse Ins. Co.*, 43 N. E. 1093, 1094, 161 Ill. 437, 52 Am. St. Rep. 377 (citing *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463, 25 N. W. 785; *Alston v. Old North State Ins. Co.*, 80 N. C. 326); *Agricultural Ins. Co. v. Hamilton*, 33 Atl. 429, 430, 82 Md. 88, 30 L. R. A. 633, 51 Am. St. Rep. 457.

The word "occupancy," as used in a fire insurance policy relating to the occupancy of a house necessary to prevent the avoidance of the policy, is not to be understood in any technical sense. It is not that occupancy or possession which follows the legal title, and which the assured might be said to have by

reason of owning and cultivating the farm on which the house stands. It means something more than this. As applied to the dwelling, it must be understood in the popular sense, as defined in the following cases: "For a dwelling house to be in a state of occupancy, there must be in it the presence of human beings, as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage." *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 169, 39 Am. Rep. 644. "A dwelling house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools." *Fitzgerald v. Connecticut Fire Ins. Co.*, 25 N. W. 785, 786, 64 Wis. 463 (citing *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117); *Moore v. Phoenix Ins. Co.*, 6 Atl. 27, 31, 64 N. H. 140, 10 Am. St. Rep. 384.

The occupancy required by the terms of the policy includes the care and supervision involved in the use of the house as a dwelling, and hence, where insured moved out and took his furniture away, leaving the house without occupants, the policy was forfeited, notwithstanding he left some one to look after it. *Bonenfant v. American Fire Ins. Co.*, 43 N. W. 682, 683, 76 Mich. 653; *Cook v. Continental Ins. Co.*, 70 Mo. 610, 614, 35 Am. Rep. 438; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644.

The word "unoccupied," as applied to a dwelling house in a fire insurance policy, signifies not used as a residence; and consequently a designated tenement becomes unoccupied when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode. Hence, no matter what other use it may be devoted to, so long as it ceases to be a place of actual abode—a place really occupied as a residence or habitation—it is vacant or unoccupied, according to the plain import of those words, and according to the sense in which they are manifestly employed in a contract of insurance to become void on the dwelling house becoming vacant and unoccupied. It is not a mere casual or occasional sleeping in a house that constitutes an occupancy of it. The element of a fixed abode is an essential ingredient of every concept of occupancy when applied to a dwelling house, and the term "unoccupied" is employed to express the directly opposite condition. *Agricultural Ins. Co. v. Hamilton*, 33 Atl. 429, 430, 82 Md. 88, 30 L. R. A. 633, 51 Am. St. Rep. 457.

The absence of one who resided in a house for six weeks, though he returned fre-

quently and looked after the house and the property therein, makes the premises "unoccupied," within an insurance policy providing that the same should be void if the house should be left unoccupied without giving immediate notice to the company thereof. *Paine v. Agricultural Ins. Co. (N. Y.)* 5 *Thomp. & C.* 619, 621.

A dwelling house is unoccupied, within a policy providing that the same shall be void if the premises become vacant or unoccupied, and so remain, without notice to and consent of the insured, where the house remains vacant for three months, and is then let to a tenant, who up to the time of the loss has placed in the house only implements for cleaning it, but has not otherwise occupied it. *Litch v. North British & Mercantile Ins. Co.*, 136 *Mass.* 491.

Ordinarily a dwelling house is unoccupied when no one is living in it and having it as a home—a place of residence. The rule that, in order to constitute occupancy of a dwelling house, some one must live in it, does not, of course, preclude the occupant from visiting or being temporarily absent, nor would such a rule preclude a tenant from moving out, and some one else moving in, giving a reasonable time for the one to get out and the other to get in. Where a tenant had moved his family out, and had moved everything but some trifles of no particular value, and had gone away without any expectancy of returning to the house for the purpose of living there, and there was no expectation that another tenant was to be put in such house, the house was unoccupied, within the meaning of an insurance policy conditioned that it should be void in case the building was unoccupied, unless consent for such inoccupancy had been indorsed on the policy. *Snyder v. Firemen's Fund Ins. Co.*, 42 *N. W.* 630, 631, 78 *Iowa*, 146.

Where premises insured for a number of years had been occupied as a summer residence by the insured, the winter months being spent in the city, and the residence being visited by the insured or his wife two or three times a week, when they frequently took their meals and entertained their friends there, and the assured had entertained a party of friends in the house two days before the fire, it was not unoccupied, within the condition of a policy prohibiting a cessation of occupancy for more than 30 days. *Western Assur. Co. v. Mason*, 5 *Ill. App.* (5 *Bradw.*) 141, 147.

To constitute occupancy of a building insured as a dwelling house, it is not essential that it be put to all the uses ordinarily made of a dwelling, or to some of those uses all the time, or that the whole of it be employed in that use; nor will the building be considered as unoccupied upon its ceasing to be used as a family residence, where the household

goods remain ready for use, and it continued to be occupied by one or more members of the family, who have access to the entire building, for the purpose of caring for it, and who do care for it, and make some use of it as a place of abode. *Moody v. Amazon Ins. Co.*, 38 *N. E.* 1011, 1013, 52 *Ohio St.* 12, 28 *L. R. A.* 313, 49 *Am. St. Rep.* 699.

The term "occupied," within the meaning of an insurance policy containing a condition that if the premises become vacant or unoccupied and so remain for more than 10 days, without notice to or consent of the company in writing, it should be void, means that the house must be habitually occupied; that is, somebody must have lived there and slept there habitually—not every night, but usually and ordinarily. A dwelling house on a farm, which is not occupied, except by the men working on the farm, during the time they are so employed, for cooking their meals and sleeping, is not occupied within the meaning of the policy. *Fitzgerald v. Connecticut Fire Ins. Co.*, 25 *N. W.* 785, 786, 64 *Wis.* 463.

Same—Partial removal of goods.

A condition in a fire policy, avoiding it in case the building becomes vacant and unoccupied, requires, in order to avoid the policy, not only that the building shall become unoccupied, but also that it shall be vacant; and therefore the policy is not avoided by the removal of the owner of the house for the season, if he leaves his furniture thereat. *Herrman v. Merchants' Ins. Co.*, 81 *N. Y.* 184, 187, 37 *Am. Rep.* 488.

A building from which the tenant thereof partially moves, leaving in the building a portion of his furniture, is not vacant or unoccupied within the meaning of a policy of insurance providing that it should be void if the premises became vacant or unoccupied, etc. *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 56 *N. W.* 693, 696, 38 *Neb.* 146, 41 *Am. St. Rep.* 724.

A house which a tenant is notified to leave, and which he does leave some two days before a fire burning the same, with his landlord's knowledge and with his consent, leaving there some articles not required for housekeeping in his new quarters, is "vacant and unoccupied," within the meaning of a provision in an insurance policy, declaring the policy void if the premises become "vacant or unoccupied." *Richards v. Continental Ins. Co. of New York*, 47 *N. W.* 350, 83 *Mich.* 508, 21 *Am. St. Rep.* 611.

A building in which the late occupants have left a part of their furniture after they are sleeping and taking their meals in another house is vacant, though the key has not been surrendered to the landlord, within the meaning of an insurance policy providing that it shall be void if the premises become

vacant or unoccupied. *Corrigan v. Conn. Fire Ins. Co.*, 122 Mass. 298, 300.

When the occupant of a dwelling house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling house, while thus deserted, must be regarded as unoccupied—that is, vacated—if the word be given its natural and ordinary signification. *Agricultural Ins. Co. v. Hamilton*, 33 Atl. 429, 430, 82 Md. 88, 30 L. R. A. 633, 51 Am. St. Rep. 457.

A house from which the occupants had been absent for several months on a visit, but the furniture of whom was left therein, and to which house the occupants' relatives went daily, was not "vacant or unoccupied," within the meaning of a policy of insurance providing that it should be void on the property being left vacant or unoccupied, etc. *McMurray v. Capital Ins. Co.*, 64 N. W. 354, 355, 87 Iowa, 453.

It appears that an insured building may be unoccupied, within the meaning of a fire policy, without being vacant—as, for instance, a dwelling house from which the family has removed, leaving a portion of their goods in the building, will not be vacant, but is unoccupied. The fact that a tenant of insured and his servants had for two days before the fire, which occurred in the night, been cleaning the dwelling house preparatory to its occupation, did not constitute an occupation, within the meaning of the policy. *Thomas v. Hartford Fire Ins. Co. (Ky.)* 53 S. W. 297, 298.

Where the insured left the house covered by the insurance policy, and went elsewhere to reside, taking part of her furniture with her, and leaving the rest, but left a man in charge, with instructions to sleep in the house at night, who quit the premises several days before the fire, and did not return, and no one was in the house when the fire occurred, the house was "unoccupied," within the insurance policy, providing that the same should be void if the premises became unoccupied. *Cook v. Continental Ins. Co.*, 70 Mo. 610, 614, 35 Am. Rep. 438.

A dwelling house in which no one lives, but in which a former occupant left some trifling articles of furniture, of little value, is "vacant and unoccupied," within the meaning of a policy of fire insurance providing that it shall be void if the building herein described be or become "vacant or unoccupied," or not in use. *Schuermann v. Dwelling House Ins. Co.*, 43 N. E. 1093, 1094, 161 Ill. 437, 52 Am. St. Rep. 377 (citing *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 394).

Same—Repairs.

Premises which are being repaired will not be deemed occupied in a way rendering

the insurance risk more hazardous than at the time of insuring, making repairs not being a way of occupying premises. *Townsend v. N. W. Ins. Co.*, 18 N. Y. 168, 176.

An insurance policy provided that "if the premises should become vacant or unoccupied, and so remain, with the knowledge of the assured, without notice and consent of the company, in writing, this policy shall be void." The dwelling house insured was rented to a tenant, who left the premises, and the owner immediately prepared to occupy the house, and, to that end, had certain repairs made, and moved her furniture into the house, but had not commenced living in it when the house was burned. The court held that occupation of a dwelling house requires that there must be in it the presence of human beings at their customary place of abode, not absolutely uninterrupted and continuous, but that must be the place of usual return and habitual stoppage, and that the purpose of the owner to move in and occupy it, and the taking of all preliminary steps to the occupancy, was not sufficient, and hence that the insured was not liable for such loss. *Barry v. Prescott Ins. Co. (N. Y.)* 35 Hun, 601, 602, 606.

A house is vacant and unoccupied, within the meaning of a fire policy conditioned against the premises becoming vacant and unoccupied, if the tenant moves out on the 26th of March, and it is burned on March 31st, before a new tenant has moved in, though he intended to move April 1st, and made some repairs in the house prior to the fire. In so holding, the court cites *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, in which the court said: "Occupation of a dwelling house is living in it." *Paine v. Agricultural Ins. Co.*, 5 Thomp. & C. 619. A fair and reasonable construction of the language "vacant and unoccupied" is that it should be without an occupant; without any person living in it. *American Ins. Co. v. Padfield*, 78 Mo. 167, 169. Speaking of a dwelling house and barn, *Oolt, J., in Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117, observed that occupancy, as applied to such buildings, implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an unoccupied house, or at least something more than the use of it for storage. *Continental Ins. Co. v. Kyle*, 24 N. E. 727, 729, 124 Ind. 132, 9 L. R. A. 81, 19 Am. St. Rep. 77.

A house vacated by the tenant, which is taken possession of the next day by the owner, intending to keep it himself, and who has papered, painted, and moved his furniture into the same, and keeps his employees in and about the house from 6 in the morning till 7 or 8 in the evening, preparing it for occupancy, and which is destroyed by

fire the day before he expected to move into the same, is not "vacant or unoccupied," within the meaning of a policy declaring that the insurer shall not be liable for loss occurring where the insured property is vacant or unoccupied. *Eddy v. Hawkeye Ins. Co.*, 30 N. W. 808, 811, 70 Iowa, 472, 59 Am. Rep. 444.

Same—Temporary absence.

A mere temporary absence of the occupant of a building therefrom will not render void a policy of insurance which contains a provision that the policy shall become void in case the building becomes vacant. *Springfield Fire & Marine Ins. Co. v. McLimans*, 45 N. W. 171, 172, 28 Neb. 846; *East Texas Fire Ins. v. Kempner*, 34 S. W. 393, 398, 12 Tex. Civ. App. 533.

An insurance policy providing that, if the buildings become vacant or unoccupied, the policy will be void, will not be held to mean that there must be a continuous actual occupancy, so that the owner could not temporarily leave the premises. *Home Fire Ins. Co. v. Peyson*, 74 N. W. 960, 961, 54 Neb. 495.

In an action on an insurance policy, the evidence showed that the plaintiff and her husband and family occupied the premises of the dwelling house, and that a week or two before the fire they left the house to visit friends, leaving no one there, but during that time the husband came back and stayed in the house overnight on two occasions, and was there the night of the fire. All the furniture was left in the house, and plaintiff took with her a satchel containing a few clothes for herself and her boy. Held, that the house was not vacant or unoccupied, within the insurance policy, providing that the same should be void if the premises were unoccupied. *Johnson v. New York Bowers Fire Ins. Co.* (N. Y.) 39 Hun, 410, 411.

Where the insured had for some time before the fire slept in an adjoining house, which belonged to her daughter, but had never abandoned the premises—her furniture and wearing apparel being left in the house, and she returning and spending the day there—the house will not be deemed to have been unoccupied, within an insurance policy providing that, if the premises should become unoccupied without the consent of the company indorsed thereon, the policy should become void. *Gibbs v. Continental Ins. Co.* (N. Y.) 13 Hun, 611, 620.

In *Herrman v. Insurance Co.*, 85 N. Y. 162, 39 Am. Rep. 644, the court, in construing a fire policy providing that the policy should be void if the house should become vacant or unoccupied, pointed out a distinction between the words "vacant" and "unoccupied," the latter condition being broken when the house was either empty or unused

as an abode, while the former required a concurrence of the absence of the occupants, and a removal of the inanimate contents of the premises. It is said in *Halpin v. Insurance Co.*, 120 N. Y. 73, 23 N. E. 988, 8 L. R. A. 79, in which a similar policy was being construed, that, while a dwelling house will not be regarded as being occupied unless it is the home or dwelling place of some person, yet temporary absence, leaving the property for a short period unoccupied, will not be regarded as a breach of the condition, while absence for a fixed, definite period, even with the intention to return and occupy the property, will violate the condition and render the policy void. The court, after citing the above cases, held that the absence of the insured from the property for nearly five months, during which time no one occupied the house, was in violation of a clause prohibiting the property from becoming vacant or unoccupied, and that such absence worked a forfeiture of the policy. *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95, 98, 64 App. Div. 367.

A house is not unoccupied, within the meaning of a fire insurance policy conditioned that it should be void if the house should become vacant or unoccupied without assent of the company, when it has an inhabitant who intends to remain in it as his residence, but who has left it for a temporary purpose. *Stupetzki v. Transatlantic Fire Ins. Co.*, 5 N. W. 401, 402, 43 Mich. 373, 38 Am. Rep. 195.

A dwelling house does not become unoccupied, within the meaning of a fire insurance policy providing that it should become void, unless consent in writing was indorsed on the policy by or in behalf of the insurer, if the building insured be or become vacant or unoccupied for the purpose indicated in the contract, where the owner of such dwelling, after a tenant has vacated, moves his furniture in and fills up the house, with an intention of making it his residence, but during that time does not actually occupy it at night, subsequently leaves it temporarily on business, and puts a party in possession until his return. *Shackleton v. Sun Fire Office*, 21 N. W. 343, 344, 55 Mich. 288, 54 Am. Rep. 379.

In holding that a fire policy containing a clause that it should become void if allowed to become vacant and unoccupied, without notice to the company, was avoided by the fact that it had remained vacant for 17 days before the fire, the court said that it was not a question as to how long the vacancy may have existed without the knowledge of the assured, but that he was bound to see that the house did not become vacant, or to give the required notice. "Of course, the terms of the contract must receive a reasonable construction. The par-

ties did not intend that one tenant should not move out and another move in. Nor did they intend that the house should be deemed vacant if the occupant should close it and go off on a visit, and not occupy it for a reasonable time." *Dennison v. Phenix Ins. Co.*, 3 N. W. 500, 502, 52 Iowa, 457.

"Occupancy" of a dwelling house, within the meaning of a fire insurance policy, implies an actual use of a house as a dwelling place, but it does not follow that the presence of the occupant in the building should be continuous and uninterrupted. The necessity of temporary absences on business, or for family convenience or pleasure, is recognized, and the insured is understood to contemplate an assent to them. *Shackelton v. Sun Fire Office*, 21 N. W. 343, 344, 55 Mich. 288, 54 Am. Rep. 379.

A dwelling house, to be in the state of occupancy, must have in it the presence of human beings as at their customary place of abode; not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. Temporary absence, either on pleasure, or from accident or for business purposes, cannot make a dwelling vacant or unoccupied, within the meaning of an insurance policy providing that it shall be void when it is vacant or unoccupied. *Morgan v. Illinois Ins. Co.* (Mich.) 90 N. W. 40, 41.

Occupation of a dwelling house is living in it, not mere supervision over it. It is not necessary that some person should live in it at every moment during the life of an insurance policy thereon containing a provision invalidating the policy if the premises should be unoccupied, but there must not be a cessation of occupancy for any considerable portion of time. *Johnson v. New York Bowery Fire Ins. Co.* (N. Y.) 39 Hun, 410, 411; *Paine v. Agricultural Ins. Co.* (N. Y.) 5 Thomp. & C. 619, 621.

"Unoccupied," as used in a policy providing that it should not be valid if the house insured was permitted to remain vacant and unoccupied for more than 10 days, meant an absence intended to be permanent for that length of time; and hence the fact that the owner of the house, who lived in it alone, left it for two months, does not, as a matter of law, render it vacant and unoccupied, where the absence was not intended to be permanent, and during such absence the house was visited daily by a neighbor, with whom the keys had been left. *Hill v. Ohio Ins. Co.*, 58 N. W. 359, 99 Mich. 359.

Elevator.

Where property insured was an elevator, and, though part of the time it was not actually used, and there was no steam or men working there, men were around the place all the time, and the insured kept his papers there, the elevator was occupied, and not

vacant in the sense that would avoid the policy. *Williams v. North German Ins. Co.* (U. S.) 24 Fed. 625.

Factory or mill.

A building insured as a morocco factory, which is vacated, and its key given to the owner's renting agent, who visits it only occasionally, is unoccupied, within the meaning of a clause in the policy of insurance making it void if the building becomes vacant or unoccupied. *Halpin v. Aetna Fire Ins. Co.*, 23 N. E. 988, 120 N. Y. 70; *Same v. Phenix Ins. Co.*, 23 N. E. 482, 484, 118 N. Y. 165; *Caraher v. Royal Ins. Co.*, 17 N. Y. Supp. 858, 864, 63 Hun, 82.

"Unoccupied," as used in a condition avoiding a policy of insurance on a mill in case the premises become unoccupied, refers to something more than a temporary suspension of work in the mill. They were not unoccupied, within the meaning of this clause, where the works had been stopped for five days, in the meantime being used for the storage and delivery of goods, requiring daily visits by one or two persons. *Albion Leadworks v. Williamsburg City Fire Ins. Co.* (U. S.) 2 Fed. 479, 488.

"Unoccupied," as used in a policy of insurance on a shop and the machinery therein, providing that, if the building insured remained unoccupied over 30 days without notice, the policy should be void, required a practical use of the building; and it was not sufficient to constitute an occupancy that the tools remained in the shop, and that a person went through almost every day to see that everything was in proper condition. *Keith v. Quincy Mut. Fire Ins. Co.*, 92 Mass. (10 Allen) 228, 230.

"Unoccupied," as used in an insurance policy conditioned that the policy shall be forfeited if the property insured becomes vacant and unoccupied, except to set up new machinery or make repairs, does not apply to a temporary suspension of the principal work of a cotton factory—the watchman and others being still employed—whether such suspension was to set up machinery or repair, or not. *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 17 N. E. 771, 775, 125 Ill. 131.

To render a sawmill "vacant and unoccupied," within an insurance policy invalidating same if the premises shall become vacant and unoccupied, there must be an entire abandonment of it by the owner. *Whitney v. Black River Ins. Co.* (N. Y.) 9 Hun, 37, 41.

A sawmill in which a gang of saws are rendered temporarily useless by the breaking of a journal, and the repairing of which is made difficult by the condition of the water, but the yard of which is occupied by logs which the owner intended to saw, is not "va-

cant and unoccupied," within the meaning of a policy providing that it shall become void on the premises becoming vacant and unoccupied. *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 120, 28 Am. Rep. 116.

"Occupy," as used in a fire policy on a sawmill, requiring insured or others to occupy the mill, is synonymous with "operate." *Ladd v. Aetna Ins. Co.*, 24 N. Y. Supp. 384, 386, 70 Hun, 490.

Lands.

Vacant and unoccupied land, within the statute of limitations, vesting title to "vacant and unoccupied land" in one who, having color of title thereto, pays taxes thereon for seven years, means land not in the actual possession of one; and hence the keeping of a wagon, when not in use, upon a city lot, in which the owner of the wagon has no claim or color of title, does not keep the lot from being vacant and unoccupied, within the meaning of the words as used in the statute. *Walker v. Converse*, 36 N. E. 202, 204, 148 Ill. 622.

The words "unoccupied lands of the United States," as used in the treaty of February 24, 1869, with the Bannock tribe of Indians, providing that they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts, cannot be construed alone, but must be construed with reference to the context in which they are found, and when so construed they refer only to the lands of the character embraced within what the treaty denominates as hunting districts. *Ward v. Race Horse*, 16 Sup. Ct. 1076, 1077, 163 U. S. 504, 41 L. Ed. 244.

Under a provision of the city charter that, where sewage assessments are made upon any unoccupied lot of a nonresident owner, it shall be made in his name, and entered in a list of nonresident owners, etc., it is held that a lot which was inclosed, but was uncultivated, and had no buildings upon it, and no one in actual possession, was unoccupied, within the meaning of the charter. *Hill v. Warrell*, 87 Mich. 135, 137, 49 N. W. 479, 480.

Tenement.

"Unoccupied," as used in a fire policy on a tenement building, which policy provided that the same should be void if the building should become unoccupied, meant not occupied by any one; and hence the fact that all of the apartments were vacant, save two, did not avoid the policy. *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126, 129.

Where an insurance policy covered 8 double tenement houses, separated from each other, and each of the 16 tenements was

valued separately, and the policy provided that if the premises became unoccupied, and remained so for 20 days, without the company's consent, the policy should be void, the vacancy provided against applied to each of the tenements separately; and hence the fact that several of them were vacant without the permission of the company, in violation of the condition, did not work a forfeiture of the entire policy, so as to preclude a recovery for the destruction of such of the tenements as had not been unoccupied within the terms of the provision. *Connecticut Fire Ins. Co. v. Tilley*, 14 S. E. 851, 852, 88 Va. 1024, 29 Am. St. Rep. 770.

The term "vacant or unoccupied," as used in a fire policy conditioned that it shall be void if the premises become vacant or unoccupied, has no definite signification, applicable to all circumstances. Under certain circumstances premises may be vacant or unoccupied, when, under other circumstances, premises in like situations may not be so. Thus, if one insures his dwelling house, described in the policy as occupied as his residence, and he moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insured it as a tenement house, or as occupied by a tenant, it may be fairly presumed that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant immediately on tenants leaving it. *Hotchkiss v. Phoenix Ins. Co.*, 44 N. W. 1106, 1107, 76 Wis. 269, 20 Am. St. Rep. 69 (citing *Lockwood v. Assurance Co.*, 47 Conn. 553, 561; *Whitney v. Black River Ins. Co.* [N. Y.] 9 Hun, 37, 39, 1 Wood, Ins. § 91, pp. 208, 210).

Saloon or store.

A policy provided that it should not cover unoccupied buildings, and, if the premises shall be vacated without the consent of the company indorsed thereon, the policy should cease. In an action to recover a loss under the policy, one of the defenses was that the policy was not in force at the time of the fire, by reason of the fact that the building was vacant and unoccupied. The trial court instructed that the word "unoccupied," as used in the policy, should be construed in its ordinary and popular sense, and, as applied to a saloon building, meant such want of occupancy as usually or ordinarily attends or is exercised over a saloon building while being operated as a saloon, and that if the jury believed that the saloon had been vacated late in the evening of the day preceding the fire, and that the plaintiff was then in the city, and so far away from the building that the time intervening between the hour of vaca-

tion and hour of the fire was not reasonably sufficient to permit the plaintiff to reoccupy it after the vacation and before the fire, then the saloon could not be considered to be vacated, within the terms of the policy. On appeal the court held that the words "vacant and unoccupied," in accordance with the instruction, should be construed in view of the uses and purposes for which the building is adapted; also, whether the parties contemplated that the premises were to be occupied by the assured or by a tenant, that the words, when used in a policy on a dwelling, were not to be construed the same as when used in a contract of insurance on a store, livery stable, or schoolhouse, since it could not be contended that a policy on a school building was not in force during the summer vacation, though there was no person in the building during the period, and therefore that the mere leaving of the building unoccupied during the night did not render it vacant and unoccupied, within the meaning of the policy. *German Ins. Co. v. Davis*, 59 N. W. 698, 700, 701, 40 Neb. 700.

Where the tenants of a store building abandon it a short time before the lease expires, but retain the key, by permission of the owner, and leave a few empty barrels and some old boxes and papers in the building, it was unoccupied, within the meaning of an insurance policy. *Home Ins. Co. of New York v. Scales*, 15 South. 134, 71 Miss. 975, 42 Am. St. Rep. 512.

Where a tenant has removed all his property from a store building, except a very small quantity, which he has permitted a third person to store there, it is vacant and unoccupied, within the provisions of a fire insurance policy making it void in case the property is vacant and unoccupied for a period of 10 days. *Limburg v. German Fire Ins. Co.*, 57 N. W. 626, 627, 90 Iowa, 709, 23 L. R. A. 99, 48 Am. St. Rep. 468.

A building containing furniture and fixtures, and in which a person slept part of the time, and containing stove, chairs, and other furniture suitable for a saloon, and also a small stock of liquors in kegs and bottles, is not "vacant, unoccupied, or not in use," within a policy of insurance against fire, exempting the insurer from liability if the building should be vacant, etc., at the time of the fire. *Stensgaard v. National Fire Ins. Co.*, 30 N. W. 468, 36 Minn. 181.

UNOFFICIAL TITLE.

Under the occupying claimant's act (Gen. St. 1878, c. 75, § 15), providing for two classes of occupants, to wit, first, those who, "under color of title and in good faith, have peacefully taken possession," etc., the first class may be defined as those who go into possession of land under color of what may

be termed private or unofficial title. *Pfefferle v. Wieland*, 56 N. W. 824, 825, 55 Minn. 202, 209.

UNOPENED.

A statute providing that roads which had remained unopened for 10 years should be vacated, and the authority for opening it repealed, would not apply to a road which was located and established, and in which there was nothing to prevent the public from traveling over it; not being inclosed or shut up or obstructed. *City of Topeka v. Russam*, 2 Pac. 669, 676, 30 Kan. 550.

Rev. St. § 4668, providing that any county road that shall remain unopened for seven years after the order is made for opening it shall be declared vacated, should not be construed to apply to roads located substantially upon then existing traveled ways, since a way that was a traveled way at the time did not require a formal opening under the order of the commissioners. *Heddleston v. Hendricks*, 40 N. E. 408, 409, 52 Ohio St. 460.

"Unopened road," as used in Laws 1879, c. 150, § 1, providing that any county road, or part thereof, which has been authorized, which shall remain unopened for public use for the space of seven years at any one time, after the order made or the authority granted for opening the same, shall be vacated, cannot be construed to include a road which is in fact used as a public highway by the public. *Wilson v. Janes*, 29 Kan. 233, 248.

UNORGANIZED COUNTY.

By the term "unorganized county," in the act of February 24, 1879, authorizing the judge of the district court to designate the county where the indictment may be found, etc., is meant simply a county which has not become organized for local government under a statute providing how that may be done. The act contemplates no such thing as a county organized for judicial purposes, for, when a county becomes organized under a law, it is so for all known purposes of civil administration—judicial as well as others. *Olive v. State*, 7 N. W. 444, 447, 11 Neb. 1.

UNPAID.

See "Remaining Unpaid."
All unpaid taxes, see "All."

To say that a note is unpaid is equivalent to saying that it has not been paid, as the prefix "un" placed before the past participle indicates the absence of the condition or state expressed by the participle; hence an allegation that a note is still wholly owing

and unpaid is equivalent to an allegation that the note is still wholly due, and has not been paid. *Tomlinson v. Ayres*, 49 Pac. 717, 718, 117 Cal. 568.

A bond conditioned for the payment of a sum of money in five equal annual installments provided that interest should be payable annually from date on the whole amount unpaid, at the rate of 10 per cent. per annum. Held, that the word "unpaid" imported that any amounts not paid when due according to the condition of the bond should continue to bear interest at the rate of 10 per cent., payable annually, until the bond was paid. *Miller v. Hall*, 18 S. O. 141, 146.

As owing.

"Unpaid," as used in an affidavit that an account filed as a set-off was "just, due, and unpaid," is equivalent to "justly due and owing," as used in How. St. § 7525, requiring the affidavit to set out that the account is "justly owing and due," for, if it is just, due, and unpaid, it must necessarily be justly owing and due. *McGowan v. Lamb*, 33 N. W. 881, 882, 66 Mich. 615.

As unaccrued.

"Unpaid," as used in a will giving the testator's wife the income of certain land during her life, or the interest on the proceeds in case she sold it after his death, and providing that at her death the principal and unpaid interest of the whole amount given her should vest in his children and their children, etc., will not be construed to mean unaccrued, but to have been used in its literal sense, so that the interest earned by the widow's fund, but not collected by the trustee or paid to her at the time of her death, vested in the testator's children. *Nading v. Elliott*, 36 N. E. 695, 700, 137 Ind. 261.

As undue.

The word "unpaid" is more commonly and properly applied to a debt due than to a debt undue, and may at least as well mean a debt due as undue. Therefore no power to confess a judgment for a debt undue is even implied by a power of attorney to confess judgment on a note for such amount as may appear to be unpaid thereon. *Sloane v. Anderson*, 15 N. W. 21, 22, 57 Wis. 123; *Reid v. Southworth*, 36 N. W. 866, 867, 71 Wis. 288.

UNPAID ASSESSMENTS.

"Unpaid assessments," as used in Act March 26, 1873, requiring the judges of the Supreme Court to appoint three commissioners to revise, alter, and adjust all unpaid assessments, is to be construed in its ordinary signification of unpaid individual assessments. *Edwards v. Jersey City*, 40 N. J. Law (11 Vroom) 176, 179.

UNPAID RENT.

"Unpaid rent," as used in laws giving a right of distress to any landlord if the tenant shall convey away, etc., leaving the rent, or any part thereof, unpaid, means the arrears of rent; that is, rent behind in payment, although due. *Weiss v. Jahn*, 37 N. J. Law (8 Vroom) 93, 96.

UNPAVED.

A municipal charter authorizing the lease of portions of the "unpaved" wharf applies to any portion not paved in a manner suitable for receiving and discharging passengers and freight, and includes a portion unused for that purpose, from which most of the macadam has been washed away. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 13 S. W. 822, 826, 101 Mo. 192, 8 L. R. A. 801.

UNPROFESSIONAL

"Unprofessional" is used in Laws 1883, c. 125, § 9, authorizing the state medical examining board to refuse certificates of practice to those guilty of unprofessional or dishonorable conduct, convertibly with dishonorable, since it might be deemed unprofessional for the members of one school of medical practice to consult professionally with a member of a different school; but such matters are not within the plain purpose of the act, which was the affording of protection to the people against ignorant, unqualified, and unworthy practitioners of this profession. *State v. State Medical Examining Board*, 20 N. W. 238, 241, 32 Minn. 324, 50 Am. Rep. 575.

"Unprofessional or dishonorable conduct," as ground for refusing a certificate to practice medicine, is: (1) The procuring, or aiding or abetting in procuring, a criminal abortion; (2) the obtaining of a fee on the assurance that a manifestly incurable disease can be permanently cured; (3) betrayal of a professional secret to the detriment of a patient; (4) causing the publication and circulation of advertisements of any medicine or means whereby the monthly periods of women can be regulated, or the menses can be established, if suppressed; (5) causing the publication and circulation of advertisements of any kind relative to diseases of the sexual organs, tending to injure the morals of the public. *Cobbey's Ann. St. Neb.* 1903, § 9428.

UNQUALIFIED.

Opinion or belief.

"Unqualified opinion," as used in Wood's Dig. 296, § 347, excluding a juror in a criminal case who has formed or expressed an un-

qualified opinion as to the prisoner's guilt, involves a belief in the facts as well as a conclusion from them. If a juror had read or heard a statement of the facts of a case this does not of itself disqualify him, for it does not follow that he has either formed or expressed an unqualified opinion. He may not have formed any opinion at all, certainly not an unqualified one. He may have received an impression, but this impression is not enough to disqualify him. A mere suspicion or inclination of the mind towards a conclusion is not enough. The state of mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters. *People v. Reynolds*, 16 Cal. 128, 133.

What constitutes "unqualified opinion or belief" sufficient to disqualify a juror is sometimes very difficult to determine. Perhaps as good an exposition of the technical meaning of this phrase is to be found in the opinion of Mr. Justice Baldwin in the case of the *People v. Reynolds*, 16 Cal. 128, 132, as could well be given. Among the causes of implied bias is the having formed or expressed an unqualified opinion or belief that the prisoner is guilty or is not guilty of the offense charged. Upon no one question of civil or criminal practice have the decisions of courts been more inharmonious than upon this question of qualification or disqualification of jurors arising from the formation or expression of opinion of the guilt or innocence of the accused. These terms were used to define the nature of the opinion or belief formed or expressed—to distinguish between a mere hypothetical opinion or a mere casual impression and a decided or fixed opinion. The language implies that, to exclude the juror, he must have a settled conviction of the guilt or innocence of the party, or has expressed such a conviction. It does not seem to be indispensable, under this section, that the juror has had the usual or any means or opportunities of arriving at a correct or intelligent opinion upon the subject if he has formed it or if he has expressed it. Minds are so differently constituted that some men form opinions and very obstinately adhere to them upon slender and insufficient grounds, while others are undecided when sufficient reason exists for forming them. If the juror has read or heard a statement of the facts of the case, this does not, of itself, disqualify him, for it does not follow that he has either formed or expressed an unqualified opinion. He may have received an impression, but this impression is not enough to disqualify him. A mere suspicion or inclination of the mind toward a conclusion is not enough; the state of the mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters. *State v. Millain*, 3 Nev. 409, 429.

"Unqualified opinion or belief," as used in a statute providing that any juror shall be disqualified who has formed or expressed an "unqualified opinion or belief that the defendant is guilty," means a fixed and certain belief, and is incompatible with reasonable doubt and uncertainty, and is not dependent on the existence or nonexistence of any extrinsic facts. It is a condition of the mind or a fixed conclusion which closes the mind against any testimony which may be presented in opposition to it, and resists the force of such testimony and perverts the judgment. The opinion or judgment must be something more than a vague impression formed from casual conversation with others or from reading abbreviated newspaper reports. It must be such an opinion on the merits as will be likely to bias or prevent a candid judgment from a full hearing of the evidence. *People v. O'Loughlin*, 1 Pac. 653, 654, 3 Utah, 133.

A juror, having formed and expressed an opinion as to defendant's guilt, is not subject to challenge as having formed an "unqualified opinion," if his information is derived from barroom talks, and he does not know the persons with whom he conversed, is not acquainted with the defendant, and does not entertain any deliberate or fixed opinion or belief as to his guilt or innocence. *State v. Raymond*, 11 Nev. 98, 107.

An "unqualified opinion," within the meaning of the statute making an unqualified opinion or belief a ground for challenge, is such a settled conviction in the mind of the juror, founded upon the knowledge of the facts of the case, as would raise a strong presumption of partiality; but a hypothetical opinion, founded on hearsay or information, and unaccompanied with malice or ill will, will not support a challenge for implied bias. There is a wide distinction between a fixed opinion formed after hearing what purports to be the facts and a mere impression formed upon rumor or hearsay evidence. *Haugen v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. 769, 771, 3 S. D. 394.

The term "unqualified opinion," within the rule that a juror who has formed an unqualified opinion is subject to challenge, does not characterize an opinion of a juror based upon hearsay, and not upon statements made by any one claiming to have personal knowledge, if the juror still thinks he can render a true verdict. *State v. Ormiston*, 23 N. W. 370, 376, 66 Iowa, 143.

The forming and expressing of an unqualified opinion sufficient as a ground of challenge for cause to a juror is not shown by the mere fact that the juror heard some of the facts and formed a slight opinion, if he has forgotten the facts, and states that he thinks he can try the case fairly and without

regard to his previous opinion. *Collins v. Burns*, 28 Pac. 145, 146, 16 Colo. 7.

An unqualified opinion, within the meaning of a statute providing that an unqualified opinion as to the defendant's guilt shall render a juror subject to challenge, means a fixed and settled conviction of the guilt or innocence of the defendant. *People v. King*, 27 Cal. 507, 512, 87 Am. Dec. 95.

In construing the statute providing that an unqualified opinion or belief in the prisoner's guilt shall render a juror subject to challenge, the court say the difference between an opinion and an unqualified opinion or belief is not very broad, and sometimes not recognized by a juror. It is very proper by other questions to ascertain whether in fact the opinion is an unqualified one or is dependent upon the truth of facts or rumors which the juror may have heard and whether it is merely an impression. In the case of *People v. Reynolds*, 16 Cal. 128, the court say the effect upon his mind must be more than an impression—it must amount to a conviction. *People v. Symonds*, 22 Cal. 848, 851.

The term "unqualified opinion" in the rule that a juror who has formed and expressed an unqualified opinion is subject to challenge does not include an opinion which the juror has formed and expressed, but is conditioned on the truth of reports which he has heard. *State v. Ostrander*, 18 Iowa, 435, 451.

The term "unqualified opinion," within the rule that a juror who has formed or expressed an unqualified opinion as to the guilt or innocence of the defendant is subject to challenge, does not apply to a juror who states that he has not formed an unqualified opinion, but if what he has heard is proved at the trial he has an opinion, but that he has no prejudice or bias to prevent him from hearing the evidence and giving a verdict in accordance with the law and testimony. *State v. Sater*, 8 Iowa, 420, 424.

Where a juror testifies that he has a fixed opinion, which it would require evidence to remove, he has an "unqualified opinion," so as to be incompetent as a juror. *People v. Johnston*, 46 Cal. 78, 79.

A juror who, in answer to a question, said he had formed some opinion from what he had heard, but never expressed any, that he did not place explicit belief in what he had heard, and that his opinion was a conditional one, had not an "unqualified opinion," so as to render him incompetent as a juror. *People v. Murphy*, 45 Cal. 137, 142.

The term "unqualified opinion," within the rule that a person having formed or expressed an unqualified opinion as to the guilt or innocence of the defendant is subject to challenge, applies to an opinion where it is unconditional that defendant is guilty or

innocent; but if the opinion is with the condition that if what the juror has heard about the case is true, then the defendant is guilty or not guilty, the opinion is qualified. *State v. George*, 18 N. W. 298, 62 Iowa, 682.

In construing the requirement that the forming or expressing of an "unqualified opinion" subjects a juror to challenge for cause, the court say that it is argued by the Attorney General that there is a difference between expressing an unqualified opinion and the unqualified expression of an opinion; and so there is, if we resort to a verbal criticism or mere metaphysical disquisition. It was not the intention of the Legislature to leave the right of parties to rest upon so narrow and dangerous a foundation. Their obvious intention was to exclude from the jury box every one who had either formed an unqualified opinion, or, having formed an opinion, had expressed it without qualification. *People v. Cottle*, 6 Cal. 227, 228; *People v. Edwards*, 41 Cal. 640, 643; *People v. Brotherton*, 43 Cal. 530, 532.

Ownership.

The New York statutes used the term "power of alienation" in reference to the real estate, and "unqualified ownership" in reference to personal property, in prohibiting perpetuity, but the meaning of the terms is synonymous. *Ladd v. Mills* (U. S.) 20 Fed. 792, 793.

UNQUESTIONABLE.

"Unquestionable," as used in insurance policies providing that the insurance shall be unquestionable, meant indisputable, and amounts to an absolute guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured. *Simpson v. Life Ins. Co. of Virginia*, 20 S. E. 517, 115 N. C. 393.

UNREASONABLE DELAY.

In determining what will constitute an "unreasonable delay" in applying for a mandamus regard should be had to circumstances which justify the delay, to the nature of the case, and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay. Where a person was dismissed from the police force of a city without legal trial, a delay of over two years in applying for a mandamus to compel the board of councilmen to try him was unreasonable, there being no special circumstance to excuse or justify such delay. *Taylor v. City of Bayonne*, 30 Atl. 431, 57 N. J. Law, 376.

"Unreasonable delay," as offering proof of acceptance of a delivery of goods, and refusal to accept within a reasonable time, are

substantially alike. Beyond a reasonable time is unreasonable delay. If the delay is not reasonable, it is unreasonable. *Pratt v. Peck*, 36 N. W. 410, 412, 70 Wis. 620.

Under Rev. St. U. S. § 4922 [U. S. Comp. St. 1901, p. 8396], providing that a patentee who has inadvertently claimed more than he is entitled to may maintain a suit for any distinguishable part of the patented invention which was bona fide his own, provided that no patentee shall be entitled to the benefit of this section, if he has unreasonably neglected or delayed to enter a disclaimer, a delay of over four years in filing a disclaimer of a claim which has been adjudged invalid by a judgment from which no appeal was taken is an unreasonable delay, and operates to invalidate the whole patent. *Office Specialty Mfg. Co. v. Globe Co.* (U. S.) 65 Fed. 599, 605 (citing *Singer v. Walmsley* [U. S.] 22 Fed. Cas. 207).

A common carrier must deliver goods without unreasonable delay, and if damages be sustained by reason of neglect to transport goods thus received in the ordinary time, unless excused by uncontrollable circumstances, the carrier must respond in damages. Having possessed himself of the goods to be transported, he must perform the duty within a reasonable time or be held liable for the loss which ensues. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 70, 5 Am. Rep. 83.

As used in Gen. St. § 1707, providing that interest may be recovered on money withheld by an "unreasonable and vexatious delay," should be construed as meaning something more than delay in the payment of a sum due. *Corson v. Neatheny*, 11 Pac. 82, 84, 9 Colo. 212.

UNREASONABLE DISTRESS.

The phrase "unreasonable distress," as used in Rev. Code, p. 869, § 24, providing that any person taking an unreasonable distress shall answer in damages to the party injured, means such a distress as a reasonable and fairly intelligent man taking into consideration the mode of sale, if the goods should come to sale, would know to be materially more than enough to satisfy the rent and expenses, and such excess should be a substantial and not of a trifling character. If the distress is unreasonable in amount, and made without malice on the part of the defendant, plaintiff is entitled to recover such damages as he has sustained by reason of the taking of such unreasonable distress. *Weber v. Vernon* (Del.) 45 Atl. 537, 538, 2 Pennewill, 359.

UNREASONABLE RATE.

In Rev. St. 1895, arts. 4565, 4566, authorizing action against the railroad commission

by a party dissatisfied with a rate made by it, in which such party must show that the rate is unreasonable and unjust to him, the same construction should be given to the phrase "unreasonable and unjust" that would have obtained in a suit to recover from the carrier excess of charges paid. At common law, in a proceeding of this kind, the term meant that the rate charged was more than a fair compensation for the services rendered, or that the difference in rates constituted an unjust discrimination against the complainant. *Garton v. Bristol & E. Ry. Co.*, 101 E. C. L. 112, 153, sustains the position that the carrier had the right to discriminate between shippers as to the amount of charges, provided it did not amount to an unjust discrimination; and in *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, the court says that the obligation which the common law imposed on the carrier was to accept and carry all goods delivered on being paid a reasonable compensation for so doing, and, if the carrier refused to accept such goods, an action lay against him, and, if the customer paid on a protest a larger sum than was reasonable, he could recover back the surplus beyond what the carrier was entitled to receive. But the fact that the carrier charged others less, though it was evidence that the charge was unreasonable, was no more than evidence tending that way. There was nothing at common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable. Discrimination in rates is often necessary to uphold justice and promote the public good, and such discrimination is not unreasonable or unjust as to him who gets in service the equivalent of what he pays. *Railroad Commission of Texas v. Weld & Neville*, 73 S. W. 529, 531, 96 Tex. 394.

UNREASONABLE TIME.

In determining what is an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case. *Bates' Ann. St. Ohio* 1904, § 3178b; *Ann. Codes & Sts. Or.* 1901, § 4592; *Code Supp. Va.* 1898, § 2841a.

"Unreasonable lapse of time," as used in the chapter relating to the dissolution of marriage, and providing for the denial of the divorce where there is an unreasonable lapse of time before the commencement of the action, means such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same with intent to continue the mar-

riage relation, notwithstanding the commission of the offense set up as a ground of divorce. Rev. Codes 1899, N. D. § 2753.

UNSAFE.

Feel unsafe and insecure, see "Feel—Felt."

Where, in an action for death caused by the condition of a road, there was a submission to the jury as to whether the highway was "defective and unsafe," the court said such expression is substantially equivalent to the expression "insufficiency or want of repair," as used in the statute authorizing a recovery for damages caused by the insufficiency or want of repair of any bridge or road. *Carpenter v. Town of Rolling*, 83 N. W. 953, 956, 107 Wis. 559.

An unsafe condition of a building which has been partially destroyed by fire, which will render the owner liable for damages caused by the falling of the building after a reasonable time is allowed him to repair, is such a condition that it would not be able to resist the elements under ordinary circumstances which might exist in that locality, or under such extraordinary circumstances as might happen in that locality, judging from past experience. *Lauer v. Palms* (Mich.) 89 N. W. 694, 695, 58 L. R. A. 67.

As insolvent.

In Rev. St. 1878, § 4551, relating to receiving deposits by banks in insolvent condition, provides that when any officer knows, or has good reason to know, that such bank is unsafe or insolvent, and receives any deposit, he shall be punished, etc., the word "unsafe" is used interchangeably with "insolvent," and does not vary the meaning of the statute. In re *Koetting*, 62 N. W. 622, 623, 90 Wis. 166.

UNSAFE AND INSECURE.

"Unsafe and insecure" in a chattel mortgage providing that, if the mortgagee at any time feel unsafe or insecure, he may seize and sell the property, etc., does not mean an arbitrary discretion, but there must be a sense of insecurity or want of safety occasioned by some present or contemplated act, which tends to impair the security of the mortgage. *Lichtenberger v. Johnson*, 49 N. W. 336, 32 Neb. 185.

UNSATISFIED.

"Unsatisfied," as used in the return of an execution as being unsatisfied, is not equivalent to a return of "No property found," and hence such return is not sufficient to continue the judgment lien under

Comp. St. 1858, p. 567, authorizing a judgment creditor to enforce the same at any time within five years after the entry thereof, but providing that when no execution shall have been issued or levied, or returned "No property found," within five years from the time of the entry of the judgment, the lien thereof shall be determined, and the property of the judgment debtor discharged therefrom. *Sherburne v. Rippe*, 29 N. W. 322, 323, 35 Minn. 540.

In proceeding to authorize the grant of an order of examination after execution, the sheriff's return of "Unsatisfied" on the execution is proof that there is no known property liable to execution. *Hinsdale v. Sinclair*, 83 N. C. 338, 343.

UNSATISFIED ACCOUNTS.

"Unsatisfied accounts," within the meaning of a charge that another has stolen a file of unsatisfied accounts, cannot be construed to mean any writing which is made by the statute the subject of larceny. *Blanchard v. Fisk*, 2 N. H. 398, 400.

UNSEATED LANDS.

In reference to assessing realty, "unseated lands" are those on which there are no such improvements as indicate a personal responsibility for its taxes. *Stoetzel v. Jackson*, 105 Pa. 562, 567.

The term "unseated," when used to denote a condition of real property, would seem to mean that class of lands which are neither in the possession of, nor cultivated by, any person. In *Kennedy v. Daily* (Pa.) 6 Watts, 269, it was held that residence without cultivation, or cultivation without residence, or both, constitutes seated lands. *McLeod v. Lloyd*, 71 Pac. 795, 799, 43 Or. 260.

UNSEAWORTHY.

Where a plea in an action on a policy insuring a ship alleged that the ship became unseaworthy before the loss, further allegations that she was "greatly broken, damaged, and shattered and loosened" did not add to the allegation of unseaworthiness, the last words being applicable to any damage, however slight. *Hollingworth v. Brodrick*, 7 Adol. & E. 28, 31.

UNSETTLED.

Any unsettled person, see "Any."

Unsettled item.

, An item in an account annexed, which has been paid and a receipt given and accepted therefor, cannot be considered an

"unsettled item," within Rev. St. c. 81, § 87, relating to mutual accounts. *Perry v. Chesley*, 77 Me. 393, 395.

UNSETTLED MERCHANT.

An itinerant or unsettled merchant or trader, within the meaning of the act relating thereto, shall include every person, firm, or corporation who, either in person or by agent, sells, or offers to sell, any goods, wares, or merchandise then in the state without any manifest intention of permanently settling, locating, or residing at some one place in the state, and who is not permanently located and regularly taxed therein. *Comp. Laws Nev. 1900, § 1243.*

UNSETTLED WOMAN.

"Unsettled woman," as used in St. 1879, relating to the acquiring of a settlement by a married woman, and providing that a settlement thereunder shall be deemed to have been gained by any unsettled woman upon the completion of the term of residence therein mentioned, etc., means a woman who was unsettled at the time the statute went into effect. *Worcester v. Great Barrington*, 5 N. E. 491, 492, 140 Mass. 243.

Where an unmarried woman had derived a settlement through her father at the time of the passage of the act of 1879, she was not an "unsettled woman," within the retroactive provision of such act, which provides that "a settlement by five years' residence should be deemed to have been gained by any unsettled woman, although the whole or a part thereof accrues before the passage of this act." *Middleborough v. Plympton*, 4 N. E. 568, 569, 140 Mass. 825.

UNSKILLFULNESS.

As used in the proposition whether a loss by fire, remotely caused by the negligence, carelessness, or unskillfulness of the master and crew of a vessel, is a loss within the policy of insurance on the vessel, "unskillfulness" does not mean a general unskillfulness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel, but only unskillfulness in the particular circumstances remotely connected with the loss, in which sense it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity. *Waters v. Merchants' Louisville Ins. Co.*, 36 U. S. (11 Pet.) 213, 219, 9 L. Ed. 69.

In usual parlance, "misconduct means a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, and carelessness, negligence, and unskillfulness are transgressions of some established but

indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite." *Citizens' Ins. Co. v. Marsh*, 41 Pa. (5 Wright) 386, 394.

UNSOLD.

The word "unsold," as used in a statute providing that all pieces or parts of land remaining unsold at a tax sale shall be stricken from the tax list, means "not sold to an actual purchaser," and no inference can be drawn from it that it was not intended that tracts not thus sold should be "bid in for the state," which is never referred to in any of the tax laws as a sale, nor the state called a "purchaser." *Mulvey v. Tozer*, 42 N. W. 387, 388, 40 Minn. 384.

In construing Act Cong. Sept. 28, 1850 (9 Stat. 519), granting to Illinois and other states all unsold swamp and overflowed lands belonging to the United States, the court holds that the term "unsold" in that act is not restricted in its application to land which had been transferred for a money consideration, but that land which had been properly located under a military land warrant was sold, within the meaning of the act. *Culver v. Uthe*, 10 Sup. Ct. 415, 416, 133 U. S. 655, 33 L. Ed. 776.

UNSOUND.

A disease of any sort, if easily removed, but which by neglect or maltreatment proves fatal, is not "unsoundness," within the meaning of the warranty of a negro. *Gadsden v. Raysor* (S. C.) 9 Rich. Law, 276, 281.

Horse or mule.

If a horse is purchased to be used in a given way, the word "sound" means that he is useful for that purpose, and "unsound" means that at the time he is affected with something which will have the effect of impeding that use. It is right to add to the definition of unsoundness that the disqualification for work may arise either from disease or accident. *Kiddell v. Burnard*, 9 Mees. & W. 668, 671.

What constitutes unsoundness in a horse is a question for the jury; and whether glanders is an aggravated form of distemper or a distinct disease, or whether distemper as well as glanders is an unsoundness, is a question of fact with which a court has nothing to do. *Lindsay v. Davis*, 30 Mo. 406, 412.

"Unsoundness," within the meaning of a warranty that a horse is sound, includes

any disease, infirmity, or defect which renders the horse less fit for present use or convenience, and not openly and palpably visible, and which is discoverable only by persons of skill and judgment with regard to the qualities of horses. Therefore, if a horse is deprived of sight in one eye, or the eye is defective, and this is only discoverable by persons skilled in horses, it constitutes unsoundness, and is a breach of the warranty. *Burton v. Young* (Del.) 5 Har. 233.

"The meaning of the word 'unsoundness,' as applied to a horse, is any disease which either actually does diminish the actual use of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either through disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effect will, diminish the actual usefulness of the horse, it is unsound. *Coates v. Stephens*, 2 Moody & R. 157. And hence, where a mule's hind pasterns were so crooked over that it was lame and less capable of work of every description than it would have been had the joints been in their natural state, the mule was unsound." *Kenner v. Harding*, 85 Ill. 264, 265, 269, 28 Am. Rep. 615.

"Unsoundness," as applied to a horse, includes a horse which is a "cribber," inasmuch as a cribber will not retain his condition or be fit for constant work. *Washburn v. Cuddihy*, 74 Mass. (8 Gray) 430, 432 (citing *Stephen's Adventures of a Gentleman in Search of a Horse* [Am. Ed.] 243; *Oliphant on Horses*, 38, 39).

It is held that the fact that a mule is pretty far gone with the glanders is a breach of a warranty of soundness. *Horton v. Green*, 66 N. C. 596, 599.

The court cannot take judicial notice of the fact—if it be a fact—that corns are never so serious as to amount to unsoundness. The law gives a general definition of unsoundness, and leaves it to the trier of the facts to find whether the infirmity of corns in a particular case is within the legal definition of unsoundness. Whenever that defect materially diminishes the value of the horse and his ability to perform service, such a diminution of value and ability is an unsoundness, although it be temporary and curable. *Alexander v. Dutton*, 58 N. H. 282, 283.

Sidewalk.

The term "unsound," as applied to a wooden sidewalk in a city, means insufficiency and want of repair. The word sufficiently describes a condition proved, showing that both the stringers and the plank

were rotten; and a notice that the walk was unsound sufficiently notified the city that the walk was defective. *Van Frachen v. City of Ft. Howard*, 60 N. W. 1062, 1063, 88 Wis. 570.

Vessel.

A marine policy provided that if, after a regular survey, the vessel should be condemned as being unsound, the underwriters should not be bound to pay their subscriptions. Held, that by the word "unsound," as there used, was meant unsoundness through decay, and not from accident, and therefore such clause was not a bar to a recovery if the survey showed unsoundness proceeding from the gnawing of rats. *Garrigues v. Cox* (Pa.) 1 Bin. 592, 595, 2 Am. Dec. 493.

UNSOUND MIND.

See "Mentally Unsound."

The words "unsound mind" are legal, and not medical, words. The origin of the term is credited to Lord Eldon. *Francke v. His Wife*, 29 La. Ann. 302, 303.

"Unsoundness of mind is the opposite of soundness. Lord Coke classifies persons of 'unsound mind' thus: (1) An idiot or fool natural; (2) he who was of good and perfect memory, but by the visitation of God has lost the same; (3) those who are sometimes of good and perfect memory, and sometimes non compotes mentis; and (4) he who is unsound by his own act, as a drunkard." *In re Black's Estate* (Cal.) 1 Myr. Prob. 24, 27.

Within the meaning of the term "unsoundness," the various phases of mental condition, as defined by the terms "insanity," "mental derangement," "unsoundness," and "monomania" are held to be within the range of inquiry in determining whether or not a person at the time of executing an alleged will was a person of unsound mind. These terms are of such variable significance that their value in any given case will depend entirely upon the relation that they bear to the particular person in connection with a particular act under inquiry. A testator who has sufficient mental power to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relations to each other and be able to form some rational judgment in relation to them, has sufficient mental power to make a will. *Cheney v. Price*, 37 N. Y. Supp. 117, 118, 90 Hun, 238.

An "unsound mind" sufficient to prevent the person possessing such mind from making a valid contract was said in some of the earlier cases, and a few of the compara-

tively recent ones, to mean a total deprivation of reason. *Ex parte Barnsley*, 3 Atk. 168; *Stewart's Ex'r v. Lisenard* (N. Y.) 26 Wend. 255. The more modern rule is that it is only necessary to show that the party executing the contract was of such a weak and feeble mind as to be incapable of comprehending its nature. The rule is sometimes stated in another form. To constitute such unsoundness of mind as to avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life. This statement of the rule is given in the opinion in the House of Lords in *Bail v. Mannin*, 1 Dow. & C. 380, and is quoted with apparent approval by the Supreme Court of the United States in *Dexter v. Hall*, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73.

The rule is thus stated in *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97: "The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether the person's mind is impaired, nor if he is affected by any form of insanity, but whether his powers of mind have been so far affected by his disease as to render him incapable of transacting business like that in question." In *Converse's Ex'r v. Converse*, 21 Vt. 168, 52 Am. Dec. 58, it is said that a person is of unsound mind if the mind is inert, the memory unable to recall, and the mind to retain in one view, all the facts on which the judgment is to be formed, for so long a time as may be required for their due consideration. In *Re Barker*, 2 Johns. Ch. 232, 233, it is said: "Every person is to be deemed of unsound mind who has lost his memory and understanding by old age, sickness, or other accident, so as to render him incapable of transacting his business and of managing his property. When it appears that a grantor has not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity." *Edwards v. Davenport* (U. S.) 20 Fed. 756, 758.

Under 2 Rev. St. p. 52, § 1, providing that "the chancellor shall have the care and custody of all idiots, lunatics, persons of unsound mind, and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness," persons of unsound mind are such as may not fall within the designation of idiots or lunatics, and the phrase "incapable of conducting their own affairs" applies to habitual drunkards only; hence a finding, in a proceeding *de lunatico inquirendo*, that the party was "so far weakened and impaired in the faculties of his mind as to be mentally incapable," etc., is insufficient. In *re Mason* (N. Y.) 3 Edw. Ch. 380, 381.

"Unsound mind," as used in a statute providing that persons of unsound mind shall

be incompetent to testify, means persons whose minds are so defective that they cannot correctly relate facts, and do not understand or fully realize what they are saying or doing. If one has sufficient intelligence to understand the nature of an oath, and can correctly relate facts and circumstances, he should be permitted to testify. *City of Guthrie v. Shaffer*, 54 Pac. 698, 701, 7 Okl. 459.

A person may be of weak mind, and by reason thereof easily influenced or dominated by others, so that in the judgment of men he ought not to be allowed to manage his affairs, but he would not necessarily be of unsound mind. In *re Clark*, 67 N. E. 212, 213, 175 N. Y. 139.

The phrase "unsound mind," as used in the civil procedure act, includes idiots, non compos, lunatics, and distracted persons. *Horner's Rev. St. Ind.* 1901, § 1285.

In the construction of statutes, the words "unsound mind" shall be construed to include every one who is a lunatic, idiot, non compos, or deranged. *Ky. St.* 1903, § 450.

The term "unsound mind," when used in any statute in reference to persons, shall include idiots, lunatics, and persons non compos mentis. *Code Miss.* 1892, § 1518.

"Persons of unsound mind," within the meaning of the Civil Code, are idiots, lunatics, imbeciles, and habitual drunkards. *Civ. Code Mont.* 1895, § 14.

The term "person of unsound mind," as employed in the chapter of the Code relating to guardians and wards, includes idiots, lunatics, or the insane. *Civ. Code Ala.* 1896, § 2271.

The words "person of unsound mind" include every person who is a lunatic, idiot, or deranged. *Sand. & H. Dig. Ark.* 1893, § 7217.

"Persons of unsound mind," within the meaning of the Civil Code, are idiots, lunatics, and imbeciles. *Civ. Code S. D.* 1903, § 13.

As adjudged unsound.

The phrase "person of unsound mind," as used in 2 Rev. St. 1876, p. 601, § 11, providing that every contract, sale, or conveyance of a person, while a person of unsound mind, shall be void, is not used in its ordinary sense, but means a person who has been duly found to be of unsound mind by the statutory proceedings therefor. *Freed v. Brown*, 55 Ind. 310, 318.

As every grade of mental incapacity.

The phrase "of unsound mind" covers every grade of mental derangement or incapacity, and no matter what its kind or degree, if it be adjudged that thereby the person of unsound mind is incapable of man-

aging his estate, this will furnish occasion for the appointment of a guardian, and while under such control he will be incapable of making a contract. But where it appears that the person under guardianship was capable of rendering service for which his estate was entitled to compensation, his admissions relative thereto are admissible in evidence. *Hart v. Miller*, 64 N. E. 239, 245, 29 Ind. App. 222.

The words "unsound mind," as used in Rev. St. 1881, § 2545, authorizing a proceeding to adjudge a person of unsound mind and incapable of managing his own estate, include every species of insanity or mental unsoundness. *McCammon v. Cunningham*, 9 N. E. 455, 456, 108 Ind. 545.

"Unsound mind," as used in an instruction that a person who is of unsound mind is incapable of making a valid will, and, if there is unsoundness of mind, it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property, are used in their broad and common sense, including every species of defectiveness and impairment of mind or memory, and not in the sense of idiot, non compos, lunatic, monomaniac, or distracted person. *Durham v. Smith*, 22 N. E. 333, 334, 120 Ind. 463.

The term "unsound mind" includes every species of insanity or unsoundness of mind. *Burkhart v. Gladesb.*, 24 N. E. 118, 119, 123 Ind. 337.

As used in the Code of Civil Procedure, unless the context shows that another sense was intended, the words "of unsound mind" include every species of mental deficiency or derangement. *Bates' Ann. St. Ohio 1904*, § 4947.

As incapable of controlling self.

"Unsound mind," as used in a return to an inquisition in the nature of a writ de lunatico inquirendo, that the party is of unsound mind, import such a deprivation of sense as renders the sufferer unfit for self-control as well as for the management of his affairs. In re *Lindsley*, 15 Atl. 1, 2, 44 N. J. Eq. 564, 6 Am. St. Rep. 913.

A return of an inquisition which states that an alleged lunatic is of unsound mind, so that he is not capable of the government of his property, necessarily implies that he is also incompetent to govern himself. In re *James*, 35 N. J. Eq. (8 Stew.) 58, 59.

As incapable of managing affairs.

For the purposes of the chapter relating to guardianship, the words "person of unsound mind" shall be construed to mean either an idiot, or lunatic, or a person of unsound mind, and incapable of managing

his own affairs, as the case may be. Rev. St. Wyo. 1899, § 4896.

"A person is of unsound mind who has lost his memory and understanding by old age, sickness, or other accident, so as to render him incapable of transacting his business and of managing his property." *Dennett v. Dennett*, 44 N. H. 531, 537, 84 Am. Dec. 97; In re *Barker* (N. Y.) 2 Johns. Ch. 232, 233; *Edwards v. Davenport* (U. S.) 20 Fed. 756, 758.

The term "unsound mind," as used in a statute providing for the bringing of an action by a next friend of a person of unsound mind, embraces not only lunatics, but persons whose minds have become so impaired or infirm by age, disease, or other cause as to be unable to take care of their own interests. *Howard v. Howard*, 10 Ky. Law Rep. 478, 480, 9 S. W. 411, 87 Ky. 616, 1 L. R. A. 610.

"Unsound mind," as used in Code 1873, § 2272, authorizing the appointment of a guardian of the property and minor children of a person of unsound mind, "relates to the capacity of the person affected to transact business. A person may be so weak and infirm as to be easily influenced in such manner that the transaction had under the effect of such influence will be set aside, and yet not be so unsound of mind as to warrant the appointment of a guardian of his property. But unsoundness of mind which will justify such an appointment must be more than mere debility or impairment of memory. It must be such as to deprive the person affected of ability to manage his estate." *Emerick v. Emerick*, 49 N. W. 1017, 83 Iowa, 411, 18 L. R. A. 757.

As incapable of transacting business in hand.

The words "unsound mind," as used in Code 1873, § 3154, authorizing the vacation of a judgment after the term entered against a person of unsound mind, mean the opposite of "sound mind," as used in the Code in relation to wills. A person of unsound mind, as was said in *Seerley v. Sater*, 68 Iowa, 376, 27 N. W. 263, is one who is incapable of transacting the particular business in hand. He need not necessarily be an insane or distracted person, and may be capable of transacting some kinds of business, and yet be of unsound mind and incapable of transacting business of magnitude, or at least some degree of intricacy. He may be capable of understanding his rights as to some transactions, and not others. *Garretson v. Hubbard*, 81 N. W. 174, 110 Iowa, 7.

A person is of unsound mind when his mental powers have been so far impaired as to render him incapable of transacting busi-

ness like that in question. *Dennett v. Dennett*, 44 N. H. 531, 537, 84 Am. Dec. 97; *Edwards v. Davenport* (U. S.) 20 Fed. 756, 758.

A person executing a contract is of unsound mind when his mind is so weak and feeble that he is incapable of comprehending its nature. *Edwards v. Davenport* (U. S.) 20 Fed. 756, 758; *In re Barker* (N. Y.) 2 Johns. Ch. 232, 233.

As incapable of understanding and acting in ordinary affairs.

To constitute unsoundness of mind to avoid a deed at law, the person executing it must be incapable of understanding and acting in the ordinary affairs of life. *Edwards v. Davenport* (U. S.) 20 Fed. 756, 758.

"Unsoundness of mind is where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life. If in the case of any person there is an essential privation of his reasoning faculties, or if he is incapable of understanding and acting with discretion in the ordinary affairs of life, then he is a person of 'unsound mind,' within the meaning of Rev. St. 1881, § 2546, providing for the appointment of a guardian in case a person is found to be of unsound mind." *Fiscus v. Turner*, 24 N. E. 662, 663, 125 Ind. 46.

A slave not actually an idiot, who is so weak in understanding and possesses so dim a reason as to be unable to comprehend the ordinary labors of a slave and perform them with the expertness that is common with that uneducated class of persons, is deemed of unsound mind. *Sloan v. Williford*, 25 N. C. 307, 309.

As testamentary incapacity.

"Unsound mind," as used in Rev. St. 1894, § 2766, and Rev. St. 1881, § 2566, authorizing a contest on the simple allegation that the testator was of unsound mind, means testamentary incapacity. *Blough v. Parry*, 43 N. E. 560, 563, 144 Ind. 463.

As total deprivation of sense.

The words "unsound mind" are equivalent to *non compos mentis*, *lunaticus*, or *insana mentis*, and import a total deprivation of sense. *Riggs v. American Tract Soc.*, 84 N. Y. 330, 336; *Valentine v. Lunt*, 3 N. Y. Supp. 906, 908, 51 Hun, 544.

The allegation, in a bill to set aside a deed, alleging that the maker was credulous, and so feeble in mind and body that he was unfit to transact business, does not show that he was of unsound mind, so as to prevent a running of the statute of limitations. Lord Hardwick says that being "*non compos*" and "*of unsound mind*" are certain terms of law, and import a total deprivation of sense. Weakness of mind does not carry this idea

along with it, but courts of law understand what is meant by "*non compos*" or "*insane*," as they are words of determinate signification. *Ex parte Barnsley*, 3 Atk. 168, 171; *Rugan v. Sabin* (U. S.) 53 Fed. 415, 421, 8 C. C. A. 578.

The words "unsound mind" are sometimes used indiscriminately to signify lunacy, and also adventitious insanity, as distinguished from idiocy, but it is a certain term in the law and imports a total deprivation of sense. As used in Code Civ. Proc. § 590, as approved by the Act Feb. 15, 1877, providing that no proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making the final order complained of, or in case the person entitled to such proceedings be an infant, a person of unsound mind, or imprisoned within one year as aforesaid, exclusive of the time of such disability, etc., is used in the same sense with, and as equivalent to, "*insane*." Mere imbecility or weakness of mind would not constitute a person of "unsound mind," within the meaning of the words as above used. There must be a total want of understanding. *Witte v. Gilbert*, 7 N. W. 288, 10 Neb. 539.

In considering the mental capacity which was sufficient to enable a testator to make a will, the court said: "*Non compos mentis*," or, since the proceedings have been in English, "*of unsound mind*," which means the same thing, are legal terms of a determinate signification, understood by courts of law, importing, not weakness of understanding, but a total deprivation of reason." *Stewart's Ex'r v. Lispernard* (N. Y.) 26 Wend. 255, 300.

The words "*of unsound mind*" have a determinate and technical import, and do not, when used in a legal sense, mean imbecility of mind, merely, but are synonymous with "*non compos mentis*," and import necessarily a total deprivation of reason, comprehending idiocy, lunacy, and adventitious madness, either temporary or permanent, remediable or irremediable. *Jenkins v. Jenkins' Heirs*, 32 Ky. (2 Dana) 102, 103, 26 Am. Dec. 437.

Aphasia.

A person is not necessarily of unsound mind because he is affected with aphasia, which is an inability to select and use proper words to express ideas, which may exist while the mental faculties of judgment, memory, and understanding remain unimpaired. *In re Comfort*, 53 Atl. 133, 135, 63 N. J. Eq. 377.

Delusions.

In holding that an instruction that insanity or unsoundness of mind is that mental condition which exists when common sense and reason are destroyed or greatly

impaired, and delusion exists, was erroneous, the court say: "If insanity or unsoundness of mind is that condition of mind which exists when common sense and reason are greatly impaired and delusion exists, then, when delusion exists, the mind is unsound, insane, and destroyed. If the true test of the absence or presence of insanity is the absence or presence of delusion, then insanity and delusion become the same thing, and insanity or delusion are no more than different terms used to designate the same condition of the mind. Tried by such a metaphysical or psychological test, Emanuel Swedenborg, John Wesley, Martin Luther, Joan of Arc, Joseph Addison, the author of *Rasselas*, Napoleon Bonaparte, and hundreds more of the greatest and soundest minded which have existed on earth, must be declared insane, for each of these stoutly maintained what men of the present day would declare delusion. Indeed, delusion is so common that, if the whole human family were tried by an infallible standard, there would be very few who could maintain an absolute sanity, and it is not improbable that the very few would be among the most asinine specimens of humanity." *Denson v. Beazley*, 34 Tex. 191, 199.

"Unsound mind" sufficient to warrant the setting aside of a gift of property does not necessarily mean that the grantor was an idiot or imbecile at the time of the gift. It is sufficient to show that he was laboring under a delusion out of which he could not be reasoned, which led him to make the gift, and which so took possession of his mind that he could not act upon the subject sensibly. *Riggs v. American Tract Soc.*, 95 N. Y. 503, 511.

Habitual drunkenness.

In 2 Rev. St. p. 52, § 1, providing that the chancellor shall have the care and custody of all idiots, lunatics, persons of unsound mind, and persons who shall be incapable of conducting their affairs in consequence of habitual drunkenness, the Legislature did not use the words "habitual drunkard" as synonymous with person of unsound mind. They evidently intended to include more than those who were of unsound mind. They intended to include another class of persons. Hence the fact that the chancellor has taken charge of a person because of habitual drunkenness is not evidence that the party so taken charge of is of unsound mind, so as to incapacitate him from making a legal will. *Lewis v. Jones* (N. Y.) 50 Barb. 645, 671.

Habitual drunkards are persons of unsound mind. Civ. Code Mont. 1895, § 14.

Idiocy or lunacy distinguished.

It will be presumed that the use of the words "person of unsound mind," in a

statute providing for the appointment of a guardian of an idiot, lunatic, or person of unsound mind, has reference to a class differing somewhat from either of the other designated classes. "While an idiot or lunatic is a person of unsound mind, a person may be of unsound mind, and not an idiot or lunatic. When we come to undertake to define precisely what is unsoundness of mind, within the meaning of the statute, we meet with great difficulty. Weakness is not necessarily unsoundness, but there may be weakness, short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness; and it is within the observation of every one that in extreme old age the mental powers oftentimes nearly fade out. When this is so, we have a clear case of unsoundness of mind as distinguishable from idiocy or lunacy. The weakness which does not amount to unsoundness shades off into that which does, yet the statute may be applied to each given case, and practically the difficulty is not a very great one. The object to be accomplished by the statute is easily comprehended. The mental weakness of old age may or may not open the door to delusion. Where it does, the judgment is ordinarily to be presumed less to be trusted than when it does not. But whether delusions are present or absent, if from such mental weakness that the judgment necessarily required in the management of the defendant's ordinary affairs cannot properly be trusted, and the just protection of his property demands the legal substitution of another's judgment, such substitution should be made." *Smith v. Hickenbottom*, 11 N. W. 664, 667, 57 Iowa, 733.

"Unsoundness of mind," as contradistinguished from "lunacy" and "idiocy," is mental deficiency, either arising from an obstacle to the development of the faculties supervening in infancy, or from disease, as epilepsy, or from the decay of old age, or from grief, or disappointment, or intemperance, or any other cause. *Thompson v. Thompson* (U. S.) 21 Barb. 107, 123.

Insane synonymous.

The words "unsound mind" are synonymous with "insane." *Nicewander v. Nicewander*, 37 N. E. 698, 700, 151 Ill. 156.

Monomania.

A "person of unsound mind," within the meaning of Rev. St. 1881, § 2556, providing that persons of unsound mind may not execute a will, does not necessarily include a monomaniac, though section 2544 defines a person of unsound mind as an idiot, non compos, lunatic, monomaniac, or distracted person. A monomaniac, therefore, is not necessarily incapacitated from executing a will. *Young v. Miller*, 44 N. E. 757, 759, 145 Ind. 652.

Non compos mentis synonymous.

The words "of unsound mind" are synonymous with "non compos mentis." *Jenkins v. Jenkins' Heirs*, 32 Ky. (2 Dana) 102, 103, 26 Am. Dec. 487.

"Unsound mind," as used in 2 Rev. St. p. 56, § 1, providing that all persons except those of "unsound mind," married women, infants, etc., may devise their real estate by their last will and testament, etc., should be construed as synonymous with "non compos mentis." *Blanchard v. Nestle* (N. Y.) 8 Denio, 37, 41.

UNSUITABLE.

See "Evidently Unsuitable"; "Suitable."

UNSURPASSED.

"Unsurpassed and unsurpassable," as used in the advertisement of an article as perfect of its kind, or as unsurpassed and unsurpassable, is not such a representation, either of its quality, condition, or character, as will support a warranty. *League Cycle Co. v. Abrahams*, 58 N. Y. Supp. 306, 308, 27 Misc. Rep. 548.

UNSURVEYED.

"Unsurveyed," within the meaning of "cession of the unsurveyed and unsold lands in the Virginia military district to the state of Ohio," by Act Cong. Feb. 18, 1871, should be construed to include lands covered by entries and surveys which were made prior to January 1, 1852, where the survey became void, and all rights under them extinguished, because of the survey not being returned to the proper department until after January 1, 1852, according as provided by statute. *Board of Trustees v. Cuppett*, 40 N. E. 792, 52 Ohio St. 567.

A complaint charged that the plaintiff, as treasurer of a corporation, acting under the direction of its directors, expended \$800 in its behalf over and above his receipts from its funds, and that the corporation was indebted to him. Held, that the phrase "under and by the direction of the board of directors" simply meant that the expenditures were made at the request of the company. *Simmons v. Sisson*, 26 N. Y. 264, 275.

UNTENANTABLE.

A leased building facing on an avenue becomes "untenantable," within the provision of the lease that "the above letting is subject, however, to any widening * * * of the avenue, and shall cease * * * in case the premises should become untenable by reason of such alteration," as soon

as the ownership of the part of the building within the lines of the avenue as widened passes out of the landlord in such a manner that it may be destroyed at any moment; as where it is sold under notice from the commissioner of highways that the purchaser must remove it within 30 days. *Payne v. Schollhamer*, 63 N. Y. Supp. 229, 230, 30 Misc. Rep. 755.

UNTIL

"Until" is a restrictive word; a word of limitation. *State v. Perkins*, 40 S. W. 650, 652, 139 Mo. 106.

The word "until" is a word of limitation, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist or have any further force or effect. *Maginn v. Lancaster*, 73 S. W. 368, 372, 100 Mo. App. 116.

The word "until," as used in Laws 1880, c. 30, § 7, declaring that the aldermen from certain wards shall hold office from a certain date until a certain other date, is in the sense of "to," denoting the running of the term from one point of time to another. *People v. Orissey*, 91 N. Y. 616, 631.

As excluding last day.

In contracts and like documents, "until" is to be construed as exclusive of the date mentioned unless it was the manifest intent of the parties to include it. *Croco v. Hille*, 72 Pac. 208, 66 Kan. 512 (citing *Webst. Dict.*).

The use of the word "until" generally signifies an intention to exclude the day to which it refers, unless a contrary intention appears from the context of the law or instrument in which the word is used. The word "until" is exclusive in its meaning. As used in Tax Law, § 35, providing that a copy of the assessment roll shall be left at a specified place, where it may be seen and examined until the third Tuesday of August, it excludes the latter day. *People v. Hornbeck*, 61 N. Y. Supp. 978, 30 Misc. Rep. 212.

The word "until," whether found in a contract or in a statute, is the same, and in either case must depend upon the intention of those using it, as manifested by the context, and considered with reference to the subject to which it relates. As used in a statute providing that a term of the probate court shall commence on the first Monday of each calendar month, and continue until the third Monday thereof, it excludes the day to which it refers. *Ryan v. State Bank*, 7 N. W. 276, 278, 10 Neb. 524.

The word "until" may, in a contract or a law, have an exclusive or inclusive mean-

ing, depending upon the subject, transaction, or connection about or in which it is used. As used in a law providing that the Governor shall receive bids for certain property from all persons until the 1st of July, etc., it has an exclusive meaning, so that the time within which bids might be received expired with the 30th of June. *Webster v. French*, 12 Ill. (2 Peck) 302, 303.

An act continuing the charter of a corporation until the 1st day of January does not include such day. *People v. Walker*, 17 N. Y. 502, 503.

In a contract for delivery of certain property until the 1st day of January, the word "until" was exclusive in its meaning. *Newby v. Rogers*, 40 Ind. 9, 16.

Rev. Laws, § 1450, allowing a tender of damages and costs to be made in certain cases at any time "until three days before" the commencement of the term to which the action was returnable, means to exclude from the period in which the tender may be made the three days next preceding the day on which the term commences; neither the day on which the tender is made nor the first day of the term can be counted as one of the three days. *Wiley v. Laraway*, 25 Atl. 435, 436, 64 Vt. 566.

The word "until," in a contract providing that merchants shall have 30 days to load a vessel, counting from the day of readiness until the day of dispatch, operates to exclude the day of dispatch. *Merritt v. Ona* (U. S.) 44 Fed. 369, 370, 11 L. R. A. 724.

An order extending the time to file a bill of exceptions until a day named does not include that day. *Eshelman v. Snyder*, 82 Ind. 498, 499; *Hartman v. Ringgenberg*, 21 N. E. 464, 119 Ind. 72; *Corbin v. Ketcham*, 87 Ind. 138, 139; *Erb v. Moak*, 78 Ind. 569.

As including last day.

The usual understanding of the word "until," used with reference to a future day, includes the day named. In *re Croft's Estate* (Pa.) 14 Wkly. Notes Cas. 437.

"Until" may either, in a contract or a law, have an inclusive or exclusive meaning, according to the subject to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used; and this rule extends to the correlatives of the word. Ordinarily, the word, like "from" and "between," excludes the day to which it relates. It has been decided that "till" includes the day to which it is prefixed. *Bunce v. Reed* (N. Y.) 16 Barb. 347, 352 (citing *Dakins v. Wagner*, 3 Dowl. 535); *Hahn v. Dierkes*, 37 Mo. 574; *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878; *Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126, 23 Atl. 198; *Board of Glynn County Com'rs v. Dart*, 67 Ga. 765; *Louisville & N. R. Co. v. Turner*, 81 Ky. 489; *Newport News*

& M. V. R. Co. v. Thomas, 96 Ky. 613, 29 S. W. 437. And as used in an order allowing an appellant until a certain day within which to prepare or present for allowance a bill of exceptions it will be held to include such day. *Conway v. Smith Mercantile Co.*, 44 Pac. 940, 6 Wyo. 327, 49 L. R. A. 201; *St. Louis & S. F. Ry. Co. v. Gracy*, 29 S. W. 579, 580, 126 Mo. 472 (citing *State v. Mosley*, 116 Mo. 545, 22 S. W. 804).

"Until," as used in a stipulation reciting that a certain party shall have until a certain day to accept a proposition, includes that day, if the offer be still open. *Houghwout v. Boisaubin*, 18 N. J. Eq. (3 C. E. Green) 315, 318.

In the absence of anything qualifying its meaning, the word "until" might perhaps be regarded as inclusive in its signification, but its import may be ambiguous, in which case its meaning will be determined from the whole text or instrument in which it is used. *Rex v. Stevens*, 5 East, 250. The word, as used in a stipulation that a party may have until March 6th to answer, includes such designated date, so that an answer on March 7th is too late. *Barker v. Keith*, 11 Minn. 65, 67 (Gil. 37, 40).

"Until," as used in Laws 1859, c. 302, § 8, providing that certain books shall be kept open for examination and correction until the 1st day of May in each year, is used in the sense of "up to," and includes such 1st day of May. *Clarke v. City of New York*, 19 N. E. 436, 111 N. Y. 621.

As used in an act giving the movant for a new trial until a certain day, time, or term to prepare and file the motion and approved brief of evidence, "until" includes said day, term, or time, and, if proper action be taken at that time, it is in season. *Rogers v. Cherokee Iron & Ry. Co.*, 70 Ga. 717.

"Until," as used in extension of time to make and serve a case made until a certain day, includes the day named. *Consolidated Kansas City Smelting & Refining Co. v. Peterson*, 55 Pac. 673, 8 Kan. App. 316.

An assignment executed on the 31st of October, of all rents due and coming due until October 1, 1874, included the rents falling due on October 1st. *Kendall v. Kingsley*, 120 Mass. 94, 95.

Until his successor shall be appointed and qualified.

The words "until his successor shall be appointed and qualified," as used in Const. art. 2, § 13, providing that the term of a certain officer shall be two years, and "until his successor shall be appointed and qualified," mean, according to their plain import, an extension of the definite term of office, and that no vacancy exists in the office while an incumbent lawfully appointed holds by virtue of such extension of his term. The

object of employing such language in the limitation of the term of office, is to prevent a vacancy occurring before a successor is duly appointed and qualified. *Smoot v. Somerville*, 59 Md. 84, 95.

Const. 1885, art. 16, § 14, providing that all state, county, and municipal officers shall continue in office after the expiration of their official terms until their successors shall be elected and qualified, is not a limitation on the power of the Governor to fill vacancies, but was intended to prevent a hiatus or interregnum occurring between the day of the termination of the office and the day of the successor's entry upon his duties. *State v. Murphy*, 13 South. 705, 708, 32 Fla. 138.

Until the further order of court.

Where the plaintiff at the commencement of an action applied for injunction, and the judge issued an order to show cause why an injunction should not issue, and in such order restrained the defendant until the further order of the court, such term had no other meaning than in the meantime, or until the decision upon the order to show cause. *Curtiss v. Bachman*, 110 Cal. 433, 438, 42 Pac. 910, 912, 52 Am. St. Rep. 111.

Rev. St. § 5024, provides that on the filing of a petition in involuntary bankruptcy, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof. why the prayer in the petition should not be granted, and that the court may also, by injunction, restrain the debtor and any other person in the meantime from making any transfer or disposition of any part of the debtor's property and from any interference therewith. An injunction was issued in pursuance to such section, restraining the debtor from any interference with the property until the further order of the court. Held, that the clause "until the further order of the court" did not extend the injunction beyond the time in which the time for the hearing of the petition could be fixed. *In re Irving* (U. S.) 13 Fed. Cas. 108.

Until the next regular election.

The phrase "until the next regular election," as used in the Constitution (article 3, § 11), providing for appointments to fill vacancies in judicial offices, means until the next regular election held at the time fixed by law for the filling of the particular class of judicial offices to which the appointment was made. *McIntyre v. Illiff*, 68 Pac. 633, 634, 64 Kan. 747.

Until paid.

Where Act March 27, 1874, incorporating a certain town, provided that a tax lien on

real estate should remain a lien thereon until paid, it cannot be said that no period of time is provided. "Until the tax is paid" is a period of time. *Skinner v. Christie*, 29 Atl. 772, 777, 52 N. J. Eq. 720.

The words "until paid," as used in a note in which the maker agrees to pay a certain sum "on or before a specified day, with interest at the rate of three per cent. until paid," do not extend the contract beyond the specified date, any more than the words "per annum" or "per month"; and therefore the holder can collect the statutory interest at the rate of 10 per cent. per annum after the note has become due and remains unpaid. *Collier v. Field*, 1 Mont. 612, 625, 626.

UNTRIED.

See "Remaining Untried."

UNTRUE.

In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is "untrue" which does not express things exactly as they are, but in another and broader sense the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent." Answers by an applicant for life insurance which are honest, sincere, and not fraudulent are not untrue, within the meaning of the application, declaring the contract null and void if the answers of the insured to the questions propounded to him are in any respect untrue. *Globe Mut. Life Ins. Ass'n v. Wagner*, 58 N. E. 970, 971, 188 Ill. 133, 52 L. R. A. 649, 80 Am. St. Rep. 169 (citing *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447); *Clapp v. Massachusetts Ben. Ass'n*, 16 N. E. 433, 436, 146 Mass. 519.

Though in one sense it may be said that that only is true which is conformable to the actual state of things, and that that which does not embrace things exactly as they are is untrue, yet the word "true" is often used as a synonym for "honest," "sincere," "not fraudulent." As applied to a stipulation making an insurance policy void in case any of the warranties prove to be "untrue," it should not be held to require absolute verity; but a warranty should not be considered untrue unless it appears that the warrantor knew or had reason to believe, at the time the warranties were made, that they were not founded on fact. *Weil v. New York Life Ins. Co.*, 17 South. 853, 857, 47 La. Ann. 1405.

In construing a life policy providing that if the declaration, or any part of it, made by the assured, shall be found in any respect untrue, the policy shall be vitiated, the court said: "What is to be understood by untrue answers or any suppression of facts? Can

they have reference to any disease with which the insured was alleged to have been inflicted, of which he knew nothing and of which he could not have informed himself of by the exercise of any diligence? Are they intended as absolute warranties of the fact that he never since childhood or during life had been afflicted with diseases of which he nor the most skillful physician could have had any knowledge whatever? The case of *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, is a strong and direct authority for the position that the word 'untrue,' in the above connection, in its broadest sense means knowingly or designedly untrue or recklessly so; that it is the opposite of sincere, honest, not fraudulent." *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 473, 474.

A policy provided that it should be void if the proposal for the insurance and answers therein made were false or fraudulent. In the proposal, which was made a part of the policy, the words "untrue or fraudulent" were used. There is no doubt that the words "false or fraudulent" written in the policy are used in the same sense. Effect should be given to both the words "false" and "fraudulent." If they both mean statements made intentionally and knowingly to deceive, then it was not necessary to use both, as nothing is added to the sense by the use of both. The word "false" is sometimes used in the sense of "fraudulent," and sometimes in the sense of "untrue." The words were inserted for abundant caution. They were intended to cover statements untrue, as well as such as were colorably true, but fraudulent in fact. *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571, 576, 577.

UNUSUAL

"Unusual" is defined by Webster to be "not usual, not common, rare; as an unusual season; a person of unusual grace or erudition." Thus the killing of a human being by means of a shot or shots from a revolver is not, as the history of criminal trials shows, an unusual manner of effecting death. *Territory v. Pridemore*, 18 Pac. 96, 98, 4 N. M. (Johns.) 137.

The words "unusual and extraordinary," as in common use, very often are exaggerations of speech, and in many cases, if properly inquired into and explained, would be found not to be synonymous with "unnatural and unexpected"; and in an action for a fire started by sparks from an engine it is error to instruct that if the wind causing the escape of sparks from defendant's engine was unusual and extraordinary, and if, but for the unusual and extraordinary character of the wind, the sparks would not have escaped and communicated the fire to plain-

tiff's premises, the defendant is not liable, without explaining the meaning of the words, so as to present to the jury the question whether the wind could reasonably have been expected at that season in that section of the country. *Blue v. Aberdeen & W. E. R. Co.*, 21 S. E. 299, 300, 116 N. C. 955.

UNUSUAL COVERING.

"Unusual covering," as used in *Tariff Act June 10, 1890, § 19*, does not include wooden cases with cardboard partitions, in which opal glass bottles were packed and imported, being usual packages for such bottles. *United States v. Richards* (U. S.) 66 Fed. 730.

UNUSUAL FLOOD OF RAIN.

An "unusual flood of rain" does not indicate a greater or more severe rain than has theretofore occurred, but rather such a rain as does not usually or but rarely occur. *City of Denver v. Rhodes*, 13 Pac. 729, 734, 9 Colo. 554.

UNUSUAL MEANS.

"Unusual means," as used in *Rev. St. § 4362*, defining manslaughter in the fourth degree as the involuntary killing of another by any weapon, or by any "means neither cruel nor unusual, in the heat of passion, in any cases other than such as are declared to be justified or excusable homicide, does not mean such a weapon or means which is most likely to take life or commonly used to take life, and does not include a pistol, which is a usual weapon for accomplishing such purpose. *Schlect v. State*, 44 N. W. 509, 510, 75 Wis. 486.

UNUSUAL NUMBER.

Where two persons went to a mill, taking with them a workman, and entered such mill, there was not an entry of an "unusual number," which of itself tends to excite terror. *Pike v. Witt*, 104 Mass. 595, 597.

UNUSUAL PUNISHMENT.

See, also, "Cruel and Unusual Punishment."

"Unusual," as used in *Declaration of Rights*, art. 26, providing that no magistrate or court of law shall inflict cruel or unusual punishment, must be construed with the word "cruel," and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts. The inflicting of the punishment of death by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, the application of such current to be continued until such convict is dead, is not a cruel or unusual punishment. In re

Storti, 60 N. E. 210, 211, 178 Mass. 549, 52 L. R. A. 520.

"Unusual," as used in Const. art. 1, § 16, prohibiting the infliction of unusual punishment, means a class of punishments which never existed in the state, or that class which the public sentiment must be regarded as having condemned. *Hobbs v. State*, 32 N. E. 1019, 1021, 133 Ind. 404, 18 L. R. A. 774 (citing *Cooley*, Const. Lim.).

The term "cruel and unusual punishment," in the constitutional provision prohibiting such punishment, does not include the imposition of a fine of \$50 and a sentence for three months at hard labor in the house of correction for selling intoxicating liquors contrary to law. *Pervear v. Commonwealth of Massachusetts*, 72 U. S. (5 Wall.) 475, 480, 18 L. Ed. 608.

The term "cruel and unusual punishment," in the constitutional provision prohibiting cruel and unusual punishment, does not characterize imprisonment at hard labor, though such punishment may be severe. *State v. Hogan*, 58 N. E. 572, 575, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626.

The term "cruel and unusual punishment," within the meaning of a constitutional provision prohibiting such punishment, does not include a penitentiary sentence of two years for selling a paper devoted mainly to scandals, etc. *State v. Van Wye*, 37 S. W. 938, 939, 136 Mo. 227, 58 Am. St. Rep. 627.

UNUSUAL USE.

"Unusual use of a road," as used in Ky. St. § 4325, providing for the punishment of any corporation which shall fail, after notice, to repair any damage that is done by the unusual use of a road, does not include the tearing down and keeping down unreasonably long a bridge constituting a part of a highway over a railroad track, such operation not being a use of the road, usual or unusual. *Commonwealth v. Illinois Cent. R. Co.*, 47 S. W. 258, 259, 104 Ky. 366.

UNUSUALLY.

When a thing is said to be "unusually small," it is meant that it is small compared with the class to which it belongs, and the comparison involved is essentially different from that which can be made between merely two things of the class. *Robinson v. Chicago, R. I. & P. Ry. Co.*, 32 N. W. 193, 194, 71 Iowa, 102.

UNUSED.

In Act March 4, 1880 (P. L. p. 111) § 1, providing that whenever any road which has been laid out according to law, or any portion of such road, shall have been unused

for public travel for a period of not less than five years, the road or such portion shall be vacated, "unused" signifies abandonment by the public. In that sense the proviso does not apply, and it could not have been intended to apply, to a case where the public was asserting in the courts its right to the highway, and seeking to remove, by the aid of the law, obstructions which interfered with its actual use. *Mercer County v. Pennsylvania R. Co.*, 45 N. J. Law (16 Vroom) 82, 83.

UNWHOLESOME MILK.

In construing a pure food act prohibiting the sale of adulterated, impure, or unwholesome milk, the court holds that "impure or unwholesome milk" means milk from cows fed on distillery waste, or any substance in a state of putrefaction, or from sick or diseased cows. *Commonwealth v. Hough*, 1 Pa. Dist. R. 51, 53.

UNWORTHY.

They are called "unworthy," in matters of succession, who, by the failure of some duty toward a person, have not deserved to inherit from him, and are in consequence deprived of his succession. Civ. Code La. 1900, art. 964.

UNWRITTEN LAW.

Unwritten law is the law not promulgated and recorded, but which is nevertheless observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men. Code Civ. Proc. Cal. 1903, § 1899; Ann. Codes & St. Or. 1901, § 736.

UNWROUGHT METAL.

Ferrochrome is not dutiable under Tariff Act July 24, 1897, c. 11, Schedule C, par. 187, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], as metal unwrought. *Dana v. United States* (U. S.) 116 Fed. 933.

UP.

The term "up the bank with its meanders," when used to designate a boundary in a deed of land on the north side of the stream, which boundary commences at a tree at the south side of the stream, thence to the south bank of said river, thence up the same with its meanders 492 poles, is to be construed as fixing the boundary on the south side of the river, and including the river, if nonnavigable, as a part of the land conveyed. *Camden v. Creel*, 4 W. Va. 365, 367.

The use of the words, "up the west bank," in a deed describing one call of the

land conveyed as being up the west bank, operates to fix the boundary as the margin of the stream, and to preclude the deed from carrying the land to the center of the stream, though it is not navigable. *Murphy v. Cope-land*, 1 N. W. 691, 692, 51 Iowa, 515.

A call in a deed for a certain distance "up the creek" ordinarily means to run with the creek; that is, according to the meanders or thread of the stream. *Buckley's Lessee v. Blackwell's Heirs*, 10 Ohio, 508, 510.

"Up the same," as used in a deed providing that the boundary shall continue to a certain creek, and thence up the same to the corner of a certain lot, cannot be satisfied by running a straight line to the corner of the lot but implied that the line is to follow the creek according to its windings and turnings, and that it must be in the middle or center of it. *Jackson v. Louw* (N. Y.) 12 Johns. 252, 255.

"Up," as used in a call in a grant from a pond or river west up the river to a stake, is equivalent to "with the river" on the line most pursued as the course of the stream. *Rogers v. Mabe*, 15 N. C. 180, 194.

"Up the branch," as used in a deed describing a boundary as a line running, from a fixed monument on the edge of a branch, up the branch by a single course to another fixed monument on the branch, should be construed to follow the straight line called for from monument to monument, and not to follow the windings of the branch. *Wharton v. Brick*, 8 Atl. 529, 530, 49 N. J. Law, 289.

Up a creek or river means the middle of the main channel thereof. *Rev. St. Ariz.* 1901, par. 930; *Pol. Code Cal.* 1903, § 3906; *Pol. Code Mont.* 1895, § 4103.

UP TO.

Where the time for filing a bill of exceptions was extended "up to" June 28th, a plea filed on that day is in time, the court remarking that the word "to," which is evidently the controlling word in this connection, is sometimes a word of inclusion. *State v. Fletcher*, 68 S. W. 429, 430, 166 Mo. 582.

UPCAST.

The term "upcast" is used to designate the compartment of the air shaft of a coal mine which is used to carry the noxious air up from the mine. *Coal Run Coal Co. v. Jones*, 19 Ill. App. (19 Bradw.) 365, 368.

UPHOLD.

A covenant in a lease to repair, uphold, and support, or to well and sufficiently repair, or to keep in repair and leave as found, or to

repair and keep in repair, or to keep in good repair, natural wear and tear excepted, or to make all necessary repairs, or to deliver up in tenantable repair, or to deliver up the premises in as good a condition as they now are, all impose upon the covenantor the duty of rebuilding or restoring premises destroyed or injured by the elements. *Armstrong v. Maybee*, 48 Pac. 737, 738, 17 Wash. 24, 61 Am. St. Rep. 898.

UPON.

See "On—Upon."

Upon the express condition, see "Express Condition."

UPPER.

In the absence of special circumstances modifying or changing its meaning, the word "upper," when used to describe a part of a survey of land made and platted upon a map, naturally suggests the north part of such survey, as surveys and maps are made with reference to the points of a compass. *Lunn v. Scarborough*, 24 S. W. 846, 847, 6 Tex. Civ. App. 15.

"Upper," as used in *Rev. St.* § 2573, making it the duty of the owner of any tenement house of more than two stories high to provide a convenient exit from the upper story, implies a story above the ground floor. *Rose v. King*, 30 N. E. 267, 268, 49 Ohio St. 213, 15 L. R. A. 160.

UPSET BID.

"Upset bid" has been used to designate a bid made after a judicial sale, and before a former bid has been confirmed, for the purpose of upsetting a sale to such former bidder. *Yost v. Porter*, 80 Va. 855, 858.

UPSETTING.

Among metal workers, "upsetting" is the term employed to describe a process of shortening and thickening. Thus, a bolt is headed by upsetting; the end portion being made shorter without removal of any portion of the metal, which therefore spreads out laterally. If a plain metal ring is reduced in diameter by upsetting, the ring will become thicker, there being apparently an intermolecular rearrangement of the particles of the metal. *Jackson v. Birmingham Brass Co.* (U. S.) 79 Fed. 801, 803, 25 C. C. A. 196.

URBAN RESIDENCE HOMESTEAD.

An urban residence homestead consists of the mansion house, the home of the family, the place where they reside, together with

all the lot or lots used in connection therewith, contributing to its enjoyment, comfort, and convenience. *Ford v. Fosgard* (Tex.) 25 S. W. 445, 447.

URBAN SERVITUDES.

The principal kinds of urban servitudes are the following: The right of support; that of drip; that of drain or of preventing the drain; that of view or of lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls or of preventing them from being raised; that of passage; and that of drawing water. Civ. Code La. 1900, art. 711.

URGENT NECESSITY.

The "immediate and urgent necessity," under which the payment of an illegal tax must be made in order to entitle the payer to recover, means something less than an actual or threatened seizure of goods. Payment to avoid the levy of a warrant already issued and in the hands of the collector, and just as sure to be levied, if the money is not paid, as night to follow day, is just as much a payment to preserve one's goods as though the levy had actually been threatened or made. *Rumford Chemical Works v. Ray*, 34 Atl. 814, 815, 19 R. I. 456.

US.

A warrant of attorney given by two persons, authorizing the attorney to appear in an action brought "against us," and confess judgment "against us," contemplates a joint judgment entered against both, and therefore does not authorize the confession and entry of a judgment against one, though the other be dead at the time judgment is entered. *Hunt v. Chamberlin*, 8 N. J. Law (3 Halst.) 336, 14 Am. Dec. 427.

Where the words "against us" are used in an agreement that "any excess of certain collaterals deposited to secure the payment of a note shall be applicable to any other note or claim held against us, J. R. & S. J. Blocker," and signed by said J. R. & S. J. Blocker, which is a firm name, the collaterals cannot be held to secure a note executed by one of the partners as principal, and the other partner and other parties as sureties. *San Antonio Nat. Bank v. Blocker*, 13 S. W. 961, 963, 77 Tex. 73.

A deed of assignment conveying all the wares, merchandise, and stock and trade belonging to a partnership, including "all property of all kinds now owned by us," included all the property of either partner, whether owned in his separate right or as a partner; and it cannot be limited to the wares, merchandise, and stock and trade belonging to

the copartnership, but includes the individual property of the partners. *Coffin v. Douglass*, 61 Tex. 406, 409.

"Where testatrix had devised all her estate to her husband in fee, and later, being about to travel abroad in company with her husband, made a will beginning with the words, 'In case of anything happening us, I would wish,' etc., and devising her estate to her sister, the phrase meant, not the death of her husband before herself, nor the death of both by the same accident, but the death of both while upon their travels." *Cowley v. Knapp*, 42 N. J. Law (13 Vroom) 297, 302.

USAGE.

See "Common Usage."

All laws or usages, see "All."

Usage is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general, and uniform that they must be presumed to have acted with reference thereto. Rev. St. Okl. 1903, § 2801; Rev. Codes N. D. 1899, § 5128; Civ. Code S. D. 1903, § 2462; Code Civ. Proc. Mont. 1895, § 3463; Civ. Code Mont. 1895, § 4664.

Usage is the law by which the significance or import of words is fixed and settled, and the shades of difference in their meaning is marked and defined. *Russell v. Colyar*, 51 Tenn. (4 Heisk.) 154, 158.

"Usage" is simply a mode of dealing in a particular locality, or among persons in a particular business or trade, and it derives its binding force from the supposed or established knowledge of the persons engaged in the particular traffic at the place or in the trade to which it relates. *Milroy v. Chicago, M. & St. P. Ry. Co.*, 67 N. W. 276, 278, 98 Iowa, 188; *Woldert v. Arledge*, 23 S. W. 1052, 1053, 4 Tex. Civ. App. 692.

Usage is the legal evidence of a custom, which is an unwritten law, established by long usage and the consent of our ancestors from time immemorial. *Minis v. Nelson* (U. S.) 43 Fed. 777, 779.

The office of a custom or usage in trade is to ascertain or explain the meaning and intention of the parties to a contract, whether written or in parol, which could not have been done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 388, 19 L. Ed. 987.

A "usage," which is also called a "custom," though the latter word has also an-

other signification, is a long and uniform practice applied to habits, modes, and courses of dealing. It relates to modes of action, and does not comprehend the mere adoption of certain peculiar doctrines or rules of law. This will be made apparent by an examination of the cases on the subject. For example, the usage referred to in *Snowden v. Warder* (Pa.) 3 Rawle, 101, was merely to adopt as a rule of law that which was contrary to law. The same remark applies to all the Pennsylvania cases and to all the New York cases and to those of Massachusetts. In all cases where usages are sustained they do in fact operate to give effect to contracts different from that which the common law would have done, and they operate in contravention of the rules of the common law. In many instances a usage has been rejected or sustained on the ground that it was or was not reasonable, and the question whether it was contradictory to a principle of law or to the terms or legal operation of the contract was not adverted to. *Dickinson v. Gay*, 89 Mass. (7 Allen) 29, 35, 83 Am. Dec. 656.

Usage is some proof of what is considered a reasonable or proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience of such use. *Gould v. Boston Dock Co.*, 79 Mass. (13 Gray) 452; *Dumont v. Kellogg*, 29 Mich. 420, 425, 18 Am. Rep. 102.

"Usage" rests on long and uniform practice, and to be binding, must be known, certain, uniform, and reasonable, and not contrary to law. 2 Bouv. Law Dict. 615; *Collings v. Hope* (U. S.) 6 Fed. Cas. 111; *Municipal Inv. Co. v. Industrial & General Trust Co.* (U. S.) 89 Fed. 254, 256; *Woldert v. Arledge*, 23 S. W. 1052, 1053, 4 Tex. Civ. App. 692.

Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. *Haskins v. Warren*, 115 Mass. 514, 535.

By the phrase "usage of trade" the law means usage fixed in the commercial law; a usage recognized by it in what is known as "trade." *State v. Chilton*, 39 S. E. 612, 614, 49 W. Va. 453.

"Usage" among commercial and business men in a locality need not be so ancient that the "memory of man runneth not to the contrary," nor need it contain the other elements of a common-law custom. *Lane v. Union Nat. Bank of Massillon*, 29 N. E. 613, 615, 3 Ind. App. 299; *Morningstar v. Cunningham*, 11 N. E. 593, 595, 110 Ind. 328, 59 Am. Rep. 211.

"The usage of merchants constitutes the law of merchants. It is a rule of their own making, and binds when no other law is ap-

plicable. The influence of usage is universal. It attaches to nations and to individuals. It creates obligations. It interprets laws. In all governments and in every community there are laws of usage and custom. Where a public officer has compensation fixed by a statute, though usage cannot alter the law, yet it is evidence of the construction given to the law and is binding on past transactions. Public officers may, by usage, be entitled to compensation for services beyond the line of their regular duty, and usage will regulate the amount of their compensation. General custom is a general law, and forms the law of contracts. It controls even the principles of law. The ancient, established, uniform, and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade are understood to consent. It makes, supplies, and construes their contracts. Known and settled usages ought to be respected by courts and juries, unless such usages are against the laws or policies of the country." *Wilcocks v. Phillips* (U. S.) 29 Fed. Cas. 1198, 1203.

The true office of a usage of trade is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature of their contracts arising, not from express stipulation, but from mere implications and presumptions and actions of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful and various senses. But, though usage is admissible to explain what is doubtful, it is not admissible to contradict what is plain. Proof of the usage is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of trade to which it was made may afford explanation and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So, where stipulations in the contract refer to matters outside the instrument, parol proof of extraneous facts is admissible to interpret their meaning. As a general rule, however, there must be ambiguity or uncertainty upon the face of a written instrument arising out of the terms used by the parties, and when such evidence is admissible it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add or ingraft upon the contract new stipulations or to contradict those which are plain. *McCarthy v. McArthur*, 63 S. W. 56, 57, 69 Ark. 313 (citing *Oelricks v. Ford*, 64 U. S. [23 How.] 49, 63, 16 L. Ed. 534; *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766).

A usage of trade of which all dealers in that line of trade are bound to take notice

must be known, must be uniform, must be certain. *Woldert v. Arledge*, 23 S. W. 1052, 1053, 4 Tex. Civ. App. 692.

A usage of so doubtful an authority as to be known only to a few, and where merchants engaged in the trade differ as to the existence of it, can never be regarded. *Collings v. Hope* (U. S.) 6 Fed. Cas. 111.

"The truest test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it." *Smith v. Wright* (N. Y.) 1 Caines, 43, 45, 2 Am. Dec. 162.

"The usage or custom of a particular port in a particular trade is not such a custom as the law contemplates to limit or control or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all parts of the states where it exists, and from its character and extent so notorious that all such contracts of insurance in that trade must be presumed to be entered into by the parties with reference to it as a part of the policy. If the usage or custom be not so notorious, if it be partial or local in its existence or adoption, if it be a mere matter of profit and personal opinion of a few persons engaged therein, it would be most dangerous to allow it to control the solemn contracts of the parties who are not or cannot be presumed to know it, or to adopt it as a rule to govern their own rights and interests. *Rogers v. Mechanics' Ins. Co.* (U. S.) 20 Fed. Cas. 1118, 1120.

The usages adopted by individuals concerned in any course of business—for instance, in the negotiation of promissory notes by which loans are obtained and renewed at banks—become, as to those parties, rules by which their contracts are to be construed, and in any circumstance not ascertained by express stipulation, and expressly as to privileges dependent on legal implication and construction, and understood to be reserved for the particular benefit of the individual. What is known among the parties to be usual in their course of business is to be taken as consented to, and to have the same effect as if inserted in their contract. *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155, 156, 6 Am. Dec. 52.

Where a usage in a particular trade or business is known, uniform, reasonable, and not contrary to law or opposed to public policy, evidence of such usage may be considered in ascertaining the otherwise uncertain meaning of a contract, unless proof of such usage contradicts the express terms of the contract. This is so, even though the usage be that of a particular person, provided it be known to the parties concerned, or providing it has been so long continued or

has become so generally known and notorious in the place or neighborhood as to justify the presumption that it must have been known to the parties. Parties who are engaged in a particular trade or business, or accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may therefore, in the absence of any agreement to the contrary, reasonably be supposed to have entered into and formed a part of their contracts and understandings in relation to such business as ordinary incidents thereto. Proof of a usage that abbreviations used in a contract had a definite and settled meaning in the business world, in the neighborhood where the notes were payable, was proper, and the proof was not required to be coextensive with the state. *Lane v. Union Nat. Bank of Massillon*, 29 N. E. 613, 615, 3 Ind. App. 299.

In order for a "usage" to constitute a defense to a master of a ship for transshipping or changing the vehicle or conveyance of goods shipped for the voyage on freight, the course of the trade must be uniform and general. It should be so well settled that persons engaged in the trade must be considered as contracting with reference to the usage. *Trott v. Wood* (U. S.) 24 Fed. Cas. 218.

Where there is no contract, proof of usage will not make one, and usage can only be admitted, either to interpret the meaning of the language employed by the parties, or where the meaning is equivocal or obscure. *Municipal Inv. Co. v. Industrial & General Trust Co.* (U. S.) 89 Fed. 254, 256.

A usage, to be binding in the naval service, must be uniform, and applicable to all officers of the same grade under similar circumstances. *United States v. Buchanan* (U. S.) 24 Fed. Cas. 1282.

Custom distinguished.

A "usage," in its most extensive meaning, includes both custom and prescription; but in its narrower signification the term refers to a general habit, mode, or course of procedure. A usage differs from a custom, in that it does not require that the usage should be immemorial to establish it; but the usage must be known, certain, uniform, reasonable, and not contrary to law. *Lowry v. Read* (Pa.) 3 Brewst. 452, 456.

There is a clear distinction between usage, however general, and custom. Usage is local practice, and must be proved. Custom is general practice, judicially noticed without proof. Usage is the fact. Custom is the law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists of a repetition of acts. Custom arises out of this repetition. Usage is in-

ductive, based on consent of persons in a locality. Custom is deductive, making established local usage a law. *Power v. Bowdle*, 54 N. W. 404, 410, 3 N. D. 107, 21 L. R. A. 328, 44 Am. St. Rep. 511 (citing Whart. Ev. § 965; And. Law Dict. "Custom and Usage").

A custom is something which has by its universality and antiquity acquired the force and effect of law in a particular place or country in respect to the subject-matter to which it relates, and is ordinarily taken notice of without proof, and is distinguishable from a usage of trade; for when a usage in a particular trade or business is known, uniform, reasonable, and not contrary to law or opposed to public policy, evidence of such usage may be considered in ascertaining the otherwise uncertain meaning of a contract, unless the proof of such usage contradicts the express terms of the agreement. This is so, even though the usage be that of a particular person, provided it be known to the parties concerned, or provided it has been so long continued or has become so generally known and notorious in the place or neighborhood as to justify the presumption that it must have been known to the parties. Parties who have engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may, therefore, in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business, as ordinary incidents thereto. *Morningstar v. Cunningham*, 11 N. E. 593, 595, 110 Ind. 328, 59 Am. Rep. 211.

"Custom" and "usage" may be treated as synonymous. *Thayer v. Smoky Hollow Coal Co.*, 96 N. W. 718, 719, 121 Iowa, 121.

USAGE AND ACQUIESCENCE.

The phrase "usage and acquiescence," as used in Gen. Laws, c. 142, § 3, providing that the division of partition fences may be established by usage and acquiescence for 20 years, may have the same meaning as the phrase "any right and privilege claimed and enjoyed for 20 years by one party and acquiesced in by the other." Both expressions may signify a right claimed and enjoyed under and in performance of an agreement, express or implied, as well as a right claimed and enjoyed adversely without an agreement. This is the natural and ordinary meaning of the words. *Gibson v. Heyward*, 30 Atl. 407, 408, 67 N. H. 265.

USAGE AND PRACTICE OF WAR.

"Usage and practice of war," as used in a statute requiring the Governor of the

state, in revoking the commission of an Adjutant General, to proceed according to the usage and practice of war, does not mean the rules and articles of war. *Mauran v. Smith*, 8 R. I. 192, 222, 5 Am. Rep. 564.

USE.

See "Statute of Uses"; "Superstitious Use."

A use is a right in one person to have the use or profits or beneficial interest in land, and another person to have the right; that is, to be the legal or formal possessor or tenant of it. *Cuyler v. Bradt* (N. Y.) 2 Caines, Cas. 326, 332.

A "use" is where the legal estate of lands was in a certain person, and the trust was also reposed in him, with some other person who took and enjoyed the profits; in other words, a use was a mere confidence in a friend that the feoffee to whom the lands were given should permit the feoffor and his heirs, and such other person as he might designate, to receive the profits of the land. *Ware v. Richardson*, 3 Md. 505, 547, 56 Am. Dec. 762.

A use is where the legal estate of lands is in a certain person, and a trust is also reposed in him, and all persons claiming in privity under him concerning those lands, that some other person shall take the profits, and be so seised or possessed of that legal estate to make and execute estates according to the direction of the person or persons for whose benefit the trust was created. *Nease v. Capehart*, 8 W. Va. 95, 105 (citing *Gilbert, Uses & Trusts*, pp. 1, 2, 59, 270).

A use, before the statute, was a purely equitable interest, and might be raised after a limitation in fee, or it might be created in futuro without any preceding limitation in fee, or the order of priority might be changed by shifting uses or by powers, or a power of revocation might be reserved to the grantor or a stranger to recall and change the uses. *Ricker v. Brown*, 67 N. E. 353, 354, 183 Mass. 424 (citing 4 Kent, Comm. 293).

"A use is said to be neither *jus in re* nor *ad rem*; neither right, title, nor interest in law, but a species of property unknown to the common law, and owing its existence to the equitable jurisdiction of chancery, resting upon confidence in the person and privity of estate; a thing collateral to the land, and only annexed to a particular estate in it, not to the mere possession; so that, when the estate to which the use is annexed is destroyed, the use itself is destroyed, as by disseisin or the entry of tenant by curtesy or in dower. It was rather a hold upon the conscience of the feoffee to uses than a lien upon or interest in the land, and the principle upon which it was found-

ed was that the feoffee was bound in conscience to follow the direction of the feoffor. A thing so subtle, and cognizable only in courts of equity, which act upon the conscience, differs essentially from an incorporeal hereditament, which is of legal cognizance." *McCartee v. Orphan Asylum Soc.* (N. Y.) 9 Cow. 437, 511, 518, 18 Am. Dec. 516.

Prior to St. 27 Hen. VIII, c. 10, the words "use" and "trust" were regarded as convertible terms. And although, even in that statute, the word "trust" is mentioned as well as the word "use"—for it classes "trusts," "uses," and "confidences" in one category, and undertakes to apply the same remedy to all by uniting the legal with the equitable interest, and thus creating a new legal estate (see 1 Sand. Uses & Trusts, 70-84)—still the distinction between the two terms is practical, substantial, and important. And because in none of our reported cases this distinction is clearly presented, we propose briefly to illustrate it at this time. The elementary writers call our attention to three things as essential to the effectual operation of the statute of uses, namely, a person seised to a use, a cestui que use, and a use in esse (1 Cruise, Dig. 349; 2 Washb. Real Prop. 113), and, when these three things concur, the use is said to be executed (Bac. Law Tracts, 351; 1 Sand. 97, 98; 2 Washb. Real Prop. 119); that is, "the statute comes in and actually transfers the seisin and possession from the feoffee to use to the cestui que use, to all intents and purposes, without any actual entry being necessary to give him the seisin. It is not merely a title, but an actual estate, which is thus created in the cestui que use, as effectually as if it had been done by a conveyance with livery of seisin at common law." When, therefore, the three elements referred to existed, the use was said to become executed, and full effect was given to the statute, and thereupon only one interest or estate remained. But a trust, technically speaking, was and is practically different. A trust may, and perhaps ordinarily does, exist only where the use is incapable of being thus executed; and so the legal estate is necessarily left as at common law. *Hutchins v. Heywood*, 50 N. H. 491, 495.

If the beneficial interest which one person has in land, which in the eye of the common law belongs to another, is a permanent enjoyment of the benefits or profits of the land, it is a use; if the interest is for a temporary purpose, it is a trust. *Hutchins v. Heywood*, 50 N. H. 491, 495.

In Act Jan. 31, 1799, providing that the widow shall be endowed of all the lands, tenements, and other real estate whereof her husband or any other to his use was seised of an estate or inheritance at any time during the coverture, the phrase "or

any other to his use" should be construed strictly as meaning merely a use, and that it did not embrace a trust. *Montgomery v. Bruere*, 4 N. J. Law (1 Southard) 260, 265.

The word "use," in a statute providing that a widow shall be endowed of all tenements and other real estate whereof her husband or any other to his use was seised of an estate of inheritance at any time during coverture to which she has not relinquished or released her right of dower by deed, refers to land so held for the husband by another under such circumstances as entitles the husband or his heirs to a conveyance of the legal estate and the actual seisin and possession of the land. The statute cannot be construed to give the widow a dower interest of a purely equitable estate in lands, of which lands her husband never had and never could have seisin in law or in deed. *Yeo v. Mercereau*, 18 N. J. Law (3 Har.) 387, 393.

In civil law.

Use is the right given to any one to make a gratuitous use of a thing belonging to another, or to exact such a portion of the fruit it produces as is necessary for his personal wants and those of his family. *Civ. Code La.* 1900, art. 626.

A use is defined by Eschriche as the right which a person has to use or enjoy the property of another according to his interests. It is one of the three personal servitudes, which are "use," "usufruct," and "habitation." It is established by contract, by last will, and by prescription, etc. *Mulford v. Le Franc*, 26 Cal. 88, 102.

"Use" is distinguished from "usufruct" in this: That, while usufruct carries the right to enjoy all the fruits and revenues which the property subjected to it can produce, use consists in taking only from the fruits of the property the portion which the user can consume—such as is necessary for his person or regulated by the title. The surplus belongs to the owner of the property. *Dom. Civil Law*, tit. 11, § 11, art. 1. Use is a limited usufruct for the needs of the user, and it is veritable usufruct except as to extent of enjoyment. They are bought and established and lost in the same way. The user must, like the usufructuary, give security, make statements and inventories. He is subject to the costs of cultivation, to those of keeping in repair, to the payment of contributions. There is a difference between the two rights only as to their extent. The usufructuary has the right to enjoy all sorts of fruits, while the user can require only such as are necessary for himself and family. *Strausse v. Sheriff*, 9 South. 102, 103, 43 La. Ann. 501 (citing *Demolombe*, c. 10, p. 713, No. 752; 7 *Laurent*, p. 118, No. 1023; *Civ. Code*, tit. 3, c. 1, §§ 1-5).

USE-USED.

See "Accustomed Use"; "Actual Use"; "Beneficial Use"; "Charitable Use"; "Conjoint Use"; "Contingent Use"; "Convenient Use"; "Double Use"; "Exclusive Use"; "Fair Use"; "Family Use"; "Natural Use and Enjoyment"; "Ordinary Use"; "Own Use"; "Private Use"; "Public Use"; "Reasonable Use"; "Religious Uses"; "Separate Use"; "Shifting Use"; "Sole Use"; "Springing Use"; "Uninterrupted Use"; "For the Use"; "In Use"; "To Be Used"; "To the Use of a Third Person."

Domestic use, see "Domestic."

Otherwise use, see "Otherwise."

"Use," as one kind of unwritten law, is defined to be "that which has arisen from those things which a man uses and does, and is of long continuance and without interruption." *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 445, 9 L. Ed. 1137.

The word "used" imports a certain degree of permanence. *Commonwealth v. Patterson*, 138 Mass. 498, 500.

"Use" is defined as "to employ for any purpose." Such use may be temporary or permanent. *Brown v. McKee* (N. Y.) 2 City Ct. R. 320, 335.

Though the word "used" may sometimes mean employed for a particular purpose on a single occasion, or on two separate occasions, a single sale does not constitute a use of a building. *State v. Stanley*, 24 Atl. 983, 984, 84 Me. 555.

A by-law of the city of London forbidding any nonfreeman to show or put to sale wares within the city or to "use any art" within the same signifies to use as a master or principal. *Clark v. Denton*, 1 Barn. & Adol. 92, 101.

The Constitution of 1777 provided that trial by jury, in all cases in which it has been heretofore "used," shall remain inviolate forever. It was held that as the unwritten common law of England was largely made up of customs which had existed for a period where the memory of man was not to the contrary, and this law was enforced in the colonies, and no statute specified the cases in which parties were entitled to a trial by jury, the word "used" must therefore of necessity have referred to the customs then existing. *Malone v. St. Peter & St. Paul's Church*, 64 N. E. 961, 962, 172 N. Y. 269.

As benefit or profit.

In a deed conveying land to the board of trustees of the County Seminary of R. county and their successors in office, forever, to have and to hold the premises, with all the appurtenances, to the only prop-

er use, benefit, and behoof of said board of trustees for the use of said seminary, forever, "use" is synonymous with "benefit," one of its definitions being the benefit or profit of lands and tenements, and does not create a condition subsequent that the premises are only to be used as a site for a seminary edifice; a condition being a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do or omit to do a particular act, an estate shall commence, be enlarged, or be defeated. *Heaston v. Randolph County Com'rs*, 20 Ind. 398, 402.

In an instruction in a prosecution for larceny regarding defendant's having received money for the "use and benefit" of another, the addition of the words "and benefit" did not change the evident meaning of the instruction, and did not give a different meaning than that conveyed by the statute, which used only the word "use." *State v. Brooks*, 52 N. W. 240, 242, 85 Iowa, 366.

Where by a will a person is given the "use" of a thing, the word "use" does not mean that such person is given the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. *Brunson v. Martin*, 52 N. E. 599, 601, 152 Ind. 111.

A use is where a man has anything to the use of another, upon confidence that the other shall take the profits. He who has the profits has the use. *Allen v. McGee*, 62 N. E. 1002, 1008, 158 Ind. 465.

"The use of a thing is not the thing itself, or any part thereof, but is that which the thing will produce. If a house or other building, or any other form of real estate, it is the rent that can be obtained for it. If it is money, it is the interest it will earn." *Spooner v. Phillips*, 24 Atl. 524, 525, 62 Conn. 62, 16 L. R. A. 461.

As controlled.

A petition in an action against a railroad for personal injuries, stating that the defendant "used and operated" a turntable in connection with its railroad, etc., is equivalent to a charge that the defendant controlled such turntable. *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 660, 42 Am. Rep. 418.

As employ.

The word "use" means to make use of; to convert to one's own service; to avail one's self of; to employ; to put to a purpose, as to use a plow, to use a chair, to use a book, to use time, or to use flour for food; to accustom; to habituate, etc. *State v. Davis* (Del.) 33 Atl. 439, 440, 9 Houst. 558; *State v. Lawrence County* (S. D.) 92 N. W. 16, 17.

The word "use" is synonymous with employment. *Hightower v. State*, 72 Ga. 482, 484.

"Use" means to "put to use, to employ, or to derive service from." *Astor v. Merritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 28 L. Ed. 401.

"Used," in Act June 29, 1888, c. 496, § 4, 25 Stat. 209 [U. S. Comp. St. 1901, p. 3536], providing that any boat or vessel used or employed in violating any provisions of the act should be liable, etc., means to make use of, or to put to a purpose. Practically the words "used" and "employed" are synonymous. Every boat or vessel put to the purpose of violating the provisions of the statute is liable to the penalties, and to be put to such or any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with sufficient authority, that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. *United States v. The Anjer Head* (U. S.) 46 Fed. 684.

In Act Cong. March 3, 1851, 9 Stat. 635, declaring that no owner of a ship shall be liable to answer for damage by fire, unless caused by design or neglect, and providing by section 7 that the act shall not apply to the owner of any vessel used in rivers or inland navigation, the word "used" means "employed," and refers to vessels solely employed in rivers or inland navigation. *Moore v. American Transp. Co.*, 65 U. S. (24 How.) 1, 37, 16 L. Ed. 674.

In Civ. Prac. Act, § 197, providing the manner in which the statement on motion for a new trial shall be prepared, and declaring that the statement "thus used" shall constitute the papers to be used on appeal, the words "thus used" mean employed as the record of the proceedings on which the motion is grounded; and, whenever a statement is prepared and settled, it is "used," within the meaning of that word in the statute. The act imposes no obligation on the trial court to use such statement on the hearing of said motion. *State v. Central Pac. R. Co.*, 30 Pac. 887, 889, 17 Nev. 259.

As expended.

The word "use" has been variously defined as to employ for the accomplishment of a purpose; to turn to account; to make use of; to treat; to convert to one's service; to avail one's self of; to employ; to put to a purpose; to employ for the attainment of some purpose or end. As used in Const. art. 7, § 13, par. 1, providing that the proceeds of a sale of certain railroads held by the state and any other property owned by the state shall be applied to the payment of a bonded debt of the state, and "shall not be used for

any other purpose whatever so long as the state has any existing bonded debt," means that the fund shall not be laid out, paid out, or expended in the discharge of any other claim for which the state is liable. *Park v. Candler*, 39 S. E. 89, 90, 113 Ga. 647.

As intentional use.

A fire policy provided that friction matches and camphine should not be used in the building insured. Held, that the word "use" did not embrace a casual use of camphine and friction matches by a workman employed in the building, contrary to the orders of the assured; the use of camphine and friction matches contemplated in such clause being a use by the authority of the assured, either express or implied. *Farmers' & Mechanics' Ins. Co. v. Simmons*, 30 Pa. (6 Casey) 299, 303.

Act June 29, 1888, c. 496, 25 Stat. 209 [U. S. Comp. St. 1901, p. 3533], prohibiting the dumping of mud from scows in the North river within prescribed limits, and declaring that any boat or vessel used or employed in violating any provision of the act shall be liable to penalties imposed, means a boat or vessel used in violating the act to the knowledge and intent of her officers, and does not include a tug which was proceeding in good faith to the prescribed dumping ground when the scows in tow were dumped by the scowmen within the prescribed limits against the express orders of the captain and officers of the tug. *The Emperor* (U. S.) 49 Fed. 751, 753.

As interest.

In a contract for the reconveyance of property sold on the payment of the exact amount of the consideration for the original conveyance and \$300 a month for the use thereof, "use" should be construed to mean "interest." *Hickox v. Lowe*, 10 Cal. 197, 207.

Mortgage or sale not authorized.

The phrase "use and apply" the property bequeathed in trust to the support of testator's son, if it meant merely to sell the property and use the money received to support the son, or if it was intended that the trustee should receive the rents and profits and apply them only to the son's support, did not give a right to mortgage the estate. *Potter v. Hodgman*, 80 N. Y. Supp. 1056, 1057, 81 App. Div. 233.

Where land was devised to the widow for her use and benefit for life, a mortgage thereon by her to pay for valuable improvements for her benefit was an equitable incumbrance on the estate of the remainderman, notwithstanding the will gave her no power to mortgage. *In re Jenks*, 43 Atl. 871, 21 R. I. 390.

A testator, in devising to C. the use of \$1,000 and certain lots, with the further pro-

vision that C. may "invest or use all this property as he may in his discretion think best," authorized a sale of the property by the devisee. *Crawford v. Wearn*, 20 S. E. 724, 725, 115 N. C. 540.

A general authority in a stock note to "use, transfer, or hypothecate" the pledged property does not authorize a sale by the pledgee before maturity of the note. *Ogden v. Lathrop*, 3 N. Y. Super. Ct. (1 Sweeny) 643, 651.

A provision in a chattel mortgage that the mortgagor might retain and "use" the mortgaged property did not amount to consent to sell the property. *Estes v. First Nat. Bank*, 63 Pac. 788, 792, 15 Colo. App. 526.

One to whom property is bequeathed for her "use" during life is not clothed with the power of disposition; for the word "use" confines the estate to the hands of the first taker, since one having a right to "use" cannot possess absolute power of alienation. *Goudie v. Johnston*, 10 N. E. 206, 297, 109 Ind. 427.

As occupied.

"Used," in a fire policy stating the purposes in which the insured property is "used," is to be construed as synonymous with "occupied." *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399, 402.

Title conveyed.

"Use," as used in a will giving a husband the use of all property of testator, will not convey or pass the title to him. In re *Metcalf's Estate*, 27 N. Y. Supp. 879, 880, 6 Misc. Rep. 524.

A conveyance of the use of land, forever, is equivalent to a conveyance of the land. *Farrar v. Cooper*, 34 Me. 394, 397.

A devise of the use and services of slaves is equivalent to a devise of the slaves themselves. *Pournell v. Harris*, 29 Ga. 736, 742.

Where a testator devised land to certain of his sons without words of inheritance, and then devised to another son the use of a certain tract of land, the word "use" should be construed to vest an estate in fee, rather than a life estate. *Hance v. West*, 32 N. J. Law (3 Vroom) 233, 235.

The word "use," in a will bequeathing to testator's wife the "use" of all testator's real and personal property, creates a life estate in the wife. *Schwartz v. Gehring*, 7 Ohio Cir. Ct. R. 426, 4 Cir. Dec. 662.

A "use," a "trust," and a "confidence" is one and the same thing, and if an estate is conveyed to one person for the use of or upon a trust for another, and nothing more is said, the statute immediately transfers the

legal estate to the usee, and no trust is created, though express words of trust are used. *Teller v. Hill*, 72 Pac. 811, 812, 18 Colo. App. 509 (citing *Perry*, Trusts [5th Ed.] 298).

As transferred.

A bona fide holder of a postdated check, who was told at the time he bought it from the payee that it had been given on an agreement that the payee should not use it until the day of its date, is not bound to understand by the word "use" that the check was not to be transferred before that date. *Bill v. Stewart*, 31 N. E. 388, 156 Mass. 508.

As value.

"Use and benefit," as used in an information alleging the stealing of certain property with the fraudulent intention on the part of defendant to deprive the owner of the "use and benefit" of the same, is not equivalent to "value," as used in the statute, which requires the property to be taken with intent to deprive the owner of the "value" of the same, and hence the information was defective. *Jones v. State*, 12 Tex. App. 424, 425.

Use a highway.

A grant to a railway company of the right to use an existing highway is not to be construed as a power to destroy the highway as such. This is the rule of construction, unless the language of the statute is such as to unmistakably show an intention to grant such power. *Palatka & I. R. R. Co. v. State*, 3 South. 158, 162, 23 Fla. 546, 11 Am. St. Rep. 395.

Use for life.

The words "use for life," as used in a statute giving a surviving spouse the "use of the realty for life," are sufficient to create a life estate, on the ground that a gift or devise of the rents, profits, and income of land passes the land itself. *Thompson v. Thompson*, 18 South. 247, 249, 107 Ala. 163.

Use for sexual intercourse.

The word "use" in a statute providing a punishment for whoever uses a female under the age of consent for the purpose of sexual intercourse does not have reference to the one who immediately uses her. It may be a male or it may be a female. *State v. Davis* (Del.) 33 Atl. 439, 440, 9 Houst. 558.

Use liquor or opium.

"Use," within the meaning of a question in an application for life policy whether the applicant uses malt or spirituous beverages, is to be construed as referring to a customary and habitual use, and not to a single act or occasional use. *Chambers v. Northwestern Mut. Life Ins. Co.*, 67 N. W. 367, 369, 64 Minn. 495, 58 Am. St. Rep. 549; *Van Valken-*

burgh v. American Popular Life Ins. Co., 70 N. Y. 605, 606.

A statement by an applicant for a life policy that he has "never used liquor" should be construed to mean that he has never used liquor for a beverage, and not that he has never taken liquor for medical purposes. *Higbee v. Guardian Mut. Life Ins. Co.* (N. Y.) 66 Barb. 462, 472.

An application for a life policy in which the applicant states that he has "never used opium" should be construed to mean that he has not used opium when not required for medical purposes, and not to mean that he has never taken the drug for medical purposes. *Higbee v. Guardian Mut. Life Ins. Co.* (N. Y.) 66 Barb. 462, 472.

Use liquor to excess.

The common term or phrase "uses liquor to excess," when applied to a person, is ordinarily understood to mean the same as saying that he gets intoxicated or drunk, and saying that such a person did so at particular times would generally be understood as meaning that these times occur as often as he finds an opportunity to do so. *State v. Pratt*, 34 Vt. 323, 324.

Use obscene language.

Code, § 4372, making it a misdemeanor to "use obscene language in the presence of a female," means the use by speech, unless one or both of the parties, by reason of some deficiency or infirmity, would not ordinarily or habitually communicate in that way, and does not include the use of written words, though the word "language" is broad enough to include words written, as well as words spoken. *Stevenson v. State*, 16 S. E. 95, 90 Ga. 456.

Use of the county.

The expression "for the use of the county" has the same meaning as "for the public use of the county," as used in Laws 1860, c. 15, § 2, authorizing a county to purchase and hold real and personal estate for the use of the county. *Shepard v. Murray County*, 24 N. W. 291, 292, 33 Minn. 519; *James v. Wilder*, 25 Minn. 305, 311.

Use of gristmill.

The phrase "water for the use of said gristmill," in a deed conveying land with a gristmill thereon, together with a water right for the use of said mill in a spring not situated on the land conveyed, clearly and unequivocally means that the water shall be used as a power in operating the mill. Such is the common and well-accepted meaning of the language employed in making the grant, and therefore the grantee has no right to use the water of the spring for other purposes. *Woodring v. Hollenbach*, 51 Atl. 318, 319, 202 Pa. 65.

Use of the inhabitants of parish.

"Use," as contained in St. 11 Geo. III, directing that commissioners set out and allot a certain portion of the common lands for the getting of stone, gravel, and other materials for the repairs of the highway and other roads, to be set out under the act and "for the use of the inhabitants" within the parish, did not authorize the inhabitants to take such materials for their private purposes, but only for the repairs of the roads. *Rylatt v. Marflett*, 14 Mees. & W. *233.

Use of invention.

A sale of a patented article imported from abroad is a "use" of the invention, within the letters patent, prohibiting any one to "make, use, or put in practice" such invention. *Walton v. Lavater*, 8 O. B. 162, 185.

Use of land.

In Lateral Railroad Act Feb. 17, 1871 (P. L. 56), requiring the assessment of damages to the owner of land taken, and requiring that the uses and purposes to which the land is put shall be considered, the phrase "uses and purposes" means and was intended to cover both the owner's present and future needs; the immediate uses of the land, and his future designs, plans, or purposes relative to its use. *Hays v. Briggs* (Pa.) 3 Pittsb. R. 504, 517.

To cultivate and have the use of lands amounts to a receipt of the rents and profits thereof, and therefore a person cultivating and having the use of land may be charged in a proper case with the receipt of the rents and profits. *Thompson v. Bostick* (S. C.) McMul. Eq. 75, 76.

A reservation of the "use and occupancy" of the land during the lifetime of the grantors, followed by an agreement by the grantee to "use, occupy, and enjoy the right reserved, and to pay therefor all taxes, together with a stipulated rent," as construed in accordance with the practical construction shown by the continuous occupancy of the grantee, who had, however, ceased to pay the rent, means that the use and occupancy were to be made available to the grantors through the use by the grantee, who was to make, during the grantors' lives, a stipulated payment which they called "rent," but which was really a charge on the land, the failure to pay which would forfeit neither the estate nor the right of possession. *Hardwick v. Laderoot*, 39 Mich. 419.

"Use and occupy," as used in a devise of certain lands to a trustee, in trust to permit testator's son-in-law to use and occupy the same for and during the term of his natural life, "is equivalent to a disposition thereof in trust for him or to his use." *Farmers' Nat. Bank v. Moran*, 14 N. W. 805, 30 Minn. 165.

Where a wife was given for life the use of a farm, and occupied it and enjoyed its products, she was entitled to the use of it, but not to cultivate it at the expense of the children. *Crane v. Van Duyne*, 9 N. J. Eq. (1 Stockt.) 259, 260.

A devise of the income, rents, and use of the real estate is equivalent to a devise of the real estate for the time fixed in the will. *In re France's Estate*, 75 Pa. (25 P. F. Smith) 220, 224.

"Use and occupy," as contained in a deed reserving to the grantors the right to use and occupy the premises for five years, are equivalent to the right to the "use and occupancy," and import a general right in the grantors to use and occupy, either by themselves or others. *Cooney v. Hayes*, 40 Vt. 478, 483, 94 Am. Dec. 425.

In a will giving to testator's wife the use and improvement of one-third of all his real estate, "use" is not to be taken in its strict legal and technical meaning, but its more general and popular acceptation, and refers to a temporary occupancy of the land, rather than to an estate in it coupled with the power of alienation. The word "use" is not ordinarily selected to convey a permanent interest in land, nor is such its natural import or meaning. *Fay v. Fay*, 55 Mass. (1 Cush.) 93, 104.

Use of money.

A will giving to testator's wife the use of his moneys during her natural life implies the possession of the moneys and putting them to the use of the legatee as she may have occasion, though the word "use" as employed in the will is ambiguous, and may mean the interest only, as well as implying the possession of the moneys and the putting them to the use of the legatee as she might have occasion. *Patterson v. Stewart*, 38 Mich. 402, 403.

Use of party wall.

In Code, § 2994, relating to party walls, and authorizing the owner to recover one-half of the value of so much of the wall as used by the other party, the word "use" has reference to the habitual or permanent employment of the means to the accomplishment of a purpose, and this purpose is the utilization of the standing wall as a part of its permanent structure, so that the use of only a footing course does not constitute the use of a party wall. *Monroe Lodge*, No. 8, I. O. O. F., v. *Albia State Bank*, 84 N. W. 682, 683, 112 Iowa, 487 (citing *Beggs v. Duling*, 102 Iowa, 13, 70 N. W. 732).

As used in McClain's Code, § 3195, relating to party walls, and providing that, if a person refuses to contribute to the building of such wall, he shall yet retain the right of

making it a wall in common by paying to the person one-half of the appraised value at the time of using it, the word "use" has reference to the habitual or permanent employment of the means to the accomplishment of a purpose, which is the utilization of the standing wall as a part of some permanent structure, so that temporary utilization is not sufficient to charge the adjoining owner. *Beggs v. Duling*, 70 N. W. 732, 734, 102 Iowa, 13.

Use of plank road.

Where a deed grants all the grantor's right, title, and interest to land for the use of a plank road, only an easement passes. *Robinson v. Missisquoi R. Co.*, 59 Vt. 423, 10 Atl. 522 (cited in *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 343, 51 W. Va. 106).

Use a port.

A warranty in a policy of insurance not to use ports in certain countries ordinarily means to enter them, and the warranty is not broken until such a port is entered; but where a voyage is taken for the sole purpose of landing at a prohibited port, and the vessel is lost before reaching the port, the warranty will be considered broken when the vessel started on the voyage. *Snow v. Columbian Ins. Co. (N. Y.)* 48 Barb. 469, 477.

"Use a port," as used in a guaranty in a policy of insurance not to use a port in certain countries, means to go into the port harbor or haven for pleasure, commerce, or territory, and to derive a benefit or advantage from its protection. *Wheeler v. New York Mut. Ins. Co.*, 35 N. Y. Super. Ct. (3 Jones & S.) 247, 252. It does not embrace a going near, sailing past, or going in the direction of it. *Snow v. Columbian Ins. Co.*, 48 N. Y. 624, 627, 8 Am. Rep. 573.

Use of railroad.

"Use," in the charter of a transportation company, did not necessarily imply the use by running trains, but was satisfied by the road being kept in repair and used for earning tolls, under a lease to another road. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. (7 C. E. Green) 130, 411.

Code Iowa, § 1307, making the company liable for injuries caused by the negligence or mismanagement of fellow employees "when such wrongs are in any manner connected with the use and operation of any railway" about which they shall be employed, includes the use of a hand car by a section crew to return home after repairing the track. *Chicago, M. & St. P. Ry. Co. v. Artery*, 11 Sup. Ct. 129, 137 U. S. 507, 34 L. Ed. 747.

Laws 1839, c. 218, providing that it should be lawful for any railroad corporation to "contract" with any other railroad corporation "for the use" of their respective

roads, cannot be construed to include a lease of a portion of a road, by which the lessee was to have and to hold the property, and containing a proviso that, in case any portion of the road should be used as a railway by it or under it, the lessee might terminate the lease on notice. *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107, 117.

Code 1873, § 1307, declaring that railroad companies shall be liable for injuries to employees caused by or directly connected with the "use and operation of the railway," is not limited to the actual running of trains on the railway, but includes the running of a single engine without cars attached, and also the propelling of a hand car, which, by reason of a collision with a flat car used by a section hand, caused plaintiff's injury. *Larson v. Illinois Cent. Ry. Co.*, 58 N. W. 1076, 1077, 91 Iowa, 81.

An employé of a railroad company, who has duties consisting in wiping off the engines and opening and shutting the doors of a roundhouse, in which the engines are run, is not engaged in work connected with the "use and operation" of a railway, within the use of that phrase in the statute exempting persons engaged in occupations connected with the "use and operation" of railways from the rule of fellow servants. *Malone v. Burlington, C. R. & N. Ry. Co.*, 21 N. W. 756, 757, 65 Iowa, 417, 54 Am. Rep. 11 (affirming *Same v. Burlington, C. R. & N. Ry. Co.*, 61 Iowa, 328, 16 N. W. 203, 47 Am. Rep. 813).

Use of timber.

A grant of the "use of the timber" on the grantor's lands should be construed to confer only an incorporeal right to the use of the timber, and not to a conveyance of the title to the timber itself or the soil on which it grew. *Clark v. Way* (S. C.) 11 Rich. Law, 621, 625.

Use tracks.

Where a statute providing that any street surface railroad company may "use the tracks" of another street surface railroad company upon certain conditions, permission to use the tracks implies use for the purpose of operating its cars thereon, and no other. *Colonial City Traction Co. v. Kingston City R. Co.*, 47 N. E. 810, 811, 153 N. Y. 540.

Use a weapon.

One who has reached for his pistol and partially drawn it from his pocket, with a remark, "By G——! I have got you now," is using the weapon, within Pen. Code, art. 571, providing that when a homicide takes place to prevent murder, if the "weapon used" by the party attempting or committing murder is such as would have been calculated to produce death, it is to be presumed that the person so using it designed to kill and murder. *Ward v. State*, 18 S. W. 793, 794, 30 Tex. App. 687.

It is the "use" of a dangerous weapon, within the meaning of the statute providing for the punishment of those who rob the United States mail by putting in jeopardy the life of the person having charge thereof by the use of dangerous weapons, to point a pistol at another, accompanied with words which denote intent to injure, or without words, if the pistol is so held as to plainly designate such intent in case of resistance or refusal to consent to the objects intended to be effected by its production and display. It need not be pointed at the person having the mail in charge, if it was intended to be used in case of resistance or refusal to surrender the mail, or if he saw the pistol or had cause to believe it was to be so used. *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 708.

Used as an aqueduct.

The words "used as an aqueduct for the conveyance of water," in a statute making it criminal for any person to cut, injure, or destroy any leaden or other pipe used as an aqueduct for the conveyance of water, has reference to the use of the pipes at the time of the injury, and not to their general nature, or to the purpose for which they were originally intended, or the use to which they are put. To constitute an offense, an injury to the pipes must be while they form a part of the aqueduct. *State v. Jones*, 33 Vt. 443, 444.

Used as a dwelling house.

The phrase "used as a dwelling house," in a fire policy on a building stated to be used as a dwelling house, are words of description, and not of warranty. *Heffron v. Kittanning Ins. Co.*, 20 Atl. 693, 703, 182 Pa. 580.

Used as a homestead.

Gen. St. c. 68, § 1, exempting from execution the dwelling house, etc., used or kept by a householder or head of family as a homestead, means "either actually occupied and used as a homestead, or else susceptible of such occupancy, and kept for the present right and purpose of so occupying and using such homestead." *Bugbee v. Bemis*, 50 Vt. 216, 219.

"Use" is the act of employing anything or the state of being so employed or applied, and hence, as used in homestead exemption statutes of Oklahoma, requiring that the same shall be used for the home of the family, requires occupancy of the homestead as an essential element of the homestead right. *Ball v. Houston*, 66 Pac. 358, 359, 11 Okl. 233.

Const. art. 16, § 52, providing that, on the death of the husband or wife, the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the survivor, or so long as the survivor may elect to "use or occupy" the same as a home-

stead, does not mean that the survivor must reside on the homestead. When left, either from necessity or convenience, by the family, no matter for how long a time, so long as it contributes to the support of the family, it remains the homestead until title is acquired to another home, which is used and occupied as such. *Foreman v. Meroney*, 62 Tex. 723, 727.

Under the statute exempting from attachment premises of the debtor "actually used or kept as a homestead," where defendant deeded his interest in the premises to another, gathered materials to build another house, filed his petition to have a homestead set out from another part of the premises, and lived for several years in different towns, his actions were inconsistent with the keeping or using of the premises for a homestead. *Whiteman v. Field*, 53 Vt. 554, 556.

Under Gen. St. c. 68, § 1, providing that the homestead, consisting of land not exceeding \$500 in value and used or kept as such homestead, shall be exempt, etc., where one owns two farms in different towns, making his home on one and residing there with his family, it is a homestead, although he intends to sell it and move onto the other in future. *Goodall v. Boardman*, 53 Vt. 92, 101.

Used as public highways.

1 Rev. St. p. 521, § 100, providing that all roads "used as public highways" for 20 years or more shall be deemed public highways, means that the user must be like that of highways generally. The road must not only be traveled on, but it must be kept in repair or taken in charge and adopted by the public authorities. The mere fact that a portion of the public traveled over a road for 20 years cannot make it a highway. The user, however, need not be adverse and under such circumstances as would be required to give an individual a right of way by prescription. Hence, where owners of land opened and fenced a strip of it, which was used by the public generally for travel for more than 20 years, and where it was mentioned in various deeds and maps as a road, does not show a user sufficient to constitute the strip a highway within the meaning of the statute, where the owners at the time of the opening and repeatedly thereafter declared that the road was a private way, and claimed the right to close it at any time; the road never having been adopted as a highway by the public authorities. *Speir v. Town of New Utrecht*, 24 N. E. 692, 694, 121 N. Y. 420.

Used by the debtor.

In the statute exempting from execution two horses, etc., "used by the debtor in obtaining the support of his family," the words "used by the debtor in obtaining the support of his family" are general, and restrict-

ed to no particular mode of use. They are answered when the team is hired to others for a compensation, which compensation goes into the general fund to support the family, as well as where the debtor himself goes with the team as its driver and adds the earnings of his labor to that of the team. *Washburn v. Goodheart*, 88 Ill. 229, 231.

Used for agricultural purposes.

Rev. St. § 2983, providing that certain property "used for agricultural purposes" should be exempt from execution as a homestead, etc., should be construed to include a parcel of land, though the owner did nothing with it, except to keep and feed his horse there. *Binzel v. Grogan*, 29 N. W. 895, 897, 67 Wis. 147.

Used for charitable or religious purposes.

A parsonage, belonging to a church society and used as the residence of the minister, is not within Const. art. 9, § 3, providing that churches and church property used for religious purposes shall be exempt from taxation, though some part of such parsonage is used for religious worship. *Ramsey County v. Church of Good Shepherd*, 47 N. W. 783, 784, 45 Minn. 229, 11 L. R. A. 175.

Property used partially for charitable purposes and partly for a store is not used for charitable purposes, within the meaning of the constitutional exemption. *State v. Lawrence County* (S. D.) 92 N. W. 16, 17.

Const. art. 207, providing that charitable institutions are exempt from taxation on "property owned and used" for their corporate purposes, should not be construed to include the property of such institutions, when leased or used for corporate income. *State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574, 575.

The phrase "used exclusively for purposes of public worship," in a statute exempting from taxation property used exclusively for the purposes of public worship, may be properly used to characterize a Jewish synagogue, although the janitor lives with his family on the top floor, paying no rent and receiving a salary for his services. *Shaarai Berocho v. City of New York*, 18 N. Y. Supp. 792, 793, 60 N. Y. Super. Ct. 479.

Used for educational purposes.

Property owned by one person and used by another for a school purpose is not "used and set apart" for educational purposes within the meaning of such terms as used in Rev. St. 1881, § 6276, cl. 5, exempting from taxation every building "used and set apart" for educational purposes. *Travelers' Ins. Co. v. Kent*, 50 N. E. 562, 563, 151 Ind. 349.

Const. art. 207, exempting from taxation buildings and property used for college or other school purposes, means property ac-

tually used for such purposes. Property held by private persons with the possible intention of using it for school purposes at some future time, but with nothing to fix the purpose or prevent the owner from abandoning it at will, is not used for such purposes within the statute. *Enaut v. McGuire*, 36 La. Ann. 804, 805, 51 Am. Rep. 14.

"Used," as found in the charter of a corporation organized for educational purposes providing that all real estate, not exceeding 100 acres, in land belonging to the corporation, should be exempt from taxation so long as the same should be used and the avails thereof expended solely for the purpose of education and instruction, applies to the land itself; and the land belonging to the corporation was intended to be exempt from taxation only so long as it was used for the purpose for which it was created. *City of Hartford v. Hartford Theological Seminary*, 34 Atl. 483, 485, 66 Conn. 475.

Under an exemption from taxation in an academy's charter as to "all lands, tenements, and personal estate that shall be given to the trustees for the use of the academy," a building used partly as a dormitory and students' boarding house and partly as a public house is not exempt. The phrase "for the use of" is not to be taken in the same sense as "for the benefit of." It is used in a more limited and restricted sense. The sole intent of the Legislature was to grant to the plaintiffs (trustees of the academy) exemption from taxation on such property, and such only, as was used by them directly in carrying on their enterprise—to their schoolhouses and lands, devoted immediately and exclusively to the purposes of their grant. *Trustees of Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 307, 308, 42 Am. Rep. 589.

Const. 1870, art. 9, § 3, provides that property used for schools shall be exempt from taxation, including the real estate on which they are located, not leased or otherwise used for profit. The Monticello Female Seminary was originally located upon a tract of 8 acres of land, upon which were erected the buildings of the institution. Afterwards the corporation acquired three other tracts of land, of 40 acres, 20 acres, and 14¼ acres. All these tracts are within the common inclosure of the seminary grounds, with dividing fences within that common inclosure. These several tracts are used, a portion for walks and lawns for the exercise and benefit of the scholars, a part for gardening to supply the institution with vegetables, a part for an orchard to supply necessary fruit for the institution, a part for raising feed for stock, for pasturage, and for woodland, and all for the exclusive use of the institution and not "otherwise used with a view to profit." Held, that the lands are exempt from taxation, under the statute of exemp-

tion relating to property of institutions of learning. *Monticello Female Seminary v. People*, 106 Ill. 398, 399, 46 Am. Rep. 702.

The clause in Act March 5, 1864, exempting the property of the Colorado Seminary used exclusively for seminary purposes, precludes the exemption from applying to land owned by the seminary for the purpose of sale, though the proceeds are to be devoted to carrying out the purposes of the institution; but the statute only exempts the property which is in actual use, as the seminary buildings, campus, etc. The thought that ownership was intended to be the test is expressly negated. The clause, "while used exclusively for such purposes," denotes an intention to make something else besides ownership the criterion. If this be not so, then the clause in question is meaningless. The word "used" embodies a different thought from the word "owned." The phrase "used exclusively" is clearly a limitation upon the general ownership. It is employed in contradistinction to "ownership." It designates a specific part or portion of the property owned. *County Com'rs v. Colorado Seminary*, 21 Pac. 490, 491, 12 Colo. 497.

Used for farm or team work.

The words "used for team work," within the meaning of the statute exempting two horses kept and used for team work, is not to be construed as requiring the horses to be kept and used exclusively for team work, but an occasional use for such purposes is sufficient. *Webster v. Orne*, 45 Vt. 40, 42.

The phrase "kept and used for team work," in a statute exempting horses kept and used for team work, was held not to include a colt about two years old, which a boy who worked out kept at his father's place, although the colt was nearly two years old, and had been used to draw wood a short distance and for certain other work, and though it was intended to use the colt for team work. *Sullivan v. Davis*, 50 Vt. 648.

Acts 1866, No. 39, providing for the exemption from execution of horses "kept and used for team work," etc., should be construed to include a colt, though it be not in actual use at the time of the attachment, where the owner keeps it with the honest intention and purpose of using it within a reasonable time for team work, to enable him with the aid of the animal to procure a livelihood. *Rowell v. Powell*, 53 Vt. 302, 304.

Laws 1871, c. 30, exempts from attachment and execution beasts of the plow, when required for farming or teaming or other actual use. Held, that the word "use" does not mean a use of pleasure or trade or amusement, but means use in husbandry or some lawful and useful industry. *Somers v. Emerson*, 58 N. H. 48, 49.

Used for navigation.

The word "used," in Act 1825, declaring that "no person shall erect any milldam or other obstruction across any stream used for the purpose of navigation by boats, flats, or rafts of lumber or timber," etc., refers to the use of it which would give it a public character at the time the obstruction was made. *State v. Cullum* (S. C.) 2 Speers, 581, 584.

Used for railroad purposes.

P. L. p. 142, providing that all property of any railway company "used for railroad purposes" shall be assessed by a city board of assessors, applies to the authorized right of way of a railroad duly acquired, over which a railway has been constructed and in good faith operated, though it may not for the time being be wholly occupied by tracks or other railroad appliances. *United New Jersey R. & Canal Co. v. City of New Jersey*, 26 Atl. 185, 55 N. J. Law, 129.

Used for sale of intoxicating liquors.

An indictment for keeping a building used for the illegal sale of intoxicating liquors is supported by proof that the defendant occupied the whole building and used part of it for the purpose alleged. *Commonwealth v. Shattuck*, 80 Mass. (14 Gray) 23.

The word "used," in Rev. St. c. 17, § 1, declaring that all places "used" as houses for the illegal sale or keeping of intoxicating liquors are common nuisances, implies habitual action, so that the sale of intoxicants on two different occasions in a dwelling house does not, as a matter of law, constitute it a common nuisance. *State v. Stanley*, 84 Me. 555, 561, 24 Atl. 983.

A building cannot be said to be "used" for the illegal sale of intoxicating liquors, within the meaning of Pub. St. c. 101, § 6, making a building so used a nuisance, on the strength of a single casual sale, made without premeditation in the course of a lawful business. The word "used" imports a certain degree of permanence. *Commonwealth v. Patterson*, 138 Mass. 498, 500.

"Used for," in Rev. St. c. 17, § 1, declaring that all places used for the illegal sale or keeping of intoxicating liquors are common nuisances, is not synonymous with "resorted to," as used in an indictment charging a person with keeping and maintaining a building occupied by himself as a saloon and shop, and resorted to for the illegal sale of intoxicating liquor. Neither word has any technical meaning attached to it. Both must therefore be construed in their ordinary signification. The building may be used by the occupant or keeper. It is resorted to by other persons. If used for sale, it must be understood that sales are made by the keeper or under his authority. If resorted to for that

purpose, sales may or may not be made, and if made, are supposed to be made by the persons so resorting. *State v. Dodge*, 6 Atl. 875, 78 Me. 439.

Used for the transportation of freight.

The phrase "used for the transportation of freight and passengers," in a statute authorizing a canal company to charge tolls upon all boats, vessels, steamboats, and other craft used for the transportation of freight and passengers, modifies the designated vessels, as well as the words "other craft," and therefore the statute does not apply to tugs, while towing freight or passenger vessels through the canal or on their return trip. *Sturgeon Bay & L. M. Ship Canal & Harbor Co. v. Leatham*, 45 N. E. 422, 423, 164 Ill. 289.

Used in the business.

"Personal property used in the business," within the meaning of Act June 20, 1868, § 19, declaring if any false entry be made on a distiller's book, etc., with intent to defraud, the distillery and all personal property used in the business, etc., shall be forfeited to the United States, does not include distilled spirits found on the premises in which the business of distilling is carried on. *United States v. 4,800 Gallons of Spirits* (U. S.) 25 Fed. Cas. 1192.

Pub. St. c. 76, § 6, forbidding any person to assume or continue to use in his business the name of a person formerly connected with him in partnership, or the name of any other person, without written consent, means to use as part or all of the partnership name, so as to indicate that the person named is a member of the firm, and does not prohibit a person from describing himself as "successor to" another. *Martin v. Bowker*, 40 N. E. 766, 163 Mass. 461.

Used in the erection and construction of road work.

Board, groceries, tobacco, money, or other supplies furnished to the employees of a subcontractor employed to build a railroad are not used in the erection and construction of the road, and therefore the amount thereof does not constitute a mechanic's lien; but the railroad company is liable to the foreman of the subcontractor for the services while in the employ of the subcontractor. *Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575.

Used on the premises.

"Used," as employed in Code 1873, § 2017, declaring that a landlord shall have a lien for his rent on all crops grown on the premises and on any other personal property of the tenant which has been used on the premises and not exempt from execution, means that the landlord shall have a lien

upon all work animals, tools, and machinery with which the premises have been cultivated, and all property to the maintenance or improvement of which the use of the premises has contributed; and hence the lien attaches to cattle used for the purpose of feeding and improving them in the ordinary ways, and where the premises are leased for the purpose of keeping cattle for sale and the cattle are so kept. *Thompson v. Anderson*, 53 N. W. 418, 419, 86 Iowa, 703.

The term "used," in Code, § 1270, providing that a landlord shall have a lien for his rent upon all crops grown upon the demised premises and upon any other personal property of the tenant which has been used on the premises during the term and is not exempt from execution, etc., is not employed in the limited sense to designate a use similar to that of agricultural implements. It was employed in a larger sense and as avoiding other terms, which would either too much widen or restrict the application of the lien. The use intended is only that which is incident to the nature and purposes of the occupation of the premises—the object of the tenancy. In this sense the cloths and goods of merchant tailors are used for the purposes of sale and for making up garments for customers, and the landlord has a lien thereon by virtue of the statute. *Grant v. Whitwell*, 9 Iowa, 152, 155.

USE AND OCCUPATION.

Change in use and occupation, see "Change."

The words "use and occupation" properly state the nature of the enjoyment of property by a tenant for life. *Faxon v. Faxon*, 55 N. E. 316, 317, 174 Mass. 509.

"Use and occupation," as used in a will by which testator gives to his son certain property for "his own use and occupancy" during the period of his life, gives a fee, there being no devise of the remainder; the testator meaning to give the use and occupation forever, which is equivalent to a devise in fee. *Armstrong v. Michener*, 28 Atl. 447, 448, 160 Pa. 21.

The term "use and occupation," as used in an agreement of partnership wherein a life tenant put into the business the use and occupation of a mill for a certain time against the time and experience of the other partner, means that the holder of the legal title is the landlord and the grantee of the use a mere tenant, with or without a specific agreement as to a rent charge. *Hart v. Hart*, 94 N. W. 890, 894, 117 Wis. 639 (citing *Depere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761).

Profits of a business is quite another insurance risk, and not at all covered by the

phrase "use and occupancy." *Tanenbaum v. Freundlich*, 81 N. Y. Supp. 292, 39 Misc. Rep. 819; *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810. Insurance on use and occupancy evidently relates to the business use which the property is capable of in its existing condition. *Tanenbaum v. Simon*, 81 N. Y. Supp. 655, 658, 40 Misc. Rep. 174.

"Insurance of use and occupation" is a modern development, and the Court of Appeals, in *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810, has defined the phrase to relate to the business use which the property is capable of in its existing condition. If it is destroyed by fire, and its use becomes impossible, then during the period required for its reinstatement as property capable of use and occupation the owner is to be compensated according to the terms of the policy. *Tanenbaum v. Freundlich*, 81 N. Y. Supp. 292, 294, 39 Misc. Rep. 819.

In a policy insuring the "use and occupancy" of a grain elevator, and providing for indemnity as long as the owner is prevented from handling grain by reason of fire, insures the business use which the property is capable of in its existing condition, and not the loss of earnings and profits of business. "Use and occupancy," as terms of insurance, may assume within their general scope the expectation of profits and earnings derivable from property; but the terms appear to have a broader significance as to the subject of insurance, and to apply to the status of the property, and to its continued availability to the owner for any purpose he may be able to devote it to." *Michael v. Prussian Nat. Ins. Co.*, 63 N. E. 810, 171 N. Y. 25.

USE AND OCCUPATION (Action of).

The action for "use and occupation" and the action of ejectment are not the same. *In re Polsgrove*, 5 Pa. (5 Barr) 500, 501, 502.

The action for mesne profits differs from an action for use and occupation in this: that the latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry *vi et armis* upon premises, and a tortious holding. The action to recover mesne profits is an action where trespass *quare clausum fregit* cannot be maintained without proof of the trespass. It is founded on the action of ejectment most generally, and follows a recovery in that action. *Thompson v. Bower* (N. Y.) 60 Barb. 463, 478.

Where plaintiff asserts the ownership of an interest in land, an easement in the possession of which he has been disturbed, the action is of a possessory character, and not one for the use, rents, and profits of real estate. *Miller v. Richards*, 38 N. E. 854, 855, 139 Ind. 263.

USEFUL.

See "New and Useful Improvement."

"Useful," in the patent law, is well recognized to be used in contradistinction to frivolous improvements and invention, or such as are injurious to the public. *Whitney v. Emmett* (U. S.) 29 Fed. Cas. 1074, 1077.

"Useful," as used in Act Feb. 21, 1793, c. 11, providing that when any person shall allege that he has invented any new and useful art, machine, etc., he may, on pursuing the directions of the act, obtain a patent, means, not an invention in all cases superior to the modes now in use for the same purpose, but useful, in contradistinction to frivolous and mischievous inventions. *Lowell v. Lewis* (U. S.) 15 Fed. Cas. 1018, 1019. In the case of *Lowell v. Lewis*, Mr. Justice Story says that the word "useful" is only incorporated in the act relating to patents in contradistinction to "mischievous." *Kneass v. Schuykill Bank* (U. S.) 14 Fed. Cas. 746, 748. In the patent laws "useful" is used in contradistinction to "mischievous." The invention should be of some benefit. *Cox v. Griggs* (U. S.) 6 Fed. Cas. 678, 680.

"Useful," as used in Rev. St. § 4929 [U. S. Comp. St. 1901, p. 3398], authorizing the issuance of a patent to any person who has invented and produced any new, useful, and original shape of any article of manufacture, does not require that the shape of the article, in order to be patentable, shall add some new utility to the article, but is used merely to exclude such thing as might have a vicious or corrupting tendency. *Westinghouse Electric & Mfg. Co. v. Triumph Electric Co.* (U. S.) 97 Fed. 99, 102, 38 C. C. A. 65.

In an action to recover on a promissory note given for a patent right, the defense being want of consideration, the jury were instructed "that, to warrant a patent, the invention must be useful; that the general application of the term 'useful' is capable of any beneficial use, and in contradistinction to 'pernicious' or 'injurious'; that in the statute respecting patents the meaning may be a little more restricted; and that, if an invention be merely frivolous or worthless, it is not, within the meaning of the law, 'useful.' But if under any circumstances the machine in question could be applied to any beneficial purpose, as for the purpose of preparing hemp for bale rope, or where water power is cheap and labor high, it might be deemed a useful invention." The instruction was held correct. *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217, 219, 220, 25 Am. Dec. 390.

USEFUL ANIMAL.

Chickens are within the terms of Code, § 2482, punishing any cruelty to "any useful

beast, fowl, or animal." *State v. Neal*, 27 S. E. 81, 84, 120 N. C. 613, 58 Am. St. Rep. 810.

USEFUL APPARATUS.

The term "new and useful apparatus," within the meaning of the patent law, authorizing the issuing of patents for such apparatus, does not include the mere permanent attachment of advertising material to balloons. *Gould v. Commissioner of Patents* (D. C.) 1 McArthur, 410, 413.

USEFUL ART.

A polite or liberal art is that in which the mind and imagination are chiefly concerned, as poetry, music, painting, as distinguished from a "useful or mechanical art," which is one in which the hands and body are more concerned than the brain. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

The term "useful art," in the patent law, includes a process. *New Process Fermentation Co. v. Koch* (U. S.) 21 Fed. 580, 582; *Corning v. Burden*, 56 U. S. (15 How.) 252, 267 (citing *McKay v. Jackman* [U. S.] 12 Fed. 618).

Under the constitutional provision under which our patent laws are framed, relating to the promotion of "useful arts," an art, as such, may be the subject of a patent. *French v. Rogers* (U. S.) 9 Fed. Cas. 790, 794.

USEFUL DESIGN.

The term "useful," in relation to designs, means adaptation to producing pleasant emotions. There must be originality and beauty. Mere mechanical skill is not sufficient. *Rowe v. Blodgett & Clapp Co.* (U. S.) 103 Fed. 873, 874 (citing *Northrup v. Adams* [U. S.] 18 Fed. Cas. 374, and approved in *Smith v. Whitman Saddle Co.*, 148 U. S. 679, 13 Sup. Ct. 768, 37 L. Ed. 606).

USEFUL HOUSE OF ENTERTAINMENT.

Code 1849, pp. 443, 444, cc. 38, 96, authorizes the granting of a license to keep a house of entertainment, if the court be of the opinion that the applicant is sober and of good character, and will probably keep a house orderly, useful, and such as the law requires. It was contended on the application for a license that the location or probable utility of the house was not material; but the court held that this would treat the word "useful" as of no importance, and compel the court to disregard a matter about which the law says they must be satisfied before they have authority to grant a license. The probable utility of the house

must depend, not only on the character and conduct of the person who is to keep it, but also on the convenience of the place proposed, the number of houses already established at or near such place, and on a variety of other considerations readily suggested; and the court, in forming an opinion as to whether the applicant will keep a useful house, must consider and weigh all such considerations. *Ex parte Yeager* (Va.) 11 Grat. 655, 656.

USEFUL INVENTION.

A "useful invention," within the meaning of the acts of Congress relating to patents, is one that may be applied to some practical and salutary use named in the patent; but it is not necessary that it should be of such general utility as to supersede all other inventions used to accomplish the same purpose. *Rowe v. Blanchard*, 18 Wis. 441, 442, 86 Am. Dec. 783.

"Useful invention," as used in the patent law (1 Stat. 318), providing that patents shall issue only for useful inventions, will not include an invention of an ornamental mode of putting up thread, which gives it no additional value, but merely makes it sell more readily at retail and for a larger price. *Langdon v. De Groot* (U. S.) 14 Fed. Cas. 1099, 1100.

A useful invention," within the meaning of the patent law, means an invention which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the moral health or good order of society. *Bedford v. Hunt* (U. S.) 3 Fed. Cas. 37; *Fair v. Shelton*, 38 S. E. 290, 291, 128 N. C. 105.

As used in the patent act of 1793, "useful invention" means such a one as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals or health or the good of society. It is not necessary that the invention be of such general utility as to supersede all other inventions in practice to accomplish the same purpose. *Bedford v. Hunt* (U. S.) 3 Fed. Cas. 37.

USEFUL TRADE.

"Useful trade," as used in a will providing that the interest from a certain sum should be applied to the education of certain boys so that they might be severally fitted and accomplished in some useful trade, does not mean one of the learned professions. The distinction between a profession and a trade is well understood, and they are seldom, if ever confounded with each other in ordinary language. If the testatrix had contemplated what in the common intercourse of society is denoted a profession, she would scarcely have used a term which is gen-

erally received as denoting one of the mechanical arts. *Dandridge v. Washington*, U. S. (2 Pet.) 370, 374, 7 L. Ed. 454.

USEFULNESS.

"Usefulness," as used in statutes requiring that railroad companies shall restore highways which they cross to their former state, so as not to impair their usefulness, implies capabilities for use, and appertains to the future as well as the present. *Chesapeake, O. & S. W. Ry. Co. v. Dyer County*, 11 S. W. 943, 944, 87 Tenn. 712 (citing *Mills*, *Em. Dom.* § 198).

The "usefulness" required of an article, to be useful within the meaning of the patent law, is that it must be a practicable method of doing the thing designed. In ascertaining its usefulness, it is not important that it should be more valuable than other modes of accomplishing the same result. *Roberts v. Ward* (U. S.) 20 Fed. Cas. 936.

USELESS.

"Useless," as used in Gen. Laws, c. 19, § 86, providing for the discontinuance of highways which are useless, is not sustained by a finding of commissioners that certain highways are not necessary. *In re Coe*, 44 N. Y. Supp. 910, 912, 19 Misc. Rep. 549.

A machine cannot be pronounced useless or impracticable, so as to render it insusceptible to patents, because improvements may be made which will obviate or prevent embarrassments to its most perfect operation. For example, where a mowing machine would mow as patented upon level prairies or other smooth ground, or upon ground containing only slight elevations and depressions, without the addition of a curved toe which was subsequently added, it could not be called a useless or impracticable machine. *Wheeler v. Clipper Mower Co.* (U. S.) 29 Fed. Cas. 881, 890.

USER.

See "Adverse User"; "Nonuser."

USES.

In the certificate of an acknowledgment stating that the grantor sealed and executed the instrument for the uses and purposes therein specified, the word "uses" is not of similar import or substantially the same as the word "consideration," which is required in such certificates by *Gantt's Dig.* § 1846, and hence the acknowledgment is insufficient. *Martin v. O'Bannon*, 35 Ark. 62, 67.

USUAL.

"Usual" is defined to mean frequent, ordinary, customary, general, often, or reg-

ular. *Chicago & A. R. Co. v. Hause*, 71 Ill. App. 147, 152, 153 (citing *Webst. Dict.*); *Chicago & A. R. Co. v. House*, 50 N. E. 151, 153, 172 Ill. 601.

"Usual" means according to usage. *Rev. St. Okl.* 1903, § 2802; *Code Civ. Proc. Mont.* 1895, § 3463, subd. 11; *Id.* § 4665; *Rev. Codes N. D.* 1899, § 5129; *Civ. Code S. C.* 1903, § 2463.

Where plaintiff offered to show that he had carried out his contract according to the "usual and customary" methods of the Philadelphia coal trade, the offer was not insufficient to admit evidence of such custom, because it did not propose to prove the usage "based on a custom," since the phrase "usual and customary" imports more than actual or exceptional, causes and indicates a fixed and established usage. *Carter v. Philadelphia Coal Co.*, 77 Pa. (27 P. F. Smith) 286, 290.

USUAL AND ORDINARY CARE.

The words "usual and ordinary care" mean nothing more or less than, if there be a great danger and hazard in the business, there should be a corresponding degree of skill and attention required by law. *Memphis St. Ry. Co. v. Kartright*, 75 S. W. 719, 721, 110 Tenn. 277 (citing *Cook v. Wilmington City Electric Co.* [Del.] 32 Atl. 643, 9 *Houst.* 306).

USUAL BUSINESS HOURS.

"The usual business hours" of a railway station agent, during which it is his duty to keep the station open for the delivery of goods, are the hours within which the community generally did business with him, and does not mean the time during which the railroad company demanded his services. *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133, 154 (Gil. 119, 138).

USUAL CHANNEL.

A warranty by the assured in a towage policy, reciting that the steam tug with her tow should not go out of the "usual and regular channel," cannot be interpreted as a warranty that the tug should never through any fault or error of navigation get out of the proper depth of water. What is meant by the clause is that in going from place to place the vessel should go by way of the "usual and regular channel," and should not intentionally take any unusual channel or any route out of the usual course, but should pursue the ordinary and accustomed route. *Egbert v. St. Paul Fire & Marine Ins. Co.* (U. S.) 71 Fed. 739, 742.

USUAL COMMISSION.

"Usual commission," as used in a will, directing that the acting executor should re-

ceive compensation for his services in addition to the usual commission allowed to executors, and that he should share in such usual commission with his coexecutors, means a commission of 5 per cent., and not a commission which a court should adjudge to be sufficient to fairly compensate the executors for their responsibility and labor involved and the care and skill required in the proper execution of the trust. *In re Lilly's Estate*, 37 Atl. 557, 558, 181 Pa. 478.

USUAL COURSE AND CUSTOM.

Rev. St. c. 138, § 7, subdiv. 4, declares that, where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not included according to "the usual course and custom of the adjoining country," shall be deemed to have been occupied for the same length of time as the part improved or cultivated. Held, that "the usual course and custom of the adjoining country" means a local custom. *Pepper v. O'Dowd*, 39 Wis. 538, 549.

USUAL COURSE OF BUSINESS.

See "Course of Business."

Rev. St. 1838, p. 472, exempting from distress property deposited with a tavern keeper in the "usual course of business," means a deposit of goods with the tavern keeper by a guest for safe-keeping. *Harris v. Boggs* (U. S.) 5 Blackf. 489, 490.

A sale in the usual course of business means according to the customs and usages of commercial transactions. *Kellogg v. Curtis*, 69 Me. 212, 214, 31 Am. Rep. 273.

"Usual course of business," as used with reference to transfers of negotiable paper, means according to the usages and customs of commercial transactions, and is not confined to persons engaged habitually in banking or purchasing notes. One who in good faith purchases a negotiable note before maturity for value, or who takes it in payment of an antecedent debt, is not out of the usual course of business. *Tescher v. Merea*, 21 N. E. 316, 317, 118 Ind. 586.

"In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is, not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is subject to investigation." *Rison v. Knapp* (U. S.) 20 Fed. Cas. 835, 837.

The obtaining of a note in exchange for property seems quite as much in the usual course of business as the getting of it for cash. *In Kimbro v. Lytle*, 18 Tenn. (10

Yerg.) 423, 31 Am. Dec. 585, a note is said to be taken in the usual course of business where the holder has given for the note his money, goods, or credits at the time of receiving it, or has on account of it incurred some loss or liability. This is quoted with approval in *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 Pac. 723. *Cunningham v. Holmes* (Neb.) 92 N. W. 1023, 1025.

USUAL COVENANTS.

"Usual covenants," as used in a contract for a conveyance of real estate by deed with usual covenants, means covenants of seisin, of right to convey, against incumbrances, to quiet enjoyment, and of warranty. *Wilson v. Wood*, 17 N. J. Eq. (2 C. E. Green) 216, 218, 88 Am. Dec. 231.

A deed with the usual covenants for title is the same as a warranty deed with full covenants. *Drake v. Barton*, 18 Minn. 462, 467 (Gil. 414, 421).

USUAL HIGH-WATER MARK.

The "usual high-water mark" of tide waters means the limit reached by the neap tides—that is, those tides which happen, between the full and change of the moon, twice in every 24 hours—and not the limit which the monthly spring tides reach, tides which occur only at the full and change of the moon, though the limit of the monthly spring tides is in one sense the "usual high-water mark," for as often as those tides occur to that limit the flow extends. *Teschmacher v. Thompson*, 18 Cal. 11, 21, 79 Am. Dec. 151.

USUAL INTEREST.

As used in a convention to pay the "usual interest," the phrase should be construed to mean legal interest; there being no uniform usage. *Segur v. His Creditors* (La.) 1 Mart. (O. S.) 74, 75.

USUAL MEDICAL ATTENDANT.

In an action on a life insurance policy, where the insured in his application had given the name of his usual medical attendant as Dr. Purdy, it appeared that the insured was a single man, who prior to the insurance had lived in his father's family, and Dr. Purdy had been the family physician for many years. Four years before another physician had attended him during a short illness, and on two occasions in the two years preceding the application still another physician had prescribed for him. The court said: "To constitute a medical attendance, it is not requisite that a physician should attend a patient at his home. An attendance at his own office is sufficient. Of these three physicians the usual medical at-

tendant certainly was not the physician who had attended him during the one brief illness; and as between the one who attended him on two occasions, visiting him in all not over half a dozen times, and the family physician in his father's family, upon whom he called yearly for many years for medical advice or treatment, the latter could properly be called the usual medical attendant; but, whether this be so or not, it was at least a question for the jury, and there was no error in submitting it to them." *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72, 78.

USUAL METHOD.

The fact that the usual, customary, and ordinary method of handling a locomotive was being pursued at the time a fire was set by it does not necessarily show that the prudent and careful way was being pursued, especially if the wind was blowing hard at the time, and the land adjacent to the roadway was covered with very combustible material. It might well be contended that more than ordinary care and caution was required. *Solum v. Great Northern Ry. Co.*, 65 N. W. 443, 444, 63 Minn. 233.

USUAL OCCUPATION.

A by-law of a benefit society provided for benefits to one disabled from following his usual or some other occupation. It was contended that "some other" meant any occupation, but the court held otherwise, on the ground that "usual" did not necessarily mean entire, or only that a member might have two occupations, one usual and one occasional, to which last the words "some other" referred. *Neill v. Order of United Friends*, 44 N. E. 145, 146, 149 N. Y. 430, 62 Am. St. Rep. 738.

USUAL PLACE OF ABODE.

Dwelling house as, see "Dwelling—Dwelling House."

"The house of his usual abode," within the meaning of Gen. St. 1894, § 5199, subd. 4, authorizing substituted service on defendant by leaving notice, etc., at the house of his usual abode, "is not an equivalent of domicile in all particulars, for one's place of abode or home, once acquired, does not necessarily continue until another one is obtained. A tramp may have a domicile, but no house of his usual abode. The term means a person's customary dwelling place or residence. In the case of a married man, the house of his usual abode is prima facie the house wherein his wife and family reside." *Missouri, K. & T. Trust Co. v. Norris*, 63 N. W. 634, 635, 61 Minn. 256.

One who owned real estate and carried on business in Massachusetts until the year

1841, when he removed to another state, where he continued to reside, will in 1843 be deemed to have a last and usual place of abode in Massachusetts. *Tilden v. Johnson*, 60 Mass. (6 Cush.) 354, 359.

Dig. 1836, p. 278, § 8, directing the summons in forcible entry and detainer to be served by leaving a copy at the defendant's "usual place of abode," does not necessarily mean the dwelling house of the party. A return reciting that a copy was left at the dwelling house of the defendant does not say that it was left at his usual place of abode. *Ser v. Bobst*, 8 Mo. 506, 507.

Gen. St. p. 514, § 2, authorizes substituted service of a summons by leaving a copy at defendant's "usual place of abode." Held, that where defendant was confined in a county jail, and during such confinement the house where he had last resided was sold by the trustee of his insolvent estate, the jail, though his residence therein was compulsory, and not voluntary, was his usual place of abode within the statute. *Appeal of Dunn*, 35 Conn. 82, 84.

"Usual place of abode," as used in Prac. Act, § 49, providing that the service of summons shall be made on the defendant in person or by leaving it at his dwelling house or "usual place of abode," is a much more restricted term than residence, and means the place where the defendant is actually living at the time when service is made. *Mygatt v. Coe*, 44 Atl. 198, 199, 63 N. J. Law, 510.

Code Va. 1860, authorizing substituted service of summons by posting notice on the front door of defendant's "usual place of abode," must be construed to mean defendant's present place of abode; and hence, where notice was posted on a house seven months after defendant and his family had left it, while they were residing at the Federal line, was not posted at defendant's place of abode. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398.

"Usual place of abode," as used in Code 1860, c. 167, § 1, providing that a summons may be served on a defendant at his "usual place of abode" by delivering a copy, means his usual place of abode eo instante. It would be absurd to hold that a boarding house or place where a person stopped temporarily when visiting a city or country on matters of business or socially should be considered his usual place of abode when his visit or stay had ended and he was absent. *Capehart v. Cunningham*, 12 W. Va. 750, 755.

"Usual place of abode," as used in Act 1736-37 (P. L. 145; 1 Brev. Dig. 221, § 29), authorizing service by leaving a copy at defendant's usual place of abode, should be construed to mean the abode of defendant at the time of service of the writ. *Johnson v. Gadsden* (S. C.) 1 Nott & McC. 89, 90.

"Usual place of abode," as used in Rev. St. § 3489, authorizing substituted service of summons by leaving a copy at defendant's usual place of abode, must be construed to require the summons to be left at defendant's present usual place of abode; and hence a return that summons was left at defendant's last usual place of abode did not show service, since such return could be true and yet the defendant reside in another county or jurisdiction. *Madison County Bank v. Suman's Adm'r*, 79 Mo. 527, 530.

"Usual place of abode," as used in Gould's Dig. c. 28, § 10, authorizing service of summons by leaving the same with a white person at defendant's usual place of abode, is synonymous with "residence," and hence a return by an officer that he left the summons at defendant's "residence" with a white person was sufficient. *Du Val v. Johnson*, 39 Ark. 182, 192.

A person's "usual place of abode" in a particular county is not necessarily his usual place of abode in the state, and the return of summons, stating that the same had been served constructively at the usual place of abode of the defendant in a certain named county, is insufficient under Comp. Laws Or. 1887, § 55, providing that, if a defendant cannot be found, service of summons may be made by delivering a copy of the same "to some person of the family * * * at the dwelling house or usual place of abode of the defendant." *Swift v. Meyers* (U. S.) 37 Fed. 37, 40.

Bankr. Act 1841, declared that the word "person," as used therein, should include corporations, and another section provided that service of process issued under the act should be made on the debtor personally or by leaving the order at his last or "usual place of abode." Held that, since the abode of a corporation can only be that place where its business is principally transacted, the phrase "usual place of abode" should be construed as to corporations to mean their principal place of business. *In re California Pac. R. Co.* (U. S.) 4 Fed. Cas. 1060, 1065.

The usual place of abode of a party, at the front door of which notice of suit may be posted in the absence of a party and of his family, does not include a house seven months after it has been vacated by defendant's family, and while they are residing within the Confederate lines; and therefore the posting of such notice is insufficient to give jurisdiction. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398.

A proof of service of summons on a person at his last and usual place of abode in C. county is equivalent to "usual place of abode," as required by Rev. St. § 2636. It means that the service was made at the person's last and usual place of abode, and that

such place of abode was then in C. county. The words "last and" are mere surplusage. The last and usual place of abode of a person is necessarily his present usual place of abode. *Healey v. Butler*, 27 N. W. 822, 823, 66 Wis. 9.

An officer returned that he made service of a summons by delivering a copy at the dwelling house or usual place of abode of the defendant and leaving the same with a free white person, etc. It appeared that the defendant was a bankrupt and had fled to Canada prior to the service with his family, and at the time of the alleged service and since that time had not resided at the place where the summons was left. Held that, though the defendant fled from the jurisdiction of the court and might be hiding just outside the same, and came within the state for the purpose of making the motion to set aside a judgment entered on such service, the summons was not properly served, since the rule authorizing service at the usual place of abode does not permit service by leaving a copy at "the last place of abode" of the defendant. *Hyslop v. Hoppock* (U. S.) 12 Fed. Cas. 1139, 1140.

In the construction of statutes the terms "usual place of residence" and "usual place of abode," when applied to the service of any process or notice, shall be construed to mean the place usually occupied by a person. If such person have no family, or do not have his family with him, his office or place of business, or, if he have no place of business, the room or place where he usually sleeps, shall be construed to be such place of residence or abode. Gen. St. Kan. 1901, § 7342.

USUAL PLACE OF BUSINESS.

St. 1870, c. 2, § 1, requires all persons using scales and measures and weights for selling goods to have the same sealed in the city or town in which they reside or have their usual place of business. Held, that the word "place," in the term "usual place of business," should be construed to mean the city or town in which a tradesman's shop was located; and hence the fact that the most of his customers lived in another town, and he weighed and measured his provisions from his market wagon as he delivered them, and that his weights and measures were sealed in that town, were not a compliance with the statutes. *Palmer v. Kelleher*, 111 Mass. 320, 321.

USUAL PLACE OF RESIDENCE.

As used in a statute requiring service of process by leaving a copy at defendant's "usual place of residence," the term means the place of abode at the time of service. The fact that defendant's wife remained in another place did not make that place the

defendant's "usual place of residence." *Seymour v. Street*, 5 Neb. 85, 88.

As used in a statute authorizing service on a defendant by delivering a copy of the summons at the "usual place of residence" of the defendant, the term means the place of abode at the time of service. *Blodgett v. Utley*, 4 Neb. 25, 30.

The words "usual place of residence" mean the place of abode. The fact that a person's family remained in one state, while he went into another state and there established himself in business, with no intention of returning to the former state, would not necessarily make such former state his usual place of residence. *Forbes v. Thomas*, 35 N. W. 411, 418, 22 Neb. 541.

In the construction of statutes, the terms "usual place of residence" and "usual place of abode," when applied to the service of any process or notice, shall be construed to mean the place usually occupied by a person. If such person have no family, or do not have his family with him, his office or place of business, or, if he have no place of business, the room or place where he usually sleeps, shall be construed to be such place of residence or abode. Gen. St. Kan. 1901, § 7342.

USUAL PROJECTIONS.

"Usual projections," as used in a deed providing that the front wall of plaintiff's house should be set back 22 feet from M. street, provided that steps, windows, porches, and other usual projections appurtenant thereto are to be allowed in said reserved space, would not permit the plaintiff to finish his house in an octagon shape, so that the whole of the front wall from the foundations to the roof encroached on and occupied a portion of the space reserved. *Linzee v. Mixer*, 101 Mass. 512, 528.

USUAL RATES.

"Usual rates," as used in the customs law, providing for the charge of commissions at usual rates, has received a judicial construction, and what the usual rate may be is a question of fact, and not what the importer may have paid as commissions. *Hutton v. Schell* (U. S.) 12 Fed. Cas. 1095.

USUAL RESIDENCE.

"Usual residence" means customary common residence. *Graham v. Commonwealth*, 51 Pa. (1 P. F. Smith) 255, 258, 88 Am. Dec. 581 (citing *Webst. Dict.*).

USUAL RISK OF LIGHTERAGE.

The phrase "usual risk of lighterage," in a marine policy insuring against usual

risk of lighterage, was construed to include a loss by drowning of cattle which became frightened on a lighter while in the process of being unloaded from a vessel and ran overboard and were drowned. *Anthony v. Aetna Ins. Co.* (U. S.) 1 Fed. Cas. 1046, 1048.

USUAL RULES AND REGULATIONS.

"Usual rules and regulations," used in a contract for advertising which was to be subject to the usual rules and regulations, relates only to the character of the advertisements, type, and mode of insertion, and the like, and not to the prices to be obtained for such advertising. *Clegg v. New York Newspaper Union*, 4 N. Y. Supp. 280, 281, 51 Hun, 232.

USUAL STOPPING PLACE.

A statute providing that passengers refusing to pay their fare may be expelled from the train at a "usual stopping place" means the usual stopping places for the discharge of passengers, and does not include a water tank, though trains usually stop there to take on wood and water. *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 367, 92 Am. Dec. 133.

The words "any usual stopping place," in Pasch. Dig. art. 4892, providing that, "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place which the conductor may select," mean either a regular station, or any other place which the company expressly, by public notice or otherwise, had designated as a proper place for passengers to get on or off its trains, and where they would, in consequence thereof, have the right to demand the exercise of this privilege. A place at which a train is stopped for wood or water only is not a usual stopping place, within the meaning of such section. *Texas & P. R. Co. v. Casey*, 52 Tex. 112, 122.

USUALLY.

"Usually," as contained in an instruction in an action against a railroad company for refusing to put a passenger off at her destination, making the company liable if the passenger had a right to believe that the train on which she was riding "usually stopped" at her destination, means habitually or customarily. *Texas & P. R. Co. v. Ludlam* (U. S.) 57 Fed. 481, 483, 6 C. C. A. 454.

As used in Act Feb. 12, 1818, authorizing certain persons to construct a dam across a river, and requiring them, as long as they make use of the same for the purpose for which it is granted, to maintain, uphold, and support the said dam, lock, etc., and at all

times keep them in good and sufficient repair, and fit, safe, and convenient for the passage of boats and craft "usually navigating" said river freely, without toll or expense of any kind or nature whatsoever, is synonymous with boats "customarily navigating" or "accustomed to navigate" the river; and hence a count in an action against the owners of such dam and lock, alleging that the plaintiffs were the joint owners of boats and craft for the navigating of said river, and accustomed to navigate the same, etc., brings them within the class of boats designated in the statute. *Farwell v. Smith*, 16 N. J. Law (1 Har.) 133, 134.

"Usually rated," as used in Highway Act 5 & 6 Wm. IV, c. 50, § 27, directing the surveyor to rate all property then liable to be rated to the poor, provided that the same rate shall also extend to such woods, mines, etc., as had theretofore been usually rated to the highways, refer not to legal ratability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally. *Reg. v. Rose*, 6 Adol. & El. (N. S.) 152, 155.

USUCAPTION.

Title by prescription must not be founded with "usucaption," which simply by the lapse of a short time cures defects in titles otherwise good. *Pavey v. Vance*, 46 N. E. 898, 900, 56 Ohio St. 162.

USUFRUCT.

See "Perfect Usufruct"; "Imperfect Usufruct."

"Usufruct" is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profits, utility, and advantages which it may produce, provided it be without altering the substance of the thing. *Civ. Code La.* 1900, art. 533.

"Usufruct," as used in the Spanish law, is "the right to use and enjoy the property of others; that is, to appropriate its fruits without impairing the substance." *Mulford v. Le Franc*, 26 Cal. 88, 102; *Heintzen v. Binniger*, 21 Pac. 377, 79 Cal. 5; *Cartwright v. Cartwright*, 18 Tex. 626, 628.

"Usufruct" is distinguished from "use" in this: that while usufruct carries the right to enjoy all the fruits and revenues which the property subjected to it can produce, use consists in taking only from the fruits of the property the portion which the user can consume, such as is necessary for his person or regulated by the title. The surplus belongs to the owner of the property. *Dom. Civ. Law*, tit. 11, § 11, art. 1. Use is a limited usufruct for the needs of the user, and

It is a veritable usufruct, except as to the extent of enjoyment. They are bought, and established and lost in the same way. The user must, like the usufructuary, give security and make statements and inventories. He is subject to the costs of cultivation, to those of keeping in repair, to the payment of contributions. There is a difference between the two rights only as to their extent. The usufructuary has the right to enjoy all sorts of fruits, while the user can require only such as are necessary for himself and family. *Demolombe*, c. 10, p. 713, No. 752; *Laurent*, p. 118, No. 1023; *Civ. Code*, tit. 3, c. 1, §§ 1, 5. *Strausse v. Sheriff*, 9 South. 102, 103, 43 La. Ann. 501.

USUFRUCTUARY.

A "usufructuary" is one who has the usufruct or right of enjoying anything in which he has no property. He has all the right to all the fruits produced by the subject of the usufruct, whether they be natural (that is, produced spontaneously by the earth or animals, as timber, fruits, wool, milk, and the young of cattle), or industrial (that is, produced by cultivation, as crops of grain), or civil (such as rents for the hire of houses, freights, or revenues from annuities and from other effects or rights). But notwithstanding these enlarged rights of a usufructuary owner to the produce or fruits of the subject of usufruct, yet there is one exception, to wit, the child born of a slave of whom one has the usufruct shall belong to the master of the slave, and not to the usufructuary. *Cartwright v. Cartwright*, 18 Tex. 626, 628.

USURER.

A usurer is one who lends money at a rate of interest greater than that established by law. *Newton v. Wilson*, 81 Ark. 484, 485.

USURIOUS.

"A usurious contract is one which stipulates for the payment of more than lawful interest for the use of money or forbearance of a debt." *Parham v. Pulliam*, 45 Tenn. (5 Cold.) 497, 501 (quoting 3 Pars. Cont. tit. "Usury").

Tyler on Usury states the requisites of a usurious contract thus: "There must be, first, a loan expressed or implied; second, an understanding between the parties that the money lent shall or may be returned; third, that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and, fourth, a corrupt intent to take more than the legal rate for the use of the sum loaned. Unless these four things concur in every transaction, it is safe to affirm that

no case of usury can be declared, and this may be regarded as a rule universally recognized in all of the states." *Balfour v. Davis*, 12 Pac. 89, 92, 14 Or. 47 (citing *Tyler, Usury*, 110).

It is the essence of a usurious transaction that there shall be an unlawful and corrupt intention on the part of the lender to take illegal interest. *Green v. Grant* (Mich.) 96 N. W. 583, 585.

The "usurious transaction" from which limitations run against an action to recover twice the amount of usurious interest paid to a national bank occurs only when the principal and legal interest have been paid or judgment recovered for such amount. *First Nat. Bank v. Denson*, 22 South. 518, 115 Ala. 650.

A transaction is usurious when we find a loan, either express or implied, and an understanding between the parties that the loan shall or may be returned with a greater rate of interest than is allowed by law. Where money is loaned, and interest is calculated at the highest lawful rate for the full period of the loan, and the aggregate of the principal and interest thus calculated is divided into as many notes as the period embraces months, one of such notes maturing each month, the transaction is a usurious transaction. *Union Sav. Bank & Trust Co. v. Dottenheim*, 84 S. E. 217, 221, 107 Ga. 606.

Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], relating to usury, and providing that a person who has paid usurious interest may recover back in an action twice the amount of the interest thus paid, provided such action is commenced within two years from the time the "usurious transaction" occurred, means the actual payment of interest in excess of the legal rate. *First Nat. Bank v. Smith*, 54 N. W. 254, 256, 36 Neb. 190.

USURIOUSLY.

The word "usuriously," in an indictment for usury, expresses a criminal intent as clearly as would the word "corruptly," used in the statute providing a punishment for usury. *Crawford v. State*, 2 Ind. (2 Cart.) 112, 113.

USURP.

Under a statute (*Mansf. Dig. c. 151, § 6466*) which provides that, whenever a person usurps an office or franchise to which he is not entitled by law, action or proceedings at law may be instituted against him, either by the state or the party entitled to the franchise, it is held that the term "usurp" is not used merely with reference to an intrusion into office without color of title, but

that a defective title is no greater protection than no title at all, and that one exercising a public office without an absolute right to hold it is to be regarded as having usurped the office, within the meaning of the statute. *Wheat v. Smith*, 7 S. W. 161, 163, 50 Ark. 266.

USURPER.

A mere usurper of an office is one who intrudes himself into an office which is vacant and ousts the incumbent, without any color of title whatever, and his acts are void in every respect. *Hamlin v. Kassafer*, 15 Pac. 778, 781, 15 Or. 456, 3 Am. St. Rep. 176; *People v. White* (N. Y.) 24 Wend. 520, 529; *Hooper v. Goodwin*, 48 Me. 80 (citing *Tucker v. Aiken*, 7 N. H. 113); *McCraw v. Williams* (Va.) 33 Grat. 510, 513; *Norfleet v. Staton*, 73 N. C. 546, 550, 21 Am. Rep. 479.

A "usurper" is one who takes possession of an office without any authority. His acts are utterly void, unless he continues to act for so long a time or under such circumstances as to afford presumption of his right to act, and then his acts are valid as to the public and third persons, though he has no defense in a direct proceeding against himself. But when, without color of authority, a person simply assumes to act, and to exercise the authority of an office, and the public know the fact, or reasonably ought to know it, his acts are absolutely void for all purposes. *Van Amringe v. Taylor*, 108 N. C. 196, 201, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51.

A "usurper" is one who undertakes to perform official acts without any color of right. A person holding an office under the apparent authority of a statute which is unconstitutional acts under a color of right, and is not a usurper. *People v. Petrea*, 1 N. Y. Cr. R. 198, 213.

USURY.

See "Plea of Usury."

"Usury," in its original and primitive meaning, "is a premium or reward for the use of money or other commodity or things." The Jews were forbidden to lend upon usury to one of their own kindred or nation, though it was lawful so to lend to a stranger. "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent on usury. Unto a stranger thou mayest lend on usury, but unto thy brother thou shalt not lend on usury, that the Lord may bless thee in all thou settest thy hand to." Deut. xxiii, 19, 20. To lend money upon usury was always forbidden by the Jewish laws. The royal minstrel of Israel, when chanting the virtues of those who might be permitted to abide

in the tabernacle of the Everlasting God, gave a high rank to him that putteth not out his money to usury. Psalm xxv. On the propagation of the Christian religion the same moral and religious feeling accompanied its spread, and usury was held criminal by the canon law. The Jews became the exclusive usurers, and were for that reason held in detestation by all Christendom. Usury was forbidden by the common law of England. *Henry v. Bank of Salina* (N. Y.) 5 Hill, 523, 528.

The definition of "usury," as given by Grotius, is: "If the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law; but, if it exceeds these bounds, it is then oppressive usury, and, though the municipal laws may give it impunity, they can never make it just." *State v. Multnomah County*, 10 Pac. 635, 639, 13 Or. 287 (citing 2 Bl. Comm. 455, 456).

"Usury" was an offense at common law, and the usurer was not only punished by the censures of the church in his lifetime, but was denied a Christian burial; and by the laws of Alfred the Great and Edward the Confessor, if, after death, even, a man was found to have been a usurer, his goods were forfeited to the Crown and his lands to the lord of the fee. *Gray v. Bennett*, 44 Mass. (3 Metc.) 522, 527.

"Usury" is the taking or contracting for exorbitant interest for the forbearance of the principal. *Fowler v. Word* (S. C.) Harp. 372.

"Usury" is *malum prohibitum*, not *malum in se*. *Hamilton v. Prouty*, 7 N. W. 659, 661, 50 Wis. 592, 36 Am. Rep. 866.

There is a class of cases which hold in effect that if property is sold by one person to another, and the seller demands one price for cash and a larger price for sale on time, this is not "usury." *Martin v. Reese* (Tenn.) 57 S. W. 419, 424.

As interest greater than allowed by law.

"Usury is the taking of more interest for the use of money, or forbearance of a debt, than the law allows." *Parkham v. Pulliam*, 45 Tenn. (5 Cold.) 497, 501; *Brundage v. Burke*, 40 Pac. 343, 11 Wash. 679 (citing *Dunham v. Gould* [N. Y.] 16 Johns. 367, 8 Am. Dec. 323); *Reed v. Coale*, 4 Ind. 283, 288; *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93, 118; *Woodruff v. Hurson* (N. Y.) 32 Barb. 557, 559; *Trask v. Hazazer*, 4 N. Y. Supp. 635, 638; *Van Schalck v. Edwards* (N. Y.) 2 Johns. Cas. 355, 364; *Wilkie v. Roosevelt* (N. Y.) 3 Johns. Cas. 206, 2 Am. Dec. 149; *Merrills v. Law* (N. Y.) 9 Cow. 65, 66; *Rosenstein v. Fox*, 44 N. E. 1027, 1029, 150

N. Y. 354; *Harmon v. Lehman, Durr & Co.*, 5 South. 203, 85 Ala. 379, 2 L. R. A. 589; *Woolsey v. Jones*, 4 South. 190, 192, 84 Ala. 88; *Dunkle v. Renick*, 6 Ohio St. 527, 534; *Gray v. Bennett*, 44 Mass. (3 Metc.) 522, 527; *Lee v. Peckham*, 17 Wis. 383, 386; *Kreibohm v. Yancey*, 55 S. W. 260, 266, 154 Mo. 67.

"Usury consists in the contracting for, receiving, or reserving of a greater rate of interest on the principal sum than is allowed by law." *United States Mortgage Co. v. Sperry* (U. S.) 28 Fed. 727, 730.

"Usury" is the charging of unlawful interest. Unless there is a law which limits the rate of interest to be charged, there can be no usury. *Newton v. Wilson*, 31 Ark. 484, 485; *Woodruff v. Hurson* (N. Y.) 32 Barb. 557, 559.

"Usury" may be defined to be the taking of more for the use of money than is authorized by law, or the extortion of a sum beyond what is legal. That is the definition of Mr. Tyler, the leading text-writer on this subject. It is otherwise defined as the illegal profit which is required by the lender of a sum of money from the borrower for its use. *New England Mortg. Sec. Co. v. Gay* (U. S.) 83 Fed. 636, 640.

"Usury" is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest. Civ. Code Ga. 1895, § 2877.

Persons incorporated under Rev. St. 1866, c. 25, for the transaction of lawful business, have no authority as a corporation to charge and receive interest on loans made by them to exceed the maximum rate of interest allowed by law; and all loans by such corporation for interest in excess of the legal rates are affected with the vice of usury. *Lincoln Bldg. & Sav. Ass'n v. Graham*, 7 Neb. 173, 178.

If a loan be in fact the consideration for the amount of compensation taken, if that amount be in part the consideration for the forbearance, and if it be authorized or sanctioned by the principal, if the whole amount taken and reserved exceed the lawful rate, it is usury, whether it is taken for the benefit of the principal or of the agent. *Stein v. Swensen*, 49 N. W. 55, 57, 46 Minn. 360, 24 Am. St. Rep. 234.

Agreement necessary.

To constitute "usury" there must be a corrupt agreement to receive more than the law allows by way of interest. *Varick v. Crane*, 4 N. J. Law (3 H. W. Green) 128, 130.

To constitute "usury" there must be a contract between the lender and borrower by which the lender receives or reserves a great-

er rate of interest than the maximum allowed by law. *Leonard v. Cox*, 10 Neb. 541, 7 N. W. 289.

There can be no usury without a contract. To constitute "usury" it must be shown that additional interest was paid or reserved in pursuance of a mutual agreement. *Egbert v. Peters*, 35 Minn. 312, 313, 29 N. W. 134; *Rosenstein v. Fox*, 44 N. E. 1027, 1029, 150 N. Y. 354 (citing *Morton v. Thurber*, 85 N. Y. 551, 556).

To constitute the offense, there must be an agreement that he who has the use of the money shall pay the owner of it more than the lawful interest; that is, more than the law demands to be paid for money. It is entirely immaterial in what manner or form, or under what pretense, usury is exacted and paid. The contract will not be held good merely because on its face and by its words it is free from taint, if it be substantially usurious. *Lee v. Peckham*, 17 Wis. 383, 386.

Where by the contract between lender and borrower the lender receives a greater rate of interest than the maximum allowed by law, such contract is affected with the vice of usury, and it makes no difference whether the usurious interest is expressed in terms in the instrument against him for the payment of the debt, or whether it is taken as a bonus or procured by some agreement, shift, or device at the time of the contract. *Richards v. Kountze*, 4 Neb. 200, 205; *Lincoln Bldg. & Sav. Ass'n v. Graham*, 7 Neb. 173, 178.

To render a contract usurious the contract itself must be tainted with the offense. If the original contract does not provide for a higher rate of interest than the law authorizes, an agreement to pay interest on overdue interest will not render the original contract usurious. *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780.

Compound interest.

Compound interest is not usury. *Otis v. Lindsey*, 10 Me. (1 Fairf.) 315, 316.

An agreement to pay interest on interest which has become due does not constitute usury. *Camp v. Bates*, 11 Conn. 487, 495; *Hager v. Blake*, 19 N. W. 780, 16 Neb. 12.

Comp. St. 1887, c. 44, § 1, provides that any rate of interest which may be agreed upon, not exceeding \$10 per year upon \$100, shall be valid upon any loan or forbearance of money. Where the interest provided for in a promissory note is the maximum rate allowed by law, and is represented by coupons providing that the interest shall be allowed thereon after maturity at the maximum rate, no interest will be allowed on such coupons. *Mathews v. Toogood*, 41 N. W. 130, 25 Neb. 99.

Contract in excess of amount loaned.

Where a note and mortgage were given for the sum of \$445.15, and only \$380 received by the testator, the defense of usury was established. *Cattle v. Haddox*, 16 N. W. 841, 14 Neb. 527.

The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law. The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious. The true construction of statutes regulating interest on a loan or forbearance of money, goods, or things in action is that no greater rate of compensation than that prescribed shall be taken upon any loan or forbearance of money, directly or indirectly, by way of loan of property or in any other manner, no matter how disguised. Where a party executed and delivered 12 notes, each for a certain sum for money borrowed at the time, but only received the amount of 9 of the notes, which were secured by chattel mortgage, the transaction was usurious. *Kreibohm v. Yancey*, 55 S. W. 260, 266, 154 Mo. 67.

Intent.

To constitute usury there must be a usurious or corrupt intent. *Nourse v. Prime* (N. Y.) 7 Johns. Ch. 69, 77; *Woodruff v. Hurson* (N. Y.) 32 Barb. 557, 559; *Rosenstein v. Fox*, 44 N. E. 1027, 1029, 150 N. Y. 354.

Usury is a matter of intention, and to avoid a contract on that ground it must appear that the writer knew the facts and acted with a view of evading the law. *Fay v. Lovejoy*, 20 Wis. 407.

To constitute usury there must be a corrupt and willful intent to violate the statute fixing the legal rate of interest; and where on a loan it was stipulated that the borrower, in addition to legal interest, should pay all taxes and assessments which might be imposed by the state or the municipality on the principal or interest of the debt, though the contract might be regarded as in itself usurious, yet as doubts had been entertained as to its being so, and it was in evidence that the parties had taken the advice of counsel before entering into the contract, and had therefore manifestly acted without a corrupt and willful intent to violate the statute, but under a mistake of law, it was held that the lender was entitled to be relieved against the consequences of the stipulation. *Mortimer's Ex'rs v. Pritchard* (S. C.) *Bailey*, Eq. 505, 507.

"It is well settled that the intention to take usury must have been in the full contemplation of the parties; not of one party, but of both parties, to the transaction." In *Condit v. Baldwin*, 21 N. Y. 219, 221, 78 Am. Dec. 137, it was held that "it is the essence of a usurious transaction that there

shall be an unlawful and corrupt intent on the part of the lender to take illegal interest, and so we must find before we can pronounce the transaction to be usurious." A mere trifling overcharge of interest in a building and loan mortgage by calculating the interest for five days longer than the correct time is not usurious, where the parties do not intend to charge usury. *Mutual Ben. Loan & Building Co. v. Lynch*, 67 N. Y. Supp. 6, 9, 54 App. Div. 559.

In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for and to take usurious interest; for if neither party intend it, and act bona fide and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract, upon its very face, imports usury, as by an express reservation of more than legal interest, the intent is apparent. There is no room for presumption. Where the contract on its face is for legal interest only, there it must be proved that there was some corrupt agreement or device or shift to cover usury, and that it was in the full contemplation of the parties. *United States Bank v. Waggener*, 34 U. S. (9 Pet.) 878, 399, 9 L. Ed. 163.

In *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569, the court says: "Many authorities hold that it is not enough that the borrower intended to make a usurious agreement, but the intention to take the usury must have been in full contemplation of the parties; not of one party, but of both, to the transaction." After reviewing the authorities on both sides, he states the conclusion of the court to be: "According to these decisions there need not be, under our statute, a mutual agreement to give and receive unlawful interest to constitute usury. If it be actually reserved, taken, or secured, or agreed to be taken or reserved, the contract is void for usury." *Brown v. Grundy* (U. S.) 111 Fed. 15, 17.

Interest in advance.

It is not "usury" for a lender, charging the highest legal rate of interest, to collect and receive the first year's interest in advance. *Willett v. Maxwell*, 48 N. E. 473, 169 Ill. 540.

Loan or forbearance.

As an absolute, essential element to constitute "usury," there must be a loan or forbearance by which the borrower obtains the use of money from the lender and agrees to repay it, together with more than 10 per cent. interest. *Wagoner v. Landon*, 95 N. W. 496, 497, 1 Neb. (Unof.) 38.

It is a cardinal principle in the doctrine of usury that to constitute usury there must

be a loan or a good consideration for the forbearance of the loan in contemplation of the parties. It must be an original contract. *Richards v. Kountze*, 4 Neb. 200, 205.

"To constitute a usurious contract, a loan, either express or implied, is necessary." *Dunkle v. Renick*, 6 Ohio St. 527, 534.

To constitute "usury," there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. *Hogg v. Ruffner*, 66 U. S. (1 Black) 115, 118, 17 L. Ed. 38.

If a loan be necessary to constitute a usurious contract, it is not necessary to the creation of a loan that the money should be paid on the one hand and received on the other, for the circumstances of a man's money remaining in another's hand in consequence of an agreement for that purpose will constitute a loan. *Van Schaick v. Edwards* (N. Y.) 2 Johns. Cas. 355, 364.

It is not necessary that the money should be actually advanced to constitute the offense of usury, but any pretense or contrivance whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will make the contract usurious. *Wilkie v. Roosevelt* (N. Y.) 8 Johns. Cas. 206, 2 Am. Dec. 149.

Money paid above the legal rate for the forbearance of an existing debt is usurious, as well as money thus paid at the time of the loss or the creation of the debt. Under this definition an allowance by a debtor of an exorbitant claim for damages to the debtor's property, or the purchase by the debtor of the property at an exorbitant price as consideration for an extension of credit, constitutes usury. The law in such an instance will look to the intent of the transaction, and will not be governed by the sham and pretense. *Hathaway v. Hagan*, 8 Atl. 678, 680, 59 Vt. 75.

Two things are necessary to constitute "usury": First, a loan; secondly, the taking of more interest than the law allows. *Scott v. Lloyd*, 34 U. S. (9 Pet.) 418, 9 L. Ed. 178. Wherever these two facts are shown to exist, the law pronounces the intent with which they were done to be corrupt. *Reed v. Coale*, 4 Ind. 283, 288.

Matured claim.

Where the original consideration of a loan is forbearance, and wholly free from the taint of usury, it will not be invalidated by a subsequent agreement to pay usurious rates after the debt has matured. *Dell v. Oppenheimer*, 4 N. W. 51, 9 Neb. 454.

Sharing in profits.

An agreement to accept a share of the profits of an enterprise in lieu of interest,

though the expected compensation would exceed the statutory rate, is not usury. *Trask v. Hazzer*, 4 N. Y. Supp. 635, 638.

Taking necessary.

There must be not only a corrupt agreement, but an actual taking under such agreement, or there is no usury. *Clark v. Badgley*, 8 N. J. Law (3 Halst.) 233, 234.

Under the act of 1837, making the actual taking of usury an indictable offense, but not a mere agreement for a usurious premium to be paid at a future time, the crime is not consummated until the usury is actually received by the usurer, either directly or indirectly. *Henry v. Bank of Salina* (N. Y.) 5 Hill, 523, 528.

UTENSIL.

See "Farming Tools and Utensils."

The word "utensil" is derived from the Latin verb "utor," and signifies an instrument; that which is used; particularly an instrument or vessel used in a kitchen, or in domestic or farming business. *Elliott v. Posten*, 57 N. C. 433, 434; *In re McManus' Estate*, 25 Pac. 413, 87 Cal. 292, 10 L. R. A. 567, 22 Am. St. Rep. 250; *In re Slade's Estate*, 55 Pac. 158, 159, 122 Cal. 434; *In re Klemp's Estate*, 50 Pac. 1062, 119 Cal. 41, 39 L. R. A. 340, 63 Am. St. Rep. 69.

UTILITY.

"Utility," within the meaning of the United States patent law, exists if a combination is new and the machine capable of being beneficially used for the purpose for which it was designed. *Strobridge v. Lindsay* (U. S.) 2 Fed. 692, 695; *Seymour v. Osborne*, 78 U. S. (11 Wall.) 516, 549, 20 L. Ed. 83.

Utility means the state or quality of being useful; usefulness; production of good; advantageousness; profitableness; benefit; service; profit; avail. In a labor lien act it covers all the things to which definition applies. *Randolph v. Builders' & Painters' Supply Co.*, 17 South. 721, 723, 106 Ala. 501.

The intent indicated by the Legislature as to the word "utility" must be controlled and limited in its meaning by the various objects of utility specified in the section. For instance, a porch is authorized. Now, it is not contended that the owners of lots are confined particularly to erections called "porches." Any other erection of a similar nature and used for similar purposes would fall within the meaning of the word "utility." At all events, the erection must bear a nearer relation to a porch than the flight of steps described in the special verdict. The objects of utility authorized by the law

are such, and such only, as may contribute to the convenience, comfort, or health of owners of lots, provided they do not annoy the public or mar the beauty of the city. *People v. Carpenter*, 1 Mich. (Manning) 273, 283.

UTMOST CARE.

The term "utmost" conveys a stronger and more significant meaning than the word "extreme," so that its use in the place of "extreme" in defining the care which a railroad company must exercise in relation to its passengers is erroneous. *East Tennessee, V. & G. Ry. Co. v. Miller*, 22 S. E. 660, 661, 95 Ga. 738.

"Utmost care" means all the care and diligence possible in the nature of the case. *Houston & T. C. R. Co. v. George (Tex.)* 60 S. W. 313, 314.

The utmost care which it is said that a carrier is bound to exercise for the safety of passengers cannot always be defined, as it must be judged "by the nature of the work to be done, the instruments to be used, the hazard and danger to life and limb from the character of the service to be performed by the carrier. Its meaning in each specific instance must be determined in view of the peculiar circumstances of the case." *Carter v. Kansas City Cable Ry. Co. (U. S.)* 42 Fed. 37, 38.

The phrase "utmost degree of care and prudence" is held to be a sufficiently accurate expression of the duty of a common carrier to exercise care for the safety of its passengers; the court remarking, in comparing this phrase with the expression "as far as human foresight and care can reasonably go," very commonly used and approved, says the meaning, whether of one formula or another, is that the carrier is legally bound to exercise the greatest, highest, utmost skill and foresight that human experience and observation and the known laws of nature suggest as conducive to the passenger's safety, and capable of being put into practice, or such active, solicitous care, skill, and foresight as intelligent, suitably trained, and very cautious persons would be expected to exercise for their own personal protection in the same business and surroundings and with the same instrumentalities required and employed. *Illinois Cent. R. Co. v. Kuhn*, 64 S. W. 202, 207, 107 Tenn. 106.

"The utmost prudence and care," as used in a statement of the rule that the law imposes on the carrier of passengers for hire the utmost prudence and care for the safety of the passengers, means that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit; but it does not mean that they must, at their peril, adopt every precaution which might

by possibility prevent accident or injury, for that would be impractical, and would impose obligations about things that could not be foreseen, and could not, therefore, be guarded against. *Kennon v. Gilmer*, 5 Pac. 847, 854, 5 Mont. 257, 51 Am. Rep. 45.

In a charge that a steamboat company was required to use the utmost care in the use of all reasonable and proper means, with regard to the equipment and machinery of the steamboat, to prevent the escape of cinders and sparks, the use of the word "utmost," if intended to convey the idea that more than reasonable care, under all the circumstances, would be used, was error. But this court has said that this language may mean no more than saying that the defendant should have used reasonable care. Whether "utmost care" means "reasonable care" depends upon the nature of the subject-matter referred to. If the subject-matter spoken of was the care necessary to be used in carrying fire about a powdermill, there certainly could be no error in saying that the utmost care should be used, as nothing less than that would be reasonable care. So there might be circumstances attending the running of a steamboat in a narrow river, when the shores are covered with combustible materials, in a very dry time, when the wind was blowing from the steamer directly upon such combustible matter, and which would be very likely to ignite if sparks were permitted to escape from the smokestack of the boat. In such case the utmost care to prevent the escape of such sparks would probably be no more than reasonable care. *Atkinson v. Goodrich Transp. Co.*, 31 N. W. 164, 166, 69 Wis. 5.

The "utmost care and diligence" which a carrier of passengers is required to exercise in providing against those injuries which can be avoided by human foresight does not "mean the utmost care and diligence which men are capable of exercising, but means the utmost care consistent with the nature of the carrier's undertaking and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the price which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. The degree of care to be used is the highest; that is, in reference to each particular, it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars." *Dodge v. Boston & B. S. S. Co.*, 19 N. E. 373, 377, 148 Mass. 207, 2 L. R. A. 83, 12 Am. St. Rep. 541.

The term "utmost care and diligence" means all the care and diligence possible in the nature of the case, and is equivalent to

"against which human care and foresight could not guard," as used in an instruction in an action for injuries from derailment of a car, that if the jury should find that the injury in question was the result of an accident or act against which human care and foresight could not guard, and was not the result of negligence in any degree on the part of defendants, then plaintiff was not entitled to recover. *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 288, 83 Am. Dec. 578.

The words "utmost care" are substantially synonymous with "highest degree of care," and therefore, in an action by a passenger for injuries owing to the alleged negligence of the carrier, an instruction that the carrier was required to exercise the highest degree of care in transporting passengers sufficiently declares the law as stated in Civ. Code, § 2100, providing that a carrier of passengers must use the utmost care and diligence for their safe carriage. *Osgood v. Los Angeles Traction Co.*, 70 Pac. 169, 170, 137 Cal. 280, 92 Am. St. Rep. 171.

"Utmost care" means the greatest care, and falls short of the expression "possible care" in this: that it is understood to apply to the surroundings as matters then stood or could be foreseen. *International & G. N. Ry. Co. v. Welch*, 24 S. W. 390, 391, 86 Tex. 203, 40 Am. St. Rep. 829. A carrier of passengers, though not an insurer, is bound to exercise such a high degree of prudence as would be exercised by a cautious and prudent man under the same circumstances, and use the utmost care in providing for their safety. *Gulf, C. & S. F. Ry. Co. v. Brown*, 40 S. W. 608, 614, 16 Tex. Civ. App. 93.

The term "utmost care" is defined to mean all the care and diligence possible in the nature of the case. A carrier is bound to use the utmost care, as so defined, to provide for the safety of passengers. *Dillingham v. Wood*, 27 S. W. 1074, 1075, 8 Tex. Civ. App. 71.

In holding that the use of the words "the utmost care and diligence" was properly used to characterize the care and diligence required of a street railway company toward its passengers, the court say that the expression is used to measure the care and diligence which a prudent man would exert in that business under like circumstances. *Heucke v. Milwaukee City Ry. Co.*, 34 N. W. 243, 245, 69 Wis. 401.

UTTER.

"To utter and publish a forged instrument is to declare and assert directly or indirectly by words or actions that it is good." *Hull v. Mallory*, 14 N. W. 374, 56 Wis. 355 (quoting *Whart. Am. Cr. Law*, 339); *State v. Calkins*, 34 N. W. 777, 778, 73 Iowa, 128;

People v. Brigham, 2 Mich. 550, 554; *People v. Caton*, 25 Mich. 388, 392; *State v. Horner*, 48 Mo. 520, 522; *People v. Rathbun* (N. Y.) 21 Wend. 509, 521; *Lindsey v. State*, 38 Ohio St. 507, 511; *Commonwealth v. Searle* (Pa.) 2 Bin. 332, 339, 4 Am. Dec. 446; *Elsley v. State*, 2 S. W. 337, 338, 47 Ark. 572; *United States v. Mitchell* (U. S.) 26 Fed. Cas. 1276.

"Uttering and publishing," as used with relation to forgery, means any disposal or negotiation of a forged instrument to another person. *People v. Rathbun* (N. Y.) 21 Wend. 509, 526.

"Utter," as used in relation to forgery, is a declaration that a forged instrument is good, or an offer to pass it as good. To merely show it without an offer to pass it, or depositing it for safe-keeping, is not an uttering; there must be an intention to pass it as good. *United States v. Mitchell* (U. S.) 26 Fed. Cas. 1276.

Simply showing a forged instrument, without an offer to pass it, is not uttering. The fact that a check payable to the order of a party was not indorsed does not prevent the uttering of the same, where the check, and not the indorsement, is alleged to be forged, and in such case an attempt to pass it is sufficient to constitute the offense. *Smith v. State*, 20 Neb. 284, 287, 29 N. W. 923, 925, 57 Am. Rep. 832.

To constitute an uttering and publishing of a forged instrument there must be a representation of its genuineness; but such representation need not be made by express words. It may be indirectly made, and be evidenced by the action and conduct of the party. 3 Greenl. Ev. § 110; *Commonwealth v. Searle* (Pa.) 2 Bin. 339, 4 Am. Dec. 446. Where the holder of forged notes, without expressly stating that they were signed by the one whose name was written thereon as maker, offered to sell them for value and actually effected a sale, the purchaser supposing that they were genuine, and such holder knew the purchase was being made in that belief, he by such conduct induced that belief and intended to induce it, and by so offering them for sale and selling them he represented them to be genuine. *State v. Calkins*, 34 N. W. 777, 778, 73 Iowa, 128.

The uttering of false, forged, or counterfeited paper with intent to defraud the United States is in contemplation of law the disposing of it by way of trade; the selling or vending of it. *United States v. Fout* (U. S.) 123 Fed. 625, 628.

The words "utter and publish," as used in Acts 1736, p. 7, punishing forgery, are not satisfied by the words "did dispose and put away," the words in the act being more general and comprehensive. *State v. Petty* (S. C.) Harp. 59.

Intent and knowledge.

To constitute the offense of uttering and publishing a forged writing it is necessary that there be an intent to defraud, and that there should be a knowledge of the falsity of the document. *Elsey v. State*, 2 S. W. 337-339, 47 Ark. 572.

The deceitful and fraudulent intent is the essence of the offense of uttering a forged instrument. *State v. Redstrake*, 39 N. J. Law (40 Vroom) 365, 368, 369.

To constitute a felonious uttering of a counterfeit note, it must not only be put away as true, but it must be innocently taken. *People v. Rathbun* (N. Y.) 21 Wend. 509, 521.

The crime of uttering a forged writing includes the uttering of a writing not genuine, but purporting to be genuine, even though there was no intent to defraud when the writing was fabricated. *Ex parte Finley*, 5 Pac. 222, 66 Cal. 262.

Delivery and receipt.

The offense of uttering a forged instrument is not complete until the paper comes into the hands of some one other than the accused. *Lindsey v. State*, 38 Ohio St. 507, 511; *Jessup v. State*, 68 S. W. 988, 989, 44 Tex. Cr. R. 83.

The word "uttering," used of notes, includes any delivery of a note to another for value with intent that it shall be put into circulation as money. *United States v. Nelson* (U. S.) 27 Fed. Cas. 80, 82.

To constitute an uttering it is not necessary that the forged instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. A receipt may be uttered by the mere exhibition of it to one with whom the party is claiming credit for it, though he refuses to part with the possession. *People v. Caton*, 25 Mich. 388, 392; *Elsey v. State*, 2 S. W. 337, 338, 47 Ark. 572; *Smith v. State*, 29 N. W. 923, 925, 20 Neb. 284, 57 Am. Rep. 832.

If a person offers another a thing—as, for instance, a forged instrument or a piece of counterfeit coin which he intends to pass as good—that is an uttering, whether the thing offered be accepted or not; and it is said that the offer need not go so far as to be in law a tender. *State v. Horner*, 48 Mo. 520, 522.

Forgery distinguished.

See "Forgery."

Pass distinguished.

In illustrating the difference between the words "uttered and published" and the word "passed," Chief Justice Tilghman says: "To utter and publish is to declare or assert di-

rectly or indirectly, by words or actions, that a note is good. To offer it in payment would be an uttering or publishing; but it is not passed until it is received by the person to whom it is offered." To the same effect is the opinion of Mr. Justice Baldwin in the case of *United States v. Mitchell* (U. S.) 28 Fed. Cas. 1276. The learned judge, in his charge to the jury in that case, remarked as follows: "The passing or delivering a paper is putting it off or giving it in payment or exchange; uttering it is a declaration that the note or order is good. To merely show it, without an offer to pass it, or depositing it for safe-keeping, is not an uttering; there must be an intent to pass it as good." *People v. Brigham*, 2 Mich. 550, 553; *Commonwealth v. Searle* (Pa.) 2 Bin. 332, 339, 4 Am. Dec. 446.

Bringing action on.

The bringing of a suit upon a forged paper for the purpose of recovering the money purporting to be due by such paper is in law an uttering of the same as true. *Chahoon v. Commonwealth* (Va.) 20 Grat. 733, 795; *Elsey v. State*, 2 S. W. 337-339, 47 Ark. 572.

Mailing.

If a forged instrument be sent by mail for the purpose of being used at the point to which it is addressed, the crime is not consummated until it is received by the person to whom it is to be delivered. *Lindsey v. State*, 38 Ohio St. 507, 511; *State v. Hudson*, 32 Pac. 413, 414, 18 Mont. 112; *Jessup v. State*, 68 S. W. 988, 989, 44 Tex. Cr. R. 83. Contra, see *United States v. Plympton* (U. S.) 27 Fed. Cas. 578.

Recording.

The word "utter," used in reference to the uttering of a forgery, was held to be satisfied by putting a forged mortgage on record, or by collecting money upon it and indorsing the payments thereon, whether the instrument was produced at the time of the payment or not. *Perkins v. People*, 27 Mich. 386, 389.

Causing a forged deed to be recorded in the office of the county clerk as genuine and true is an "uttering and publishing," within the meaning of those terms as used in the statute imposing a penalty for having uttered and published a forged instrument. *Paige v. People* (N. Y.) 3 Abb. Dec. 439, 446; *Elsey v. State*, 2 S. W. 337-339, 47 Ark. 572.

Publish synonymous.

The word "utter," as employed in Gen. St. c. 29, art. 9, § 5, providing for the punishment of any person who shall knowingly utter or publish any forged or counterfeited instrument, is used in the same meaning as "published." *Johnson v. Commonwealth*, 90 Ky. 488, 14 S. W. 492.

UTTERER OF COUNTERFEIT.

See "Common Utterer of Counterfeit Coin."

UTTERLY DESERT.

"Utterly deserted," as used in St. 1838, c. 126, enacting that a divorce from the bond of matrimony may be decreed in favor of either party whom the other shall have willfully and utterly deserted for the term of five years consecutively, does not include an instance where a husband so abuses his wife that she has justifiable cause to leave him, and does leave him for such cause, and does not return, nor offer to return, to him, and he for five consecutive years next after her departure wholly neglects to provide for her maintenance, and does not seek to live with her. *Pidge v. Pidge*, 44 Mass. (3 Metc.) 257, 258.

"Utter desertion," as used in a statute making utter desertion a ground for divorce, means an abandonment of all marital obliga-

tions. *Stewart v. Stewart*, 7 Atl. 473, 474, 78 Me. 548, 57 Am. Rep. 822.

UTTERLY LOST.

"Utterly lost," in marine policies, is intended to distinguish a loss where the vessel is technically lost, as in the case of an abandonment, and requires that the ship shall be in fact a total loss; and she cannot be totally lost merely because it may cost more than she is worth to repair her. *Insurance Co. of Pennsylvania v. Duval* (Pa.) 8 Serg. & R. 138; *Delaware Mut. Safety Ins. Co. v. Gossler*, 96 U. S. 645, 656, 24 L. Ed. 863.

UTTERLY VOID.

"Utterly void," as used in Rev. St. 1833, declaring conveyances by debtors in fraud of creditors utterly void, does not mean that they are mere nullities, void to all intents and purposes, but simply voidable. *Fox v. Willis*, 1 Mich. (Man.) 821, 825.

V

V. L. O. L.

Letters are habitually used as an abbreviation for words. For instance, the letters "U. S." are universally understood to stand for the United States, and "Ky." for Kentucky; and in the same way in a bail bond the letters "V. L. O. L." describe the offense of violating local option law, and sufficiently describe the same. *Allen v. Commonwealth*, 73 S. W. 1027, 1028, 24 Ky. Law Rep. 2257.

V.—VS.

Where names of persons are separated by the abbreviation "v." or "vs.," the name or names preceding such abbreviation and the name or names following it are as certainly designated plaintiff or plaintiffs and defendant or defendants, respectively, as if these words were written in their appropriate places. *City of Lead v. Klatt*, 75 N. W. 896, 11 S. D. 109.

It was argued in support of a demurrer to a plea in abatement that the plea was not wholly in the English language; that "vs." stands for "versus," and that "versus" is not an English word; that the plea should have been entitled "Smith against Butler." But "vs." and "versus" have been too long used in legal practice, and their meaning is too well understood, to be open to the objection stated. They have, in fact, become ingrafted upon the English language, at least so far as they are used in this country in legal proceedings. Their meaning is well understood, and their use quite as appropriate as the word "against" could be. *Smith v. Butler*, 25 N. H. (5 Fost.) 521, 522.

VACANCY—VACANT—VACATE.

Vacancy is the state of being empty or unfilled. *State v. Askew*, 2 S. W. 349, 351, 48 Ark. 82.

The word "vacant" primarily signifies "deprived of contents; empty; not filled; as a vacant room. A thing is vacant when there is nothing in it." *Norman v. Missouri Town Mut. Fire Ins. Co.*, 74 Mo. App. 456, 459 (quoting *Webst. Dict.*).

VACANCY — VACANT — VACATE (Of Building).

The words "vacant and unoccupied," in a policy of insurance, should be construed in view of the uses and purposes to which the building is adapted. Their meaning when used in a policy on a dwelling is not the same as when used in a contract of in-

surance on a store, a livery stable, or a school building. It will hardly be contended that a policy on a school building is not in force during that period. Each case must be determined on its own particular facts. *German Ins. Co. v. Davis*, 59 N. W. 698, 700, 40 Neb. 700.

A building containing furniture and fixtures, and in which a person slept part of the time, and containing stove, chairs, and other furniture suitable for a saloon, and also a small stock of liquors in kegs and bottles, is not "vacant, unoccupied, or not in use," within a policy of insurance against fire, exempting the insurer from liability if the building should be vacant, etc., at the time of the fire. *Stensgaard v. National Fire Ins. Co.*, 30 N. W. 468, 36 Minn. 181.

A condition of a contract of fire insurance, that the policy should be void if the building should be occupied or used so as to increase the risk or become vacant or unoccupied for a period of more than 10 days, or the risk be increased by any means whatever, intends such a desertion of the premises and removal from them as would materially increase the risk. *Moore v. Phoenix Fire Ins. Co.*, 6 Atl. 27, 30, 64 N. H. 140, 10 Am. St. Rep. 384.

Dwelling house.

A building in which the late occupants have left a part of their furniture after they are sleeping and taking their meals in another house is "vacant," though the key has not been surrendered to the landlord, within the meaning of an insurance policy providing that it shall be void if the premises become vacant or unoccupied. *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, 300.

A policy of insurance on dwelling houses and a house to let which stood close by provided that if the premises should become vacant or unoccupied the policy should cease. The insurance was for several terms, but the consideration paid was a gross sum. The buildings were destroyed when the dwelling house alone was occupied. It is held that the contract was indivisible, and that the premises were not "vacant," within the policy, so as to discharge the company from liability for loss of the other house. *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. Rep. 179.

Same—Change of tenants.

Where a policy on a tenement house provided that if it should be vacant or unoccupied without notice to or consent of the

company in writing the policy should be void, the term "vacant" in the clause should not be strictly construed, but should be construed in conformity with the character of the property insured, and therefore where a tenant kept possession after the expiration of his tenancy until a Friday evening, and the new tenant took possession the next morning, but was unable to entirely move into the house on that day, and on Tuesday, before the incoming tenant had succeeded in moving into the property, it was destroyed by fire, the house was not "vacant and unoccupied," within the condition of the policy. *Home Ins. Co. of New York v. Mendenhall*, 45 N. E. 1078, 1081, 164 Ill. 458, 36 L. R. A. 374.

"Vacant or unoccupied," as used in an insurance policy conditioned against the premises becoming vacant or unoccupied, includes an instance where a tenant moves out, after which one who had previously engaged the house made some repairs and kept two or three planes in the house and put hay in the stable, and buried some potatoes on the premises, intending to move in on a certain date, before which a fire burning such house occurred. *Continental Ins. Co. of New York City v. Kyle*, 24 N. E. 727, 729, 124 Ind. 132, 9 L. R. A. 81, 19 Am. St. Rep. 77.

A dwelling does not become "vacant," within the meaning of a fire insurance policy providing that it should be void unless consent in writing was indorsed thereon by him, or on behalf of the insurer, if the building insured be or become vacant or unoccupied for the purpose indicated in the contract, where the owner of such dwelling, after a tenant has vacated the premises, moves his furniture into and cleans up the house with an intention of making it his residence, and during that time does not actually occupy it at night, subsequently leaves it temporarily on business, and puts a party in possession until his return. *Shackelton v. Sun Fire Office*, 21 N. W. 343, 344, 55 Mich. 288, 54 Am. Rep. 379.

A house vacated by the tenant, which is taken possession of the next day by the owner, intending to keep it himself, and who has papered, painted, and moved his furniture into the same, and keeps his employes in and about the house from 6 in the morning till 7 or 8 in the evening preparing it for occupancy, and which is destroyed by fire the day before he expected to move into the same, is not "vacant or unoccupied," within the meaning of a policy declaring that the insurer shall not be liable for loss occurring where the insured property is vacant or unoccupied. *Eddy v. Hawkeye Ins. Co.*, 30 N. W. 808, 811, 70 Iowa, 472, 59 Am. Rep. 444.

"Vacant or unoccupied," as used in a fire policy conditioned that it shall be void

if the premises become vacant or unoccupied, has no definite signification applicable to all circumstances. Under certain circumstances premises may be vacant or unoccupied, and when, under other circumstances, premises in like situations may not be so. Thus, if one insures his dwelling house described in the policy as occupied as his residence, and he moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insured it as a tenement house, or as occupied by a tenant, it may be fairly presumed that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant immediately on tenants leaving it. *Hotchkiss v. Phoenix Ins. Co.*, 44 N. W. 1106, 1107, 76 Wis. 269, 20 Am. St. Rep. 69 (citing *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553, 561; *Whitney v. Black River Ins. Co.* [N. Y.] 9 Hun, 39; 1 Wood, Ins. § 91, pp. 208, 210).

A house which a tenant is notified to leave, and which he does leave some two days before a fire burning the same, with his landlord's knowledge and with his consent, leaving there some articles not required for housekeeping in his new quarters, is "vacant and unoccupied," within the meaning of a provision in an insurance policy declaring the policy void if the premises become vacant or unoccupied. *Richards v. Continental Ins. Co. of New York*, 47 N. W. 350, 83 Mich. 508, 21 Am. St. Rep. 611.

A building from which the tenant thereof partially moves, leaving in the building a portion of his furniture, is not "vacant or unoccupied," within the meaning of a policy of insurance, providing that it should be void if the premises became vacant or unoccupied, etc. *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 58 N. W. 695, 696, 38 Neb. 146, 41 Am. St. Rep. 724.

An insured house from which the tenant moved, and to which the owner went on the day after such moving, and in which he stayed that day, and into which he then made preparations to move, having placed a man in charge of the house, is not "vacated," within the meaning of an insurance policy providing that it should be void if the premises insured be vacated. *Doud v. Citizens' Ins. Co.*, 21 Atl. 505, 506, 141 Pa. 47, 23 Am. St. Rep. 263.

In an action on a fire policy the defense was that at the time the building was destroyed it was vacant, contrary to the condition of the policy. The structure was a two-story frame building, occupied at the issuance of the policy by a tenant as a combination restaurant and residence. On the day before the burning the tenant began to move

his furniture from the building into another with intent to change his residence. The goods were hauled by a party who had only one conveyance, and, when night approached, the moving was not complete, and a substantial portion of the tenant's furniture was left in the building, the intention being to finish the hauling the next morning. The tenant's family lodged that night in their new abode, but retained the keys and possession of the building until they should have time the next day to remove the remainder of the goods. About 1 o'clock the following morning, the building and contents were entirely destroyed by fire. Held, that the building was not "vacant," within the meaning of the word as used in the policy. *Norman v. Missouri Town Mut. Fire Ins. Co.*, 74 Mo. App. 456, 459.

Same—As empty.

The word "vacant," as used in a fire policy providing that it shall be void if the house insured become vacant, means empty, and a house filled with furniture cannot be said to be vacant. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 188, 37 Am. Rep. 488.

A condition in a fire policy, avoiding it in case the building became vacant and unoccupied, requires, in order to avoid the policy, not only that the building shall become unoccupied, but also that it shall be vacant; and therefore the policy is not avoided by the removal of the owner of the house for the season, if he leaves his furniture thereat. *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 187, 37 Am. Rep. 488.

A vacant house is literally an empty house. One or more persons may live in a house, and in either case it is occupied; they may have much or little furniture, and in neither event is it vacant. *Woodruff v. Imperial Fire Ins. Co. of London*, 83 N. Y. 133, 143.

Same—Occupancy by caretaker.

A fire policy describing the property as a house, and providing that the policy should be void if the house "shall be or become vacant or unoccupied," constitutes an undertaking by the insured that the house should not be without an occupant during the time covered by the policy; but it was not necessary that it should be occupied in the same manner or form in which it was occupied at the time of the insurance, so long as it was occupied by one person who had access to the entire building for the purpose of caring for it. *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468.

Same—Temporary absence.

A mere temporary absence of the occupant of a building therefrom will not render

void a policy of insurance which contains a provision that the policy shall become void in case the building becomes vacant. *Springfield Fire & Marine Ins. Co. v. McLimans*, 45 N. W. 171, 172, 28 Neb. 846; *Johnson v. Norwalk Fire Ins. Co.*, 56 N. E. 509, 175 Mass. 529.

A policy providing that it should not be valid if the house insured was permitted to remain vacant and unoccupied for more than 10 days meant an absence intended to be permanent for that length of time; and hence the fact that the owner of the house, who lived in it alone, left it for two months, does not, as a matter of law, render it vacant and unoccupied, where the absence was not intended to be permanent, and during such absence the house was visited daily by a neighbor, with whom the keys had been left. *Hill v. Ohio Ins. Co.*, 58 N. W. 359, 99 Mich. 466.

The fact that the owner of a house, who lived alone in it, left it for two months, does not, as a matter of law, make it "vacant or unoccupied," within the meaning of a condition contained in an insurance policy, voiding the insurance, should the premises become vacant or unoccupied, where the absence was not intended to become permanent, and the house was visited daily by a neighbor in whose care the house had been left. *Hill v. Ohio Ins. Co.*, 58 N. W. 359, 99 Mich. 466.

A house from which the occupants had been absent for several months on a visit, but whose furniture was left therein, and to which the occupants' relatives went daily, was not "vacant or unoccupied," within the meaning of a policy of insurance providing that it should be void on the property being left vacant or unoccupied, etc. *McMurray v. Capital Ins. Co.*, 54 N. W. 354, 355, 87 Iowa, 453.

A dwelling house, to be in the state of occupancy, must have in it the presence of human beings as at their customary place of abode; not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. Temporary absence, either on pleasure or from accident or for business purposes, cannot make a dwelling "vacant or unoccupied," within the meaning of an insurance policy providing that it shall be void when it is vacant or unoccupied. *Morgan v. Illinois Ins. Co.*, 90 N. W. 40, 41, 130 Mich. 427.

A dwelling house does not become "vacant or unoccupied," in the usual acceptance of such term, when the tenant leaves it in the ordinary course of things, for a few hours. A furnished abode would not, according to usage, be called a "vacant or unoccupied" house on account of the temporary absence of the tenant. *East Texas Fire Ins.*

Co. v. Kempner, 34 S. W. 393, 398, 12 Tex. Civ. App. 533.

"Vacated," as used in a policy of insurance providing that if the dwelling house insured should become vacated by the removal of the owner or occupant the policy should be void, etc., means a permanent removal—an entire abandonment of the house as a place of residence. Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 263, 23 Am. Rep. 111.

A tenant of a dwelling house placed all her furniture in one room, and went for a visit of six weeks, with the intention of occupying the house on her return. The furniture was placed in such room so that the others might be repaired during her absence. She left the key with her friend, with directions to visit the house daily and see that the doors were closed, etc. Held, that the house was not "vacant," within the meaning of a condition in a fire policy avoiding it if the property became vacant. Huber v. Manchester Fire Assur. Co., 36 N. Y. Supp. 873, 876, 92 Hun, 223.

When the occupant of a dwelling house moves out with his family, taking part of his furniture and all the wearing apparel of his family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling house, while thus deserted, must be regarded as "vacated," within the meaning of an insurance policy, providing that the same shall be void if the premises insured become "vacated" by the removal of the occupant, etc. Sleeper v. New Hampshire Fire Ins. Co., 56 N. H. 401, 408.

Within a policy of insurance on a dwelling house, containing the condition that if the same should become vacant or unoccupied, and so remain, the policy was to be void, means a house which has ceased to be used as a dwelling. A house which is furnished could not be called "vacant," because of the temporary absence of the tenant. Lasselie v. Hoboken Fire Ins. Co., 43 N. J. Law (14 Vroom) 468, 470.

A fire policy provided that if the insured premises were vacated, and no one placed in charge, the insured should bear the risk for that time. The policy further stipulated that temporary absence, like on a visit, should not create vacant property. Farm property being threatened with destruction from a forest fire, the tenant in possession of the property first plowed furrows round the buildings insured, then placed his goods in a wagon, and took them to a spring, and left his wife in charge, and returned to fight the fire with the assistance of neighbors. After a time his wife became ill, so, leaving the neighbors to continue the fight, he drove her to town, several miles distant, and returned as quickly as possible. It was held

that no vacation had occurred, within the terms of the policy. Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 390, 72 N. W. 254.

Same—As uninhabited.

An insurance policy providing that if the premises become "vacant, unoccupied, or uninhabited" the policy shall be void, means that if the house ceases to be used as a place of human habitation or for living purposes the policy shall be void. Home Ins. Co. v. Boyd, 49 N. E. 285, 237, 19 Ind. App. 173.

"Vacant" is the equivalent of "unoccupied," as used in a by-law of a mutual insurance company, providing it will not be liable for any loss on any dwelling house which has been vacant for 30 days previous to the loss, with the signification of "uninhabited." Doblantry v. Blue Mounds Fire & Lightning Ins. Co., 53 N. W. 448, 449, 83 Wis. 181.

A house is "vacant and unoccupied," within the meaning of a fire policy conditioned against the premises becoming vacant and unoccupied, if the tenant moves out on the 26th of March, and it is burned on March 31st, before a new tenant has moved in, though he intended to move April 1st, and made some repairs in the house prior to the fire. In so holding, the court cites Cook v. Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438, in which the court said: "Occupation of a dwelling house is living in it." Paine v. Agricultural Ins. Co. (N. Y.) 5 Thomp. & C. 619. A fair and reasonable construction of the language "vacant and unoccupied" is that it should be without an occupant—without any person living in it. American Ins. Co. v. Padfield, 78 Ill. 169. Speaking of a dwelling house and barn, Colt, J., in Ashworth v. Builders' Mut. Fire Ins. Co., 112 Mass. 422, 17 Am. Rep. 117, observed that "occupancy," as applied to such buildings, implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an unoccupied house, or at least something more than the use of it for storage. Continental Ins. Co. v. Kyle, 24 N. E. 727, 124 Ind. 132, 9 L. R. A. 81, 19 Am. St. Rep. 77.

A policy of fire insurance on a dwelling house which should become void on its becoming vacant and unoccupied means that the house is without an occupant—without some person living in it. When the occupant of a dwelling house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling house, while thus deserted, must be regarded as "unoccupied"—that is, vacated—if the word be given its natural and ordinary signification. Agricultural Ins. Co. v. Hamilton, 33 Atl. 429, 430, 82 Md. 88, 80 L. R. A. 633, 51 Am. St. Rep. 457.

Same—As unoccupied.

An insurance policy providing that the same shall be void if the house insured shall become "vacant and unoccupied" means that it should be without an occupant—without any person living in it. *American Ins. Co. v. Padfield*, 78 Ill. 167, 169.

The term "vacant or unoccupied," in a policy of fire insurance providing that it shall become void if the building herein described be or become vacant or unoccupied, etc., means that the house is without an occupant—that is, no one is living in it. *Schuermann v. Dwelling House Ins. Co.*, 43 N. E. 1093, 1094, 161 Ill. 437, 52 Am. St. Rep. 377 (citing *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *Fitzgerald v. Connecticut Fire Ins. Co.*, 64 Wis. 463, 25 N. W. 785; *Alston v. Old North State Ins. Co.*, 80 N. C. 326).

"Vacant" and "unoccupied" are not synonymous, though sometimes so used. Vacancy, correctly speaking, can only occur when the building is empty, contains substantially nothing; while occupancy, when speaking of residences, refers more particularly to human habitation, the *pedis possessio* or actual living in the dwelling. 1 May, Ins. (3d Ed.) § 249a; *Ostrander, Fire Ins.* (2d Ed.) § 144. "The last-named author thus illustrates the difference between vacant and unoccupied: 'The distinction,' he says, 'is perhaps more clearly marked in the case of a dwelling house from which the family has removed, leaving a portion of their household goods in the building. It will not be vacant, but occupancy is at an end when it is no longer the place of abode of any living person.' In *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488, Judge Earl says: 'A dwelling house is unoccupied when no one lives there, but it is not necessarily vacant. A house filled with furniture throughout cannot be said to be vacant, the primary and ordinary meaning of which is empty.' So in this case, though the dwelling in question was, at the time the fire occurred, unoccupied, it was not vacant. It is true that all the household goods of the tenant were not within the building, but there was a substantial portion remaining, and the tenant had the actual use of the house to shelter and protect his goods; they were 'under lock and key,' and held there for removal the succeeding day. Removal was in fieri; not complete. If the tenant had taken his family to a neighbor's house, leaving his household goods packed and ready for moving the next day, could it with any show of reason be said that the building was vacant? Surely not. Neither could it be said to be vacant if the tenant had taken away a portion, and left a portion for removal the following day. The house would not in either event be vacant, though unoccupied. See *Cook v. Con-*

tinental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438; *Wheeler v. Phoenix Ins. Co.*, 53 Mo. App. 446, and cases there cited. * * * As to these and like conditions inserted in policies of insurance, the courts will not enlarge the meaning of words used so as to save the insurers from their obligation, but will hold them rather to the strict terms of their contracts. And if words of doubtful meaning are inserted in the contract of insurance, then that construction will be adopted which is most favorable to the policy holder." *Norman v. Missouri Town Mutual Fire Ins. Co.*, 74 Mo. App. 456, 459.

In *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644, the court, in construing a fire policy providing that the policy should be void if the house should become vacant or unoccupied, pointed out a distinction between the words "vacant" and "unoccupied"; the latter condition being broken when the house was either empty or unused as an abode, while the former required a concurrence of the absence of the occupants and a removal of the inanimate contents of the premises. *Couch v. Farmers' Fire Ins. Co.*, 72 N. Y. Supp. 95-97, 64 App. Div. 367.

Same—As untenanted.

The term "vacant house" is used to designate an untenanted house. *State v. Askew*, 2 S. W. 349, 351, 48 Ark. 82.

Factory or mill.

To render a sawmill "vacant and unoccupied," within an insurance policy invalidating the same if the premises shall become vacant and unoccupied, there must be an entire abandonment of it by the owner. *Whitney v. Black River Ins. Co.* (N. Y.) 9 Hun, 37, 41.

A sawmill in which a gang of saws are rendered temporarily useless by the breaking of a journal, and the repairing of which is made difficult by the condition of the water, but the yard of which is occupied by logs which the owner intended to saw, is not "vacant and unoccupied," within the meaning of a policy providing that it shall become void on the premises becoming vacant and unoccupied. *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 120, 28 Am. Rep. 116.

In construing a provision of an insurance policy providing that "if the premises hereby insured shall become vacant or unoccupied, or if the property insured, being a mill or manufactory, shall cease to be operated, and so remain for more than 15 days without notice to the company and consent indorsed thereon, the policy shall be void," the court said: "We think that the meaning of that clause is that the policy is to be void if the premises become vacant or unoccupied, and so remain for a period of more than 15 days without notice, etc. If the property

be a mill or manufactory, the ceasing to be operated is equivalent to a vacancy." *Miaghan v. Hartford Fire Ins. Co.* (N. Y.) 24 Hun, 58, 61.

An insurance policy conditioned that the policy shall be forfeited if the property insured becomes vacant and unoccupied, except to set up new machinery or make repairs, does not apply to a temporary suspension of the principal work of a cotton factory, the watchman and others being still employed, whether such suspension was to set up machinery or repair, or not. *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 17 N. E. 771, 775, 125 Ill. 131.

Where premises were in charge of the usual superintendent of the insured, and the night and day watchman were on duty all the time the machinery lay still, and employes were at the factory from the day the work was suspended until the building was burned, in no sense were the premises "vacant and unoccupied." *Brighton Mfg. Co. v. Reading Fire Ins. Co.* (C. C.) 33 Fed. 232, 234.

House and barn.

The word "vacant," as used in a fire policy on a house and barn, conditioned to be void if the premises insured became vacant, means the vacancy of both house and barn. *Worley v. State Ins. Co. of Des Moines*, 59 N. W. 16, 17, 91 Iowa, 150, 51 Am. St. Rep. 334, 23 Ins. Law J. 580, 581.

Store.

Where a tenant has removed all his property from a store building except a very small quantity, which he has permitted a third person to store there, it is "vacant and unoccupied," within the provisions of a fire insurance policy making it void in case the property is vacant and unoccupied for a period of 10 days. *Limburg v. German Fire Ins. Co.*, 57 N. W. 626, 627, 90 Iowa, 709, 23 L. R. A. 99, 48 Am. St. Rep. 468.

A policy provided that it should not cover unoccupied buildings, and, if the premises should be vacated without the consent of the company indorsed thereon, the policy should cease. In an action to recover a loss under the policy, one of the defenses was that the policy was not in force at the time of the fire by reason of the fact that the building was vacant and unoccupied. The trial court instructed that the word "unoccupied," as used in the policy should be construed in its ordinary and popular sense, and, as applied to a saloon building, meant such want of occupancy as usually or ordinarily attends or is exercised over a saloon building while being operated as a saloon; and that if the jury believed that the saloon had been vacated late in the evening of the day preceding the fire, and that the plain-

tiff was then in the city, and so far away from the building that the time intervening between the hour of vacation and the hour of the fire was not reasonably sufficient to permit the plaintiff to reoccupy it after the vacation and before the fire, then the saloon could not be considered to be vacated, within the terms of the policy. On appeal the court held that the words "vacant and unoccupied," in accordance with the instruction, should be construed in view of the uses and purposes for which the building is adapted; also whether the parties contemplated that the premises were to be occupied by the assured or by a tenant; that the words, when used in a policy on a dwelling, were not to be construed the same as when used in a contract of insurance on a store, livery stable, or schoolhouse, since it could not be contended that a policy on a school building was not in force during the summer vacation, though there was no person in the building during the period; and therefore that the mere leaving of the building unoccupied during the night did not render it "vacant and unoccupied," within the meaning of the policy. *German Ins. Co. v. Davis*, 59 N. W. 698, 700, 701, 40 Neb. 700.

VACANCY—VACANT—VACATE (Of office).

The word "vacancy," as applied to an office, has no technical meaning. *People v. Edwards*, 28 Pac. 831, 832, 93 Cal. 153.

The word "vacant," as applied to an office without an incumbent, means empty, unoccupied. There is no technical nor peculiar meaning to the word. An existing office without an incumbent is vacant. *State ex rel. Sanders v. Blakenmore*, 15 S. W. 960, 961, 104 Mo. 340; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17, 21 (citing *Stocking v. State*, 7 Ind. 328); *People v. Osborne*, 4 Pac. 1074, 1078, 7 Colo. 605.

"Vacant" means empty, unoccupied, as applied to an office without an incumbent. An existing office, without an incumbent, is vacant. *State ex rel. Sanders v. Blakenmore*, 104 Mo. 340, 345, 15 S. W. 960.

An office presently filled cannot become or be vacant without a removal, either voluntary or involuntary. *State v. McClinton*, 5 Nev. 329, 334.

"Vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future

event. *Collins v. State*, 8 Ind. 344, 350; *Akers v. State*, Id. 484; *State v. Bemenderfer*, 96 Ind. 374, 375; *Gosman v. State*, 6 N. E. 349, 351, 106 Ind. 203; *People v. Tilton*, 37 Cal. 614, 617; *Commonwealth v. Hanley*, 9 Pa. (9 Barr) 513, 516; *Johnston v. Wilson*, 2 N. H. 202, 204, 9 Am. Dec. 50; *People v. Henderson*, 35 Pac. 517, 522, 4 Wyo. 535, 22 L. R. A. 751; *Pruitt v. Squires*, 88 Pac. 643, 644, 64 Kan. 855.

"Vacancy" in an office means that the office is empty; that is, without an incumbent who has a right to exercise its functions and take its fees or emoluments. *State v. Ware*, 10 Pac. 885, 888, 13 Or. 380; *Smith v. McConnell*, 22 S. E. 721, 722, 44 S. C. 491 (citing *Ex parte Meredith* [Va.] 33 Grat. 119, 36 Am. Rep. 771); *In re Lewensohn* (U. S.), 98 Fed. 578, 579; *State v. Maloney*, 20 S. W. 419, 422, 92 Tenn. (8 Pickle) 62.

The sense in which the term "vacancy," as applied to an office, is used in all legislative enactments, in which a different meaning or intention is not in direct terms declared, is defined by the Legislature of California to refer to such terms of office as have been entered upon by an incumbent, who for some cause during his term has ceased to occupy the office, or to terms of office the incumbent of which has been legally designated by election or appointment and fails to enter upon its incumbency. *People v. Parker*, 37 Cal. 639, 650.

Where an officer continues in office after his term has expired, pending the issuance of a commission to his successor, there is no "vacancy," within the statutory provision that regimental field officers of the National Guard, except when elected to fill a vacancy, are commissioned for three years from the date of election, and until their successors are commissioned. *Baxter v. Latimer*, 116 Mich. 356, 362, 74 N. W. 728.

The word "vacancy," as applied to an office, means a place or post unfilled; an office that is not occupied. Under Gen. St. 1865, c. 18, § 131, providing that if there shall be a vacancy in the office of county attorney for any county it shall be the duty of the judge or justice of the peace, before whom any cause shall be pending, to appoint a competent person to represent the state, and fix his compensation, which shall be taxed as costs in the cause, the absence of the county attorney from the county, although for an indefinite time, does not create a vacancy in his office. *Kouns v. Draper*, 43 Mo. 225, 227.

The term "vacancy" implies an empty space; a place unfilled; and, when applied to an office, it means the state of being destitute of an incumbent, or a want of the proper officer to officiate in such office. But in neither case has it any reference what-

ever to any former time, or any former condition of the place or office. If a place is empty now, there is a vacancy, and it matters not whether it has once been filled, or whether it has always been empty; and so of an office. *Opinion of Justices*, 45 N. H. 590, 592.

To "vacate an office" is defined, among other things, to mean to quit possession of or to put an end to it. *Hutch. Code* provides that in all cases where a sheriff or other officer shall sell land by virtue of legal process, and shall have died, removed from the state, or otherwise vacated his office without having executed a deed, the court shall direct his successor to do so. Held, that the statute applies to cases where the sheriff holds after the end of his official term, and then goes out of office without having made a deed. *Thornton v. Boyd*, 25 Miss. (3 Cushman.) 598, 607.

Under the act of 1878 providing for election of supreme and circuit judges in distinct classes, the election was postponed until the next general election, and by favor of an emergency clause the act took effect from and after its approval by the Governor. In the meantime the offices created by the act were filled by appointment by the Governor, as provided by the act. That portion of the act authorizing the Governor to appoint the judges during the interim was not in conflict with Const. art. 5, § 16, authorizing the Governor to fill a vacancy in the office of judge of any court, by appointment, which shall expire when a successor shall have been elected and qualified, for the offices came into legal existence when the act took effect, and ipso facto became vacant at their creation. *Olue v. Greenwood*, 10 Or. 230, 238.

A "vacancy," within Pub. St. c. 10, § 27, directing the town clerk to issue his warrant for an election to fill a vacancy occurring by reason of failure to elect a Senator or Representative, means a vacancy where there is no incumbent to continue to hold the office. *State v. Perry*, 18 R. I. 276, 280, 27 Atl. 606, 607.

A "vacancy in office," within the meaning of Const. § 78, providing that in the case of a vacancy in office for any cause, and no mode is provided by the Constitution or law for filling such vacancy, the Governor shall have power to fill the vacancy by appointment, can never exist when an incumbent of the office is lawfully there, and is in the actual discharge of official duty. The vacancies contemplated by the Constitution relate only to such actual vacancies as may arise from death, resignation, and the like. *State v. Boucher*, 56 N. W. 142, 145, 3 N. D. 389, 21 L. R. A. 539.

"Vacant," as used in 1 Gen. St. p. 465, declaring that, when a commissioner accepts

another office, his former office shall become vacant, does not mean corporeally vacant, but that the office has no occupant who holds by a good title in law, and mere words in a statute cannot alone make an office unoccupied which in fact is occupied. *Oliver v. City of Jersey City*, 44 Atl. 709, 711, 63 N. J. Law, 634, 48 L. R. A. 412, 76 Am. St. Rep. 228.

The term "vacancy in office," as used in the article relating to vacancies, means such as exists when there is an unexpired part of the term of office without a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, and when there has been no election to fill the office at the time appointed by law. It applies whether a vacancy is occasioned by death, resignation, removal from the state, county, or district, or otherwise. *Ky. St.* 1903, § 1521; *Gen. St. Minn.* 1894, § 18; *Hopkins v. Swift*, 18 Ky. Law Rep. 526, 529, 37 S. W. 155, 100 Ky. 14.

Creation of office.

The verb "to vacate," in its English form, has acquired an active sense through a long period of transition, by popular usage and in consequence of its early adoption as a technical and legal term. "To leave empty," "to cease from occupying," "to annul," "to make void," undoubtedly express the different meanings in which, as a verb, the word has come to be employed. But it does not follow that its derivatives have acquired exclusively equivalent meanings in popular or legislative or legal usage. In its original Latin form the word was invariably used to define the state and condition of some existing thing at some particular point of time. It had no transitive power whatever. It meant "to be empty, void, or vacant; to be void of, free from, or without; to lack or want a thing." And many of the derivatives from the English verb retain the exact meaning of the original Latin word. To be "vacant," in its primary sense, is "to be deprived of contents; empty; not filled." The first definition of "vacancy" is "the quality of being vacant; emptiness." Usage has warranted the employment of these words in an enlarged and broader sense, but the primary and strictly grammatical meaning which they still retain is identical with their exclusive original significance. The result is that the word "vacancy" aptly and fitly describes the condition of an office when it is first created and has been filled by no incumbent. *Walsh v. Commonwealth*, 89 Pa. 419, 424, 33 Am. Rep. 771, 7 Wkly. Notes Cas. 22, 23.

It has been held that a "vacancy" may exist when an office is created and no one has been appointed to fill it; and it has been said an existing office without an incumbent is vacant, whether it be a new or an old one. *People v. Opel*, 58 N. E. 996, 999, 188 Ill. 194

(citing *Mechem*, Pub. Off. §§ 127, 132); *In re Collins*, 40 N. Y. Supp. 517, 519, 16 Misc. Rep. 598; *Commonwealth v. Dickert*, 45 Atl. 1058, 1061, 195 Pa. 234; *People v. Rucker*, 5 Colo. 455, 463; *State ex rel. Henderson v. Boone County Court*, 50 Mo. 817, 324, 11 Am. Rep. 415; *State ex rel. Van Buskirk v. Boecker*, 56 Mo. 17, 21; *State v. Condon*, 65 S. W. 871, 875, 108 Tenn. 82; *State v. Scott*, 15 S. E. 405, 407, 38 W. Va. 704.

A vacant office is an office without an incumbent, and it can make no difference whether the office be new or an old one. An old office is vacated by death, resignation, or removal. An office newly created becomes ipso facto vacant in its creation. *State ex rel. Brown v. McMillan*, 18 S. W. 784, 786, 108 Mo. 153. Thus, there is a "vacancy," within the meaning of Const. art. 7, § 50, providing that all vacancies occurring in certain judicial offices shall be filled by special election, by the fact of the creation of an additional judgeship. *State v. Askew*, 2 S. W. 349, 351, 48 Ark. 82.

Where a new county was created by the Legislature out of territory taken from two adjoining counties, the office of sheriff and other county offices in such new county were vacant, and could be filled either by appointment by the Legislature or by the Governor. The court said: "There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. There is no basis for the distinction urged that it applies only to the office vacated by death, resignation, or otherwise. An existing office without an incumbent is vacant whether it be a new one or an old one. A new house is as vacant as one inhabited for years, but abandoned yesterday. We must take the words in their usual sense." *State v. Irwin*, 5 Nev. 111, 130.

The Constitution declared that there should be a district attorney and a district judge in each senatorial district, to be appointed by the Governor by and with the consent of the Senate. It also authorized the Governor to fill vacancies in office occurring when the Legislature was not in session, the appointees to hold until the next meeting of the Legislature. The Legislature provided for organizing a court under this provision, but the act did not take effect until after the Legislature had adjourned, when the Governor appointed a judge and district attorney. In considering the validity of this appointment the court said: "It is very clear that in the case under discussion there was in fact a vacancy existing. There was an office. Nothing was wanted but men to fill the office. If this was not a 'vacancy,' the word is wrongly defined by the law quoted by lexicographers. Webster defines it to be, 'The state of being vacant; emptiness.'

Bouvier, 'A place which is empty.' Gormley v. Taylor, 44 Ga. 76, 81, 82.

"Vacancy," as used in Const. art. 3, § 8, providing that when any officer, the right of whose appointment is vested in the General Assembly, or in the Governor and Senate, shall, during the recess, die, or his office by any means become vacant, the Governor shall have power to fill such vacancy, is contradistinguished from "filled" or "occupied," and does not imply an original vacancy, but a vacancy caused by any means. People v. Forquer, 1 Ill. (Breese) 104, 115.

De facto incumbent.

"Vacancy," as used in a statute authorizing special meetings to fill any vacancy in the certain offices of a society, does not apply to an instance where there is a de facto, though not a de jure, incumbent. Harrison v. Simonds, 44 Conn. 318, 319.

Death of officer-elect.

Where a sheriff-elect died before qualifying or receiving a certificate of election, but after the expiration of the term of the sheriff in office, though the sheriff-elect was never in office, his death creates a "vacancy," within the meaning of Const. art. 5, § 23, providing that vacancies in the office of sheriff shall be filled by the commissioner's court. Maddox v. York, 54 S. W. 24, 21 Tex. Civ. App. 622.

The word "vacancy," in Pub. St. c. 10, § 27, providing, "Whenever any person elected Senator or Representative shall, at any time between his election and the expiration of his term, refuse to serve, * * * or whenever, in case of a failure to elect at the annual meeting, * * * the office shall become or be vacant, the town clerk shall forthwith issue his warrant for an election to fill such vacancy, unless a special election for that purpose shall be ordered by the house in which the vacancy occurs," is used in part with reference to the incoming House, in the sense of a vacancy in the members-elect, and not simply with reference to an actual vacancy in the representation of the town, for there can be no vacancy in the representation so long as the old member is present to act before the qualification of his successor. A vacancy in the office of Senator or Representative, within the meaning of such section, occurs on the death of a member-elect before the meeting of the House to which he was chosen. In re North Smithfield Election, 18 R. I. 817, 821, 27 Atl. 597, 598.

Expiration of term.

"Vacant," as used in Rev. St. 1858, § 248, declaring that whenever the office of any justice of the peace shall become vacant by resignation, removal, or otherwise, the justice to whom the books and papers of such former justice shall be delivered shall pro-

ceed to try actions, etc., includes the case of one who ceases to be justice by reason of the expiration of his term. Stamm v. Dixon, 5 N. W. 858, 861, 49 Wia. 328.

Under an act providing that members of the board of commissioners of a reform school shall be appointed by the Governor, by and with the advice of the Senate, and hold their offices for three years from the day of their appointment and until their successors are appointed and qualified, unless vacancies occur from death, resignation, or removal for cause, the office does not become vacant at the expiration of three years, and the Governor has no authority to appoint a successor except by and with the advice of the Senate. The appointment of a successor during the recess of the Senate does not create a vacancy in the office which the appointee may fill. State v. Howe, 25 Ohio St. 588, 595, 18 Am. Rep. 321.

The word "vacancy," in a statute providing that the commissioners of a county shall appoint some suitable person, resident of the county, to fill any vacancy occurring in the office of the county auditor, characterizes the existing condition on the expiration of the term of office of a county auditor, when his successor, by reason of a change of the law, has been elected, but his term fixed to commence in the future; and this is true although the statutes provide that any person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the Constitution and laws. State v. Brewster, 9 N. E. 849, 851, 44 Ohio St. 589.

Under Code, § 879, one who held an office under appointment by the Governor by and with the advice of the Senate was authorized to continue to discharge the duties until his successor had qualified, and such office does not become vacant, so as to authorize the Governor to appoint a successor when the Legislature is not in session. Such a vacancy could only be caused by the resignation or death of the incumbent or some other event by which the duties of the office were no longer discharged at all, in which case, and in order to prevent a failure of the public service, the Governor might appoint during the recess of the Senate. People v. Bisell, 49 Cal. 407, 409, 412.

Failure to elect.

"Vacancies," as used in Const. U. S. art. 1, § 2, which provides that, when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies, includes a vacancy which happens by reason of a failure to elect a Representative, as well as a vacancy which occurs after the Representative has been elected. In re Repre-

sentative Vacancy, 9 Atl. 222, 223, 15 R. L. 621.

An office cannot be said to be vacant while any person is authorized to act. In case of the failure by a town to elect officers at the annual town meeting, there is no vacancy because the officers of the preceding year hold the offices until others are chosen or appointed in their places and have qualified. *People v. Van Horne* (N. Y.) 18 Wend. 515, 518.

Although it has been held in special instances that the term "vacancy" relates only to cases where officers have been elected, and not to those where there has been a failure to elect, yet that construction cannot apply where the Legislature specifically defines a failure to elect as one cause of a vacancy. *People v. Crissey*, 91 N. Y. 616, 634.

A vacancy in office exists when there has been no election to fill the office at the time appointed by law. *Elliott v. Burke*, 68 S. W. 445, 447, 113 Ky. 479.

Failure to file bonds.

In construing a statute providing that, if any officer required by law to give bond fails to file the same in the proper office within the time fixed, he vacates his office, the court said: "It seems to us more reasonable to construe this section to mean that the failure of the sheriff to file his bond in the office of the judge of probate within 15 days after his election did not per se vacate his office, but created a cause of forfeiture or vacancy only, that might be enforced by the statute in a proper judicial proceeding instituted for that purpose. In such a proceeding it would be a good defense to show that the failure to file his bond within the time prescribed was not the fault of the petitioner; that he had tendered the judge of probate a good and sufficient bond within the time, and requested him to approve it; and that he neglected or refused without any sufficient legal excuse therefor." *Ex parte Candee*, 48 Ala. 386, 397, 398.

Failure to qualify.

A "vacancy," within the meaning of a statute in reference to an appointment to fill a vacancy in the office of mayor, exists when the successor of mayor in office is elected, but fails to qualify, and therefore the office may be filled by appointment. *Vaughan v. Johnson*, 77 Va. 300, 305; *Johnson v. Mann*, Id. 265, 268, 280.

The Constitution of California clearly defines the sense of the phrase "vacancy in the office of Governor," as used therein, by specifically enumerating the instances which devolve the duties of the executive on the Lieutenant Governor. All the instances mentioned are such as can only occur after the term of the Governor has commenced to run.

It is only after the installation of the particular incumbent that any one of these contingencies could happen. The manner of electing a comptroller and the term of his office are the same as are prescribed for the Governor, and each holds his office until his successor has qualified. The term of the office is fixed at two years certain with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years, and, where the successor-elect fails to qualify, the incumbent of the office continues to hold until the next election, and no vacancy occurs. *People v. Whitman*, 10 Cal. 38, 44, 45.

"Vacant," as used in Gen. St. 1878, c. 9, § 2, providing that an office shall be vacant upon failure of the incumbent to qualify, etc., applies to the particular term to which the event causing a vacancy relates. *Scott County v. Ring*, 13 N. W. 181, 184, 29 Minn. 398.

As applied to term.

Const. art. 4, § 8, declares that sheriffs, etc., shall be chosen by the electors of the respective counties once in every three years, and as often as vacancies shall happen. Held, that "vacancies," as so used, applies only to the office, and is not applicable to the term of office. *People v. Green* (N. Y.) 2 Wend. 266, 273.

"Vacancy," as applied to an office, applies not to the incumbent, but to the term, or to the office, or both, depending generally upon the context of the statute. *People v. Le Fevre*, 40 Pac. 882, 886, 21 Colo. 218.

"Vacancy" in an office means the want of an incumbent at the time. It has no reference to duration of time, and the appointment of a person to fill a vacancy pro tempore does not invest him with a full term, unless the law so expressly provides. Vacancy in an office is one thing, and term is another. An office may be vacant and filled many times during a term. *State v. Johns*, 3 Or. 533, 537.

"Vacancy," as used in reference to an office, relates not only to the office which is to be filled, but to the term for which the appointment is to be made. *Monash v. Rhodes*, 53 Pac. 236, 237, 11 Colo. App. 404.

The "vacancy" meant by Const. art. 8, § 7, declaring that, if any person elected or appointed to any county office shall fail to give bond and qualify within 60 days after his election, the said office shall become vacant, means that the office is without such an occupant as precludes the filling of it in any mode which the Constitution may provide or may recognize as lawful; that notwithstanding the incumbent of the former term may, and it is contemplated that he shall, continue in office or perform the official du-

ties of the said office after the expiration of his official term, and until his successor is duly qualified, still the office is vacant as to the new term in the sense that any office is vacant which is not occupied by a person chosen to fill it for such term. *State v. Murphy*, 18 South. 705, 712, 32 Fla. 138.

VACANT LAND.

The ordinary meaning of the word "vacant" in its general use is to be empty or unfilled. When applied to an office, it means the condition when it is first created, and not filled by any incumbent, or after the death or removal of an incumbent before his successor is appointed. Vacant lands are such as are absolutely free, unclaimed, and unoccupied. In the case of *Marshall v. Bompart*, 18 Mo. 84, 87, it was said that the word, when applied to lands, means those which have not been appropriated by individuals. Lands are not vacant when they are occupied by others engaged in exploring for oil under oil placer claims, though such claims may not appear of record in the land office. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 13, 50 C. C. A. 79, 61 L. R. A. 230.

"Vacant and unoccupied land," as used in the statute of limitations, vesting title to vacant and unoccupied land in one, who, having color of title thereto, pays taxes thereon for seven years, means lands not in the actual possession of one; and hence the keeping of a wagon, when not in use, upon a city lot, in which the owner of the wagon has no claim or color of title, does not keep the lot from being "vacant and unoccupied," within the meaning of the words as used in the statute. *Walker v. Converse*, 36 N. E. 202, 204, 148 Ill. 622.

Within the meaning of a city charter extending the limits of the city, and providing that land within the territory annexed which was used exclusively for farming purposes or was vacant and unoccupied should not be taxed for city purposes beyond a certain specified rate, where a tract of land within such annexed territory was by the owner caused to be platted as lots and streets, he holding the lots for sale at a price greatly in excess of the land for farming purposes, but cultivating and using the most of the land until purchasers could be obtained, the remainder thereof being uninclosed and not used for any purpose, such cultivated land was used exclusively for farming purposes, and the other was vacant and unoccupied, and not subject to taxation at full rates. *Gillette v. City of Hartford*, 31 Conn. 351, 359.

The term "vacant lands," as used in Acts Tenn. 1847, c. 20, providing for the granting by the state of vacant lands, does not apply to the bed of the Mississippi river, which may, years after the passage of the

act, become dry land by a sudden change in the course of the river, by cutting a new channel; such land not being "vacant land," within the meaning of the policy of the land law of the state. In *Goodwin v. Thompson*, 83 Tenn. (15 Lea) 209, 54 Am. Rep. 410, it was held that the title to the soil under the waters of streams navigable in a legal sense could not be acquired by individuals under the general land law of the state. *Stockley v. Cissna* (U. S.) 119 Fed. 812, 834, 56 C. C. A. 324.

Vacant land of a state, subject to grant to settlers in the usual way, through the land office, does not include the beds of the channel of the tidal navigable streams, the title to which is in the state. *State v. Pacific Guano Co.*, 22 S. C. 50, 75.

As ungranted.

In reference to an application for a grant of land under the Georgia headright laws, an opinion of a surveyor that the premises in question were "vacant" means that they were ungranted. *Pritchett v. Ballard*, 29 S. E. 210, 102 Ga. 20.

Lands recently purchased by the state from a corporation, to which they had been originally granted by the state, are not "vacant lands," within the acts for granting lands; and a grant taken out for such lands vests no title in the grantee. *State v. Arledge* (S. C.) 2 Bailey, 401, 402, 23 Am. Dec. 145.

"Vacant lands," as used in the statute (Battle's Revision, c. 41, § 1), which provides that lands, in order to be the subject of entry under the statute, must be such as belong to the state and such as are vacant and unappropriated, does not include lands which have been granted by the state to individual citizens, but which the state subsequently acquires title to, but puts to no particular use, or which, having used, it abandons. *State v. Bevers*, 86 N. C. 588, 590.

As unoccupied.

The term "vacant lands" is used to designate unoccupied lands. *State v. Askew*, 2 S. W. 349, 351, 48 Ark. 82.

VACANT SUCCESSION.

A succession is called "vacant" when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it. Civ. Code La. 1900, art. 1095; *Simmons v. Saul*, 11 Sup. Ct. 369, 372, 138 U. S. 439, 34 L. Ed. 1054.

VACATION.

Of court.

The periods between the end of one term of court and the beginning of the next are

called "vacations." *Von Schmidt v. Widber*, 34 Pac. 109, 110, 99 Cal. 511.

The term "vacation" was defined at the common law as all the time between the end of one term and the beginning of another. 6 Jacob's Law Dict. 323. But the term as used in section 66 of the practice act, authorizing judgments by confession in vacation, was construed to include a period of 32 days, during which a circuit court had adjourned over; but it was said that the term is not to be understood as embracing all the time the court is not actually in session, or as embracing the time of an adjournment from day to day. Burrill says: "In practice, intermission of judicial proceedings; the recess of courts; the time during which courts are not held." Wharton defines the word "vacation": "Intermission of judicial proceedings, or any other stated employment; recess of courts or senates." *Conkling v. Ridgely*, 1 N. E. 261, 263, 112 Ill. 36, 40, 54 Am. Rep. 204.

The word "vacation," as used in Code, § 3389, 3394, providing that, if an order for injunction is made in vacation, the judge must indorse the order on the petition, means such time as the court is not actually in session, though it ordinarily means the time between terms. *Thompson v. Benepe*, 24 N. W. 601, 602, 67 Iowa, 80.

The term "vacation," in Gen. St. c. 152, § 2, providing that a certain recognizance may be taken before the superior court in any county in term time or before the clerk of the court in vacation, is used in contradistinction to term time, indicating an intention to use it in its legal sense. The English legal year was divided into four terms of different lengths, separated by the vacations, which were the seasons of the great festivities or fasts which were deemed necessary on account of the avocations of rural business; and in this country the courts have their terms and vacations. *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 997. The legal definition of the word "vacation" is that period of time between the end of one term and the beginning of another. *Brayman v. Whitcomb*, 134 Mass. 525, 526 (citing Bouv. Law Dict.).

Courts of highest resort have not been in accord as to when it was "vacation," within the meaning of statutes authorizing the court in term, and the judges in vacation, to grant certain orders. By some, vacation is held to be only that period of time between the end of one term and the beginning of another. *Brayman v. Whitcomb*, 134 Mass. 525. In Iowa it means such time as the court is not actually in session. In Illinois it means an adjournment for a considerable period of time. *Rhodes-Burford Furniture Co. v. Mattox*, 40 N. E. 545, 13 Ind. App. 221.

The Revised Statutes provide that whenever any act is authorized to be done by or

any power given to a court or judge thereof in vacation, or whenever any act is authorized to be done by or any power given to a clerk of any court in vacation, the words "in vacation" shall be construed to include any adjournment of court for more than one day. Another section provides that, if a warrant be issued in term, it shall be made returnable forthwith, but, if issued in vacation, it shall be made returnable to the next term thereafter; and if a defendant be arrested during the term he shall be brought into court, but if he be arrested in vacation of the court the officer shall bail him, etc. In construing these statutes in the case of an arrest made on an information filed January 4th, the court having adjourned the term on December 23d to January 11th, it was held that the court was not in vacation at the time the information was filed, but that it was filed during term. *State v. Derkum*, 27 Mo. App. 628, 630, 631.

"Vacation" has been held to mean the period between the day on which a term of court is adjourned to the next court in course, or until the day of the beginning of another term, and not the mere interval when, for any reason, the court is not in session, and is adjourned over for more than a day. *Warner v. Donahue*, 72 S. W. 492, 494, 99 Mo. App. 37 (citing *State v. Derkum*, 27 Mo. App. 628). See, also, *Brayman v. Whitcomb*, 134 Mass. 525, 526; *Hadley v. Bernero*, 71 S. W. 451, 452, 97 Mo. App. 314.

Although it may be difficult to say generally, with sufficient completeness to cover all cases, what is "vacation" in chancery, as that term is used in V. S. 4527, providing that on violation of an injunction the court of chancery or in vacation a chancellor can punish the person guilty thereof, it is clear that when the county court finally adjourns, and the chancellor neither directs the continuance of the stated term of the court of chancery nor adjourns the term nor closes a special term, and nothing more appears, it is "vacation," within the meaning of the statute during all the time between the stated terms of the county court. In *re Murphy*, 50 Atl. 817, 73 Vt. 115.

Of highway.

The temporary turning out of a main road to avoid an obstruction or a mudhole will not operate as a vacation of the part of the highway occupied by the obstruction. *Davis v. Nicholson*, 81 Ind. 183, 186.

Of school.

"Vacation" is defined as the intermission of the regular studies and exercises of an educational institution between terms; and an intermission of two days in a term or school is not a "vacation," as used in a contract of employment of school teachers, providing that they shall not be paid for vaca-

tion, though the word be erroneously used by the board in authorizing the intermission. *Board of Education of City of Emporia v. State*, 52 Pac. 466, 467, 7 Kan. App. 620.

VACCINATION.

See "General Vaccination"; "Successful Vaccination."

Vaccination and quarantine, while both are preventive measures adopted to prevent the contracting of the disease of smallpox, are essentially different, in that to quarantine persons means to keep them, when suspected of having contracted or been exposed to the disease, out of a community, or to confine them in a given place therein, and to prevent intercourse between them and the people generally of such community, while persons who are merely vaccinated are allowed to go when and where they please and mingle freely with the other members of the community; and authority to county officials to levy taxes for the purpose of quarantine does not authorize such officials to incur indebtedness and levy taxes for the purchase of vaccine points to prevent the spread of smallpox in the county. *Daniel v. Putnam County*, 38 S. E. 980, 981, 113 Ga. 570, 54 L. R. A. 292.

VACCINE VIRUS.

Vaccine virus is the morbid principle of cowpox, which acts as a preventive of smallpox, and is, of course, a different article from antitoxine. In the *Century Dictionary*, the secondary definition of the word "vaccine," when used as a noun, is the modified virus of any specific disease introduced into the body in inoculation with a view to prevent or mitigate a threatened attack of that disease or to confer immunity against subsequent attacks. None of the other standard dictionaries—*Webster*, *Worcester*, *Funk & Wagnalls*—give any such definition of the phrase *Koechl v. United States* (U. S.) 84 Fed. 448, 28 C. C. A. 458.

The preparation known as "anthrax vaccine" or "black leg," which is used for the prevention of anthrax or black leg, a disease of cattle, is included within Act July 24, 1897, c. 11, § 2, Free List, par. 692, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], relating to "vaccine virus," and is thereby taken out of the provision in section 1, Schedule A, par. 68, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631], for "medicinal preparations not specially provided for." *Pasteur Vaccine Co. v. United States* (U. S.) 123 Fed. 846.

VADIUM.

A vadium is that sort of bailment in which goods or chattels are delivered to another as a pawn, to be a security to him for

money borrowed of him by the bailor. "Vadium" is the Latin term therefor, and the relation is expressed in English by the word "pawn." *Coggs v. Bernard*, 2 Ld. Raym. 909, 913.

VADIUM VIVUM.

A "vadium vivum" is defined by Kent to be when the creditor takes the estate to hold and enjoy it without any limited time of redemption, and until he repays himself out of the rents and profits. In that case the land survives the debt, and, when the debt is discharged, the land, by right of reverter, returns to the original owner. The holding of the land in pledge is like the holding of any other pledge until the debt is repaid; the owner of the pledge cannot recover it from the creditor. Thus where a mortgagee had been in possession of the mortgage, he could not be deprived of such possession without the payment of the mortgage debt, though the note which had been given had been outlawed. *Spect v. Spect*, 26 Pac. 203, 204, 88 Cal. 437, 13 L. R. A. 137, 22 Am. St. Rep. 314.

A *vivum vadium*, or Welsh mortgage, was a species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of his land, and it was so called because neither the money nor the land was lost, and were not left in dead pledge. There was a living pledge, for the profits earned were constantly paying off the debt. But the distinguishing characteristics of such an instrument were that there was no proviso that the conveyance was to be void on payment of the debt, and there was no covenant, express or implied, for such payment. *O'Neill v. Gray* (N. Y.) 39 Hun, 566, 568.

The common law recognizes two kinds of landed securities, respectively, known as "*vivum vadium*" and "*mortuum vadium*." *Vivum vadium* consisted of a feoffment to the creditor and his heirs until out of the rents and profits he had satisfied himself his debt. The creditor took actual possession of the estate, and received the rents and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might re-enter and maintain ejectment, and it was said to have been collected *vivum vadium*, because neither debt nor estate was lost. *Courtwright v. Cady*, 21 N. Y. 343, 344.

VAGABOND.

"Vagabond" ordinarily means a vagrant or homeless wanderer without means of honest livelihood, but as used by a testator after making a devise to his son, in providing that in case such son should not make good use of the devise, "but becomes a drunkard and a vagabond, then the devise shall remain in

trust," meant an idle, worthless, improvident fellow, who is so utterly without moral sense or self-respect that he will neither provide for his family nor take proper care of himself. *Forsyth v. Forsyth*, 19 Atl. 119, 122, 46 N. J. Eq. 400.

"Vagabonds," as used in an indictment charging the unlawful keeping of a house for the purpose of public prostitution and as a common resort for prostitutes and vagabonds, is not equivalent to "vagrants," as used in Pen. Code, art. 339, declaring a disorderly house to be one kept for the purpose of public prostitution or as a common resort for prostitutes and vagrants. *Johnson v. State*, 13 S. W. 1005, 1006, 28 Tex. App. 562.

VAGRANCY—VAGRANT.

As an offense, see "Offense."

"Vagrancy," when not defined by statute, must be considered such vagabondage as fairly comes within the common-law meaning of the word. There must be something more than a mere going about from place to place in a neighborhood or township without visible means of support; and the mere fact of sleeping in a barn one night is not sufficient, with the going about, to constitute vagrancy. "Vagrant" is defined by Bouvier to be, in the common meaning of the statutes punishing vagrancy, "a person who refuses to work and goes about begging." A person may be going about the community without any visible means of support, and yet be guilty of no offense. He may be seeking work with an honest intent to gain thereby a livelihood. *In re Jordan*, 50 N. W. 1087, 90 Mich. 3.

"Vagrancy" is distinguished expressly from disorderly conduct generally and from breaches of the peace, and a city council cannot enlarge its meaning or extend it to causes of vagabondage not fairly within the common-law meaning of the term, which was possibly designed to protect the public from expense quite as much as from disorder. *In re May*, 1 N. W. 1021, 1022, 41 Mich. 299.

The term "vagrant" does not include a lewd woman who is a minor and is supported by her parents. *Taylor v. State*, 59 Ala. 19.

By force of statute common prostitutes and professional gamblers are vagrants. Pen. Code, art. 385. Such persons are not, however, necessarily vagabonds; and consequently an indictment which charged the keeping of a house for the purpose of public prostitution and as a common resort for prostitutes and vagabonds should have been quashed to the extent of striking out the word "vagabonds," the indictment being drawn under a statute declaring a disorderly house to be one kept for the purpose of pub-

lic prostitution or a common resort for prostitutes and vagrants." *Johnson v. State*, 13 S. W. 1005, 1006, 28 Tex. App. 562.

A child who has been committed "as a disorderly child, who deserts his home without sufficient cause, keeps company with dissolute and vicious persons, against the lawful command of his father, and is bad, ungovernable, and disorderly beyond his father's control," is not a "vagrant," within the meaning of Laws 1897, c. 508, authorizing boys to be received in a training school who shall be arrested or committed as vagrants. *In re Braffett*, 57 N. Y. Supp. 890, 27 Misc. Rep. 329.

The act of June 13, 1836, divided vagrants into five classes: (1) All persons unlawfully returning into any district whence they have been legally removed without bringing a certificate from the city or district to which they belong; (2) all persons having no means of support, who live idly and refuse to work for the usual wages given to other laborers; (3) all persons who shall refuse to perform the work allotted to them by the overseers of the poor; (4) all persons going about begging or gathering alms; and (5) all persons coming from some place without the commonwealth, who shall be found residing therein, following no occupation, having no means of subsistence, and giving no reasonable account of themselves or their business. "Vagrants," as thus classified, do not include all persons who come under the term "disorderly," as used by the Legislature. "Disorderly" means lawless; contrary to law; violating, or disposed to violate, the law and good order; inclined to break loose from restraint; unruly; in a manner violating law and good order; contrary to rules or established institutions. It includes all those who violate the peace and good order of society either as vagrants, disorderly, or for a breach of the public peace, or who should be bound for their good behavior. *In re Aldermen and Justices of the Peace (Pa.)* 2 Pars. Eq. Cas. 458, 464.

In Pennsylvania the act of 1876, popularly known as the "Tramp Act," thus defines and describes "vagrants": "(1) All persons who shall unlawfully return into any district whence they have been legally removed, without bringing a certificate from the proper authorities of the city or district to which they belong, stating that they have a settlement therein; (2) all persons who shall refuse the work which shall be allotted to them by the overseers of the poor, as provided by the act of June 13, 1836, etc.; (3) all persons going about from door to door, or placing themselves in streets, highways, or other roads, to beg or gather alms, and all persons wandering abroad and begging who have no fixed residence in the township, ward, or borough in which the vagrant is ar-

rested; (4) all persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering or residing therein, and shall follow no labor, trade, occupation, or business, and have no visible means of subsistence, and can give no reasonable account of themselves or their business in such place. *Commonwealth v. King* (Pa.) 2 Kulp, 386, 388.

Ordinance No. 2364 of the city of St. Louis declares: "All able-bodied persons who, not having visible means to maintain themselves, live idly, without employment; or are found loitering or rambling about, or wandering about and lodging in groceries, tippling houses, beer houses, outhouses, sheds, or stables, or in the open air, and not giving a good account of themselves; or wandering about and begging; or going about from door to door begging; or placing themselves in the streets or in other thoroughfares, or in public places, to beg or receive alms; all keepers or exhibitors of any gambling table or device; all persons who, for the purpose of gaming, travel about on steamboats, or go from place to place; and all persons upon whom shall be found any instrument or thing used for the commission of burglary, or for picking locks or pockets, and who cannot give a good account of their possession of the same—shall be deemed vagrants." *Roberts v. State*, 14 Mo. 138, 145, 55 Am. Dec. 97.

Under Rev. Ord. St. Louis, § 1062, defining a "vagrant" as one who shall be found trespassing on the private premises of others, and not giving a good account of himself, one cannot be fined as a vagrant because found trespassing on the private premises of another, if able to give a good account of himself. *City of St. Louis v. Babcock*, 156 Mo. 148, 150, 56 S. W. 732.

The vagrancy of a husband, which is a ground for a divorce, is a vagrancy as defined in the Criminal Code, describing a vagrant as every able-bodied man who shall neglect or refuse to provide for the support of his family. In a divorce case based on the ground of the husband's vagrancy, the evidence must be such as would support a conviction for vagrancy in a criminal prosecution. *Dwyer v. Dwyer*, 26 Mo. App. 647, 651.

Every person without visible means of living, who has the physical ability to work, and who does not for the space of 10 days seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, or

place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person; and every common drunkard—is a vagrant. Pen. Code Idaho 1901, § 4852.

Any person who may be found loitering around houses of ill-fame, gambling houses, or places where liquors are sold or drank, without any visible means of support, or shall be the keeper or inmate of any house of ill-fame, gambling house, or engaged in any unlawful calling whatever, or any able-bodied married man who shall neglect or refuse to provide for the support of his family, shall be deemed a "vagrant." *Gen. St. Kan.* 1901, § 2281.

All persons not having visible means of support and maintenance, who live without employment, and all persons wandering abroad and living in taverns, beer houses, market places, sheds, barns, or in open air, and not giving good account of themselves, and all persons wandering about and begging, or who go from door to door, or from place to place, or occupy public places for the purposes of begging and receiving alms, and all prostitutes, and all keepers, occupants, lessees, tenants, and pimps of houses used for prostitution or gambling, shall be deemed and are hereby declared to be vagrants. *Cobbey's Ann. St. Neb.* 1903, § 2339.

The following persons are vagrants: (1) A person who, not having visible means to maintain himself, lives without employment; (2) a person who, being an habitual drunkard, abandons, neglects, or refuses to aid in the support of his family; (3) a person who has contracted an infectious or other disease in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health; (4) a common prostitute who has no lawful employment whereby to maintain herself; (5) a person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highway, passages, or other public places, to beg or receive alms; (6) a person wandering abroad and lodging in taverns, groceries, alehouses, watch or station houses, outhouses, market places, sheds, stables, barns, or uninhabited buildings, or in the open air, and not giving a good account of himself; (7) a person who, having his face painted, discolored, covered, or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood, or inclosure; (8) any child between the age of five and fourteen, having sufficient bodily health and mental capacity to attend the public school, found wandering in the streets or lanes of any city or incorporated village, a truant, without any lawful occupation; (9) every male person who lives wholly or in part on the earnings of pros-

titution, or who in any public place solicits for immoral purposes. A male person who lives with or is habitually in the company of a prostitute, and has no visible means of support, shall be deemed to be living on the earnings of prostitution. Cr. Code N. Y. 1903, § 887.

Any person who may be able to labor and who has no apparent means of subsistence, and neglects to apply himself to some honest occupation for the support of himself and his family, or if any person shall be found spending his time in dissipation or gaming, or sauntering about without employment, or endeavoring to maintain himself or his family by any undue or unlawful means, such person shall be a vagrant. Code N. C. 1883, § 3834.

The following persons are "vagrants" within the meaning of a provision punishing vagrancy: (1) An idle person who lives without any means of support and makes no exertion to obtain a livelihood by honest employment; (2) any person who strolls idly about the streets of towns or cities, having no local habitation and no honest business or employment; (3) a person who strolls about to tell fortunes or to exhibit tricks not licensed by law; (4) a common prostitute; (5) a professional gambler; (6) any person who goes about to beg alms who is not afflicted or disabled by a physical malady or misfortune; (7) a habitual drunkard who abandons, neglects, or refuses to aid in the support of his family. Pen. Code Tex. 1895, art. 413.

The following persons shall be deemed vagrants: (1) All persons who shall unlawfully return into any county or corporation whence they have been legally removed; (2) all persons who, not having the wherewith to maintain themselves and their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work in the place where they then are; (3) all persons who shall refuse to do the work which shall be allotted to them by the overseers of the poor; (4) all persons going about from door to door, or placing themselves in streets, highways, or other roads, to beg alms, and all other persons wandering abroad and begging, unless disabled or incapable of labor; (5) all persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering and residing therein, and shall follow no labor, trade, occupation, or business, and have no visible means of subsistence, and can give no reasonable account of themselves, or their business in such place. Code Va. 1887, § 884.

Any person able to support himself in any respectable calling, who shall be found within the limits of this state without any

visible means of support, and living an immoral or worthless life, shall be deemed a vagrant. Rev. St. Wyo. 1899, § 5126.

VAGUE ENTRY.

Entry may be either vague or special. The first is so entirely defective in its description of locality as to furnish no rational ground of belief that one place more than another was intended. *Phillip's Lessee v. Robertson*, 2 Tenn. (2 Overt.) 399, 415.

VAGUENESS.

Vagueness in pleading, it is well settled, is not frivolousness; it is to be corrected by amendment and not visited by judgment. *Kelly v. Barnett* (N. Y.) 16 How. Prac. 185, 187.

VALE.

The Spanish word "vale" means a general obligation, rather than a promissory note. *Govin v. De Miranda*, 35 N. E. 623, 140 N. Y. 662.

VALID.

The term "valid" means in law having legal strength, force, and effect, or incapable of being rightfully overthrown or set aside. *Emerson v. Knapp*, 75 Mo. App. 92, 97.

"Valid" means having force; of binding force; legally sufficient or efficacious; authorized by law. Hence, in Comp. St. Neb. 1896, c. 6, § 1, providing that no assignment for the benefit of creditors shall be valid, unless the same be made in conformity to the terms of the act, means that such assignment shall be void. *Sager v. Summers*, 68 N. W. 614, 615, 49 Neb. 459.

VALID AND EXISTING INSURANCE.

The agent of certain insurance companies in which plaintiff had insurance told him that they desired to cancel such insurance. He replied that the policies were transferred as security to certain of his creditors, and that the unearned premiums should be sent to them, which was done. One of the creditors refused the premium when received, on the ground that the fire had already occurred. On the same day on which the agent attempted to return the premium to plaintiff, plaintiff took out other insurance in the defendant company. Held that, the former policies not having been canceled at the time the policy in the defendant company was taken out, they constituted a "valid and existing insurance," within the prohibitory condition of defendant's policy. *East Texas Fire Ins. Co. v. Flippin*, 23 S. W. 550, 551, 4 Tex. Civ. App. 576.

VALID AND SUFFICIENT DEED.

The phrase "valid and sufficient deed," in an agreement for the sale of land, means an operative conveyance to transfer a good and sufficient title, but, in an order directing the officer of the court to convey, it means no more than a deed in form and terms sufficient to make the title obtained by it as valid to the purchaser as it was in the power of the officer to make it. *Easton v. Pickersgill*, 55 N. Y. 310, 318.

VALID CLAIM.

A statement in a bill in equity that a claim upon which defendant had obtained judgment against complainant was not valid was sufficient to charge that the claim was not of such a character that it could be supported either in law or equity. *Herbert v. Herbert*, 20 Atl. 290, 291, 47 N. J. Eq. 11.

VALID CONSIDERATION.

See, also, "Valuable Consideration"; "Value."

A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise. *Civ. Code Ga.* 1895, § 3657.

VALID DISTRIBUTION.

A "valid distribution," as the term is used in *Rev. St.* 1875, p. 372, § 5, providing that an agreement for distribution of an estate by the parties interested shall be a valid distribution of the estate, means that act which ascertains the individual shares of the distributees in and to specific property. *Appeal of Mathews*, 45 Atl. 170, 171, 72 Conn. 555.

VALID EXCUSE.

A provision in a mutual benefit certificate that the members might be relieved from the effect of forfeiture for the nonpayment of assessments on good or valid excuse to the officers of the association, it is held not to vest in the officers the exclusive right to determine the validity of the excuse. The word "valid," says the court, as here used, is equivalent to "good," "sufficient," or "satisfactory." *Dennis v. Massachusetts Ben. Ass'n*, 24 N. E. 843, 845, 120 N. Y. 496, 9 L. R. A. 189, 17 Am. St. Rep. 660.

VALID JUDGMENT.

A valid judgment is a record of a court having jurisdiction, which binds both parties. It is a sentence of the law, pronounced by the court, upon the matter contained in

the record. *Middlesex Bank v. Butman*, 29 Me. (16 Shep.) 19, 28.

VALID LAND CERTIFICATE.

A "valid land certificate," within *Rev. St.* art. 3921, providing that all surveys properly made by virtue of valid land certificates shall be deemed valid, is a certificate having such strength or force under the law as will entitle its owner, through it, to appropriate a part of the unappropriated public domain. *Adams v. Houston & T. C. Ry. Co.*, 7 S. W. 729, 741, 70 Tex. 252.

VALID LOCATION.

A "valid location," within the meaning of the United States mining laws, is a location which is distinctly marked on the ground, so that its boundaries can be readily traced. Any marking on the ground claimed by stakes and mounds, and written notices whereby the boundaries of the claim located can be readily traced, is sufficient. *North Noonday Min. Co. v. Orient Min. Co.* (U. S.) 1 Fed. 522, 532.

A "valid location," as the term is used when applied to a mining claim, is the purchase of a privilege. It is the grant of such an easement or property in the claim located as carries with it the right to acquire full title upon complying with the law. In order to keep this grant alive, the locator and his grantee must at all times be capable and qualified to receive the full title from the government. *Tibbitts v. Ah Tong*, 2 Pac. 759, 763, 4 Mont. 536.

To constitute a valid location of a lode mining claim there must be: "(1) A discovery, within the limits of the claim located, of a vein or crevice of quartz or ore, with at least one well-defined wall on a lead, lode, or ledge of rock in place containing gold, silver, or other valuable mineral deposits; (2) the location must be distinctly marked on the ground, so that its boundaries may be readily traced; (3) a declaratory statement in writing under oath describing such discovery and location, with a description of the claim located." *Upton v. Larkin*, 17 Pac. 728, 732, 7 Mont. 449.

VALID MORTGAGE.

The term "valid mortgage" means a mortgage which is "a lien upon specific property, with the ordinary incidents of such lien, one of which is prior as to that particular property over all other debts of the mortgagor which have not, prior to that time, ripened into a lien." *King v. Fraser*, 23 S. O. 543, 548.

"Valid mortgage," as used in an affidavit alleging that a mortgage was a valid

mortgage, has reference simply to the title. *Du Flon v. Powers* (N. Y.) 14 Abb. Prac. (N. S.) 391, 395.

VALID SALE.

A valid sale means one having the quality of legal sufficiency and complete obligation. *Sharpleigh v. Surdam* (U. S.) 21 Fed. Cas. 1173, 1178.

VALIDATION.

In regard to a proceeding to validate a proposed issue of bonds, "validation" means to irrevocably bind the taxpayer to the payment of such bonds. *Smith v. City of Dublin*, 39 S. E. 327, 330, 113 Ga. 833.

VALIDITY.

"Validity" has a well-understood technical, as well as a popular, acceptation, and must receive such meaning in the courts if its use in the statute does not suggest a different one. In the general nomenclature of the law, no word is so frequently used to signify legal sufficiency in contradistinction to mere regularity as this one. We say a deed is regular, but invalid for want of power in the attorney or officer. When a lawyer says he concedes the regularity of a sale, but objects to its validity, it is known the conditions are questioned upon which the power to make it depended. Elementary books, in treating of questions of both business and official agency, employ it as a commendous word, as always including every incident of complete legality. "Regularity," on the other hand, never does so. An official sale, an order, judgment, or decree may be regular. The whole practice in reference to its entry may be correct, but still invalid for reasons going behind the regularity of its forms. But when we say a judgment, decree, or sale is valid, it fully excludes the idea that it is void for any reason. *Sharpleigh v. Surdam* (U. S.) 21 Fed. Cas. 1173, 1178.

In the authorities which declare that the obligation, interpretation, nature, and validity of a contract made in one place, which is to be performed in another, are to be determined by the law of the place of performance, the term "validity" refers to the conditions of the contract, and the extent and nature of its obligation, as to which the agreement will be upheld or defeated, according to the sanction or the prohibition of the law of the place where the parties have located the transaction. *Campbell v. Cramp-ton* (U. S.) 2 Fed. 417, 423.

The terms "validity" and "inconsistency" "involve entirely distinct ideas. Whether a former law is inconsistent with the provisions of the latter act is one question;

whether the provisions of the latter act are valid or invalid is another and different question." *Meshmeier v. State*, 11 Ind. 482, 489.

"Validity," as applied to treaties, admits of two descriptions—what is necessary and voluntary. By "necessary validity" is meant that which results from the treaties having been made by persons authorized by and for purposes consistent with the Constitution. To this kind of validity all such questions as these relate; that is: Has the treaty been made and ratified by the President with the advice and consent of three-fourths of the Senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved by mutual agreement? Has it been violated and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the Constitution? Are those articles void? Do they vitiate the whole treaty, etc.? By "voluntary validity" is meant that validity which the treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. It is called "voluntary" because it entirely depends on the will of the nation, either to continue to let it operate, or to annul and extinguish it. To this head such questions as these relate; that is: Has the treaty been so violated as justly to become voidable by the nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals. Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone that risk until we can be better prepared for it? Shall we at this moment take any measures, or would it be more prudent to remain silent for the present, and let the treaty go on and continue to operate as if nothing had happened, etc.? *Jones v. Walker* (U. S.) 13 Fed. Cas. 1059, 1062.

VALUABLE.

(1) Having value or worth; possessing qualities which are useful and esteemed; precious; costly; as, a valuable horse; valuable land; a valuable cargo. (2) Worthy; estimable; deserving esteem; as, a valuable friend; a valuable companion. *Webst. Dict.*

VALUABLE CONSIDERATION.

See, also, "Consideration"; "Valid Consideration"; "Value."

A valuable consideration, in the sense of the law, may consist either of some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment,

loss, or responsibility given, suffered, or undertaken by the other. *Appeal of Clark*, 19 Atl. 332, 333, 57 Conn. 565; *Tillinghast v. Banks*, 14 Ga. 649, 652; *Hamer v. Sidway*, 27 N. E. 256, 257, 124 N. Y. 538, 12 L. R. A. 463, 21 Am. St. Rep. 693; *Babcock v. Chase*, 36 N. Y. Supp. 879, 880, 92 Hun, 264; *Corcoran v. New York Cent. & H. R. R. Co.*, 45 N. Y. Supp. 861, 863, 20 Misc. Rep. 197; *Hamer v. Sidway*, 38 N. Y. St. Rep. 888, 890; *Hammond v. Shepard* (N. Y.) 40 How. Prac. 452, 453; *Devezac v. Seller* (Ky.) 14 S. W. 590, 591; *Akers v. Phillips* (Ky.) 58 S. W. 790, 791; *Stovall v. McCutchen*, 54 S. W. 969, 107 Ky. 577, 47 L. R. A. 287, 92 Am. St. Rep. 373; *Donahoe v. Rich*, 28 N. E. 1001, 1003, 2 Ind. App. 540; *Jaqua v. Montgomery*, 33 Ind. 36, 45, 5 Am. Rep. 168; *Bridges v. Stephens*, 34 S. W. 555, 559, 132 Mo. 524; *Cox v. Sloan*, 57 S. W. 1052, 1065, 158 Mo. 411; *Winter v. Kansas City Cable Ry. Co.*, 61 S. W. 606, 611, 160 Mo. 159; *Mullanphy v. Riley*, 10 Mo. 489, 490, 493; *Homan v. Steele*, 26 N. W. 472, 474, 18 Neb. 652; *Armstrong v. Buel*, 59 N. W. 515, 517, 40 Neb. 803; *Irwin v. Lombard University*, 46 N. E. 63, 65, 56 Ohio St. 9, 36 L. R. A. 239, 60 Am. St. Rep. 727.

"A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension or forbearance of a right will be sufficient to sustain the promise." That is, a benefit or advantage accruing to the party who makes the promise, or some inconvenience or injury sustained by the party to whom the promise is made, is sufficient to support a contract. *Homan v. Steele*, 26 N. W. 472, 474, 18 Neb. 652.

"A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent for the grant, and is therefore founded in motives of justice." *Potter v. Gracie*, 58 Ala. 303, 307, 29 Am. Rep. 748 (quoting 2 Bl. Comm. 296, 297); *Groves v. Groves*, 62 N. E. 1044, 1045, 65 Ohio St. 442; *Ten Eyck v. Whitbeck*, 31 N. E. 994, 996, 135 N. Y. 40, 31 Am. St. Rep. 809.

"A valuable consideration is such as money or the like." *Clark v. Troy*, 20 Cal. 219, 220, 224.

A "valuable consideration," as defined in the books, means money or any other thing that bears a known value. As much may be inferred from the word "consideration" as from the word "value." *Jackson v. Alexander* (N. Y.) 3 Johns. 484, 489, 3 Am. Dec. 517.

A "valuable consideration" means, and necessarily requires, under every form and kind of purchase, something of actual value, capable, in the estimation of the law, of pecuniary measurement; parting with money or money's worth, or an actual change

of the purchaser's legal position for the worse. *The Elmbank* (U. S.) 72 Fed. 610, 617 (citing 2 Pom. Eq. Jur. § 747).

To constitute a valuable consideration, as against existing creditors, the consideration recited, if relied on, must be such as will evidence an obligation on the part of the creditor that the grantee could have enforced against him or his estate. *Stockslager v. Mechanics' Loan & Savings Institute*, 39 Atl. 742, 744, 87 Md. 232 (citing *Grover & Baker Sewing Mach. Co. v. Radcliff*, 63 Md. 496).

A valuable consideration is a thing of value parted with, or a new obligation assumed, at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply "value." Rev. St. Okl. 1903, § 2803; Rev. Codes N. D. 1899, § 5130; Civ. Code S. D. 1903, § 2464; *Porter v. Andrus*, 88 N. W. 567, 569, 10 N. D. 558.

The phrase "valuable and adequate consideration," used in Act Cong. June 30, 1864, c. 173, § 132, declaring that if any person shall by deed of gift or other assurance of title made without valuable and adequate consideration, and purporting to vest the estate, either immediately or in the future, convey any real estate, such disposition shall be taken to confer upon the grantee the succession, means either money paid or some present legal interest or estate parted with or charged, or services rendered, to the value of the property received. *United States v. Banks* (U. S.) 17 Fed. 322, 323.

The term "valuable consideration," as applied to the consideration expressed in a deed, differs in its meaning from the term as used in the recording act of New York with reference to purchasers for a valuable consideration, and as used by the courts of equity. In the latter cases it means substantial value; and a nominal sum, though actually paid, or an antecedent debt or a promise on the part of the grantee from which he can be relieved, do not constitute valuable considerations. *Turner v. Howard*, 42 N. Y. Supp. 335, 338, 10 App. Div. 555.

Rev. St. U. S. §§ 1781, 1782 [U. S. Comp. St. 1901, p. 1212], make it a criminal offense for any member of Congress to receive or agree to receive any money, property, or other valuable consideration for procuring or aiding to procure any contract from the government, etc. Section 1781 makes it an offense for any person to give or agree to give any money, property, or other valuable consideration for the procuring or aiding to procure such contract by a member of Congress. The words "property" and valuable consideration," as used in such provisions, do not include the delivery to a member of Congress of a nonnegotiable note made by a government contractor, promising to pay a

certain sum as the proceeds of the contract were received; such notes being executed pursuant to an agreement to pay such member for his services in procuring a contract. *United States v. Driggs* (U. S.) 125 Fed. 520, 522.

As affected by inadequacy.

A "valuable consideration," as used in Ky. St. § 1907, in relation to fraudulent conveyances, requires that the consideration should be valuable, and a consideration not much, if any, in excess of 50 per cent. of the goods sold, is so inadequate as to cause surprise or warrant a suspicion of fraud or contrivance on the part of the purchaser. *Carter v. Richardson* (Ky.) 60 S. W. 397, 399.

A valuable consideration is something mutually interchanged between the parties. It is not necessary that they should be of equal value. *Dygart v. Remerschnider*, 82 N. Y. 629, 642 (citing 2 Bl. Comm. 297, 444; 4 Kent, Comm. 462).

Acts to be subsequently performed.

A valuable consideration for a conveyance of land may be other than the actual payment of money, and may consist of acts to be done after the conveyance. *Stanley v. Schwalby*, 16 Sup. Ct. 754, 763, 162 U. S. 255, 40 L. Ed. 960.

Agreement to forbear.

A valuable consideration in a contract is anything which is of an advantage to the one or disadvantage to the other. Forbearance of suit is a sufficient consideration to support a contract; and the waiver by a guarantor of a note of the right to pay the note and sue the maker, made at the request of the holder, who is desirous of saving the maker from the annoyance of the suit, is a sufficient consideration to uphold a release of the guarantor from all liability to the holder. *Ditmar v. West*, 35 N. E. 47, 7 Ind. App. 637.

From time immemorial an agreement to forbear to sue has been held to be a valid and sufficient consideration. *Bridges v. Stephens*, 34 S. W. 555, 559, 132 Mo. 524.

Agreement to pay debt of another.

The words "valuable consideration," as used in section 74 of the Code of Civil Procedure, providing that no attorney shall, after action brought, promise or give a valuable consideration for having placed in his hands a demand for the purpose of bringing action thereon, includes an agreement to pay the debt of another to a third person. The source from which the money is to come cannot change the fact that it is a valuable consideration. Whether the consideration be paid out of the money he is to receive from the transaction, or independent of it, is of

no consequence. It is none the less his money, and none the less a consideration, though he take it from the proportion which he is to receive as a result of the litigation. In re *Fitzsimons*, 79 N. Y. Supp. 194, 197, 77 App. Div. 345.

Cancellation of pre-existing debt.

"Valuable consideration," as used in Civ. Code Cal. § 1214, providing that every conveyance of real estate other than a lease for a term not exceeding a year is void as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded, should be construed to include the cancellation of pre-existing indebtedness in consideration of which the conveyance was made. *Gassen v. Hendrick*, 16 Pac. 242, 74 Cal. 444.

Dismissal of condemnation proceeding.

The term "valuable consideration" is defined in the abstract as the relinquishment by the promisee of some right which he may lawfully exercise or enforce. As applied to sales, it is the relinquishment of the right of property; in respect to bailments, it is the relinquishment of the right of possession; in considerations founded upon some act or forbearance, it is the relinquishment of a personal right, singly or in conjunction with others. Where a county dismissed a condemnation proceeding which was nearly completed, in consideration of a certain agreement, such dismissal constituted a valuable consideration. *Barbour County Court v. Hall*, 41 S. E. 119, 122, 51 W. Va. 269.

VALUABLE IMPROVEMENTS.

Rev. St. c. 141, § 3123, provided that in certain cases persons against whom judgments are rendered in ejectment may recover the value of permanent and valuable improvements made by them on the land. Held, that the words "valuable and permanent improvements," as there used, had reference to the purposes for which the lands are or may be used; thus, if the lands are farming lands, they must be improvements which enhance the value of the land for farming purposes—which enhance the value of the land as a whole. If, in making the improvements, valuable timber is destroyed, and the value of the land thus made less, this should be taken into account in estimating the value of the improvements, and if the cutting of the timber and clearing the land was an injury, rather than a benefit, to the premises, the person ejected should not be entitled to recover, as for a benefit, therefor. *Pacquette v. Pickness*, 19 Wis. 219, 224.

VALUABLE MINERALS.

Other valuable minerals, see "Other."

VALUABLE OR NECESSARY CONSTITUENT.

Under Act March 20, 1884, as amended April 22, 1890, prohibiting the adulteration of foods, "Breakfast Cocoa," in the preparation of which the manufacturer takes the cocoa bean and extracts a considerable portion of the oil therefrom, is not a violation of the prohibition in the statute that an article of food shall be deemed to be adulterated if any "valuable or necessary constituent" has been wholly or partly abstracted. *Rose v. State*, 11 Ohio Cir. Ct. R. 87, 88, 5 O. C. D. 72, 73.

VALUABLE PAPERS.

"Valuable papers," within Code, § 2163, providing that any paper writing appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found after his death among his valuable papers, shall be sufficient to convey lands, are such as are regarded by the testator as worthy of preservation—in his estimation, of some value. Valuable papers are not confined to deeds for lands or slaves, obligations for money, or certificates for stock. Any others which are kept and considered worthy of being taken care of by the particular person must be regarded as embraced in that description. *Hooper v. McQuary*, 45 Tenn. (5 Cold.) 129, 132.

Valuable papers are not papers having a money value, but such as are kept and considered worthy of being taken care of by the particular person. *Marr v. Marr*, 39 Tenn. (2 Head) 303, 306. Entries in a diary of daily transactions, whether on separate sheets of paper or in book form, preserved by the writer, and which were directed to be delivered by the writer's servant to the person selected by him to manage his estate after his death, would be valuable papers. *Reagan v. Stanley*, 79 Tenn. (11 Lea) 316, 322.

"Valuable papers," as used in Rev. Code, c. 119, § 1, providing that no last will shall be good unless signed by the testator and witnessed, or unless such last will and testament be found among the valuable papers and effects of any deceased person, does not necessarily and without exception mean the most valuable papers. Valuable papers consist of such as are regarded by the testator as worthy of preservation, and therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, applications for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person must be regarded as embraced in the term "valuable papers." *Winstead v. Bowman*, 68 N. C. 170, 173.

VALUABLE RIGHT.

A "valuable right," within Pen. Code, art. 790, providing that swindling is the acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, etc., is one which could be enforced at law. A chance in a raffle is not such a right. *Rosales v. State*, 8 S. W. 344, 345, 22 Tex. App. 673.

VALUABLE THING.

See, also, "Anything of Value"; "Thing of Value."

"Money or other valuable thing," within the meaning of a statute imposing a penalty for running a ferry for money or other valuable thing without obtaining a license, does not include a supposed benefit to one who runs a free ferry as an inducement to trade at his store, if there is no prior agreement to trade at his store with the parties ferried, and no money paid by them prior to the time that they are so ferried. *Shinn v. Cotton*, 12 S. W. 157, 52 Ark. 90.

Bond, check, or note.

"Valuable thing," within the meaning of the statute making it criminal to obtain from another anything of value by means of false pretenses, is defined by Rev. St. § 6794, to include a check or bond given for the payment of money. *Tarbox v. State*, 38 Ohio St. 581, 582.

"Valuable thing," as used in Rev. St. 1845, c. 30, § 130, making it a penal offense for any person to play for money or other valuable thing at any game with cards, dice, etc., would include checks, notes, or instruments understood by the parties to represent value. *Gibbons v. People*, 33 Ill. 442, 443, 445.

"Valuable thing," as used in Rev. St. 1879, § 1335, punishing any person who shall designedly, by color of any false token or writing, or by any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or other "valuable thing," includes a note. *State v. Porter*, 75 Mo. 171, 174.

"Valuable thing," as used in a statute providing for the punishment of any person obtaining money, wares, merchandise, or other valuable thing by false pretenses, includes everything of value, and embraces the promissory note of a third person. "Valuable thing" is more comprehensive than "valuable security." Every valuable security is a valuable thing, but many valuable things are not valuable securities. Mere tangible things were not alone meant. *State v. Thatcher*, 35 N. J. Law (6 Vroom) 445, 453.

County records.

County records are "valuable things," within the meaning of Gen. St. 1889, par. 2195, which provides that every person who shall be convicted of breaking and entering any shop, store, booth, tent, warehouse, or other building, etc., in which there shall be any goods, wares, or merchandise, or other valuable thing, shall be guilty of burglary. *State v. Rogers*, 39 Pac. 219, 220, 54 Kan. 683.

Lodging.

The phrase "valuable thing," as used in Act April 18, 1884, c. 26, 23 Stat. 11 [U. S. Comp. St. 1901, p. 3679], providing that every person who, with intent to defraud, falsely assumes to be an officer or employé acting under the authority of the United States, and in such pretended character demands or obtains any money or other valuable thing, shall be guilty, etc., covers the obtaining of a month's lodging. *United States v. Ballard* (U. S.) 118 Fed. 757, 759.

Signature.

"Valuable thing," as used in Crimes Act, § 171, making it a misdemeanor to obtain, by false pretenses, money, wares, merchandise, goods, or chattels or other valuable thing, does not include the signature of an instrument which cannot under any circumstances affect the signer. "The phrase 'valuable thing,' was first employed in statutes for the punishment of false pretenses under the strict rule for the interpretation of penal statutes. The collocation of this phrase with words descriptive of only tangible personal property might seem to indicate a legislative design to limit its application to things of like nature. It is the true policy of the law neither to restrain the interpretation of the word within too narrow limits nor to explain it away to the encouragement of fraud. The signature of a negotiable note, which on its being passed to a bona fide holder would render the signer legally liable, has been held to be a 'valuable thing,' within the meaning of statutes relating to false pretenses. However, the term 'valuable thing' will not be extended beyond the signature of instruments which can be so used as to become valid in law or in equity against the signer, notwithstanding proof of the false pretenses by which the signature was obtained, and will never be given a meaning broad enough to comprehend signatures which cannot under any circumstances affect the signer if he make proof of the facts which must be established to maintain a criminal prosecution." *Robinson v. State*, 20 Atl. 753, 754, 53 N. J. Law, 41.

Unenforceable contract.

The term "valuable thing," within the meaning of the statute making it criminal

to obtain any valuable thing by false pretenses, does not include a contract which is not capable of being enforced. *State v. Clay*, 13 S. W. 827, 829, 100 Mo. 571.

VALUATION.

See "Excessive Valuation"; "Just Valuation."

As an estimation.

"Valuation," as used in a contract that certain material is to be taken after valuation, as shown by the books of account of the partnership, means an estimation, and is not equivalent to value or market value. *Lowenstein v. Schiffer*, 56 N. Y. Supp. 674, 679, 88 App. Div. 173.

As statement of value.

"Valuation" as used in Rev. St. c. 7, § 22, providing that the assessors shall receive, as the true valuation of the property of each individual, the list, if any, brought in by him according to the provisions of the chapter, etc., is equivalent to "enumeration" or "statement," and not to "estimate of value." *Moors v. Street Com'rs of Boston*, 134 Mass. 431.

As value.

"Valuation," as used in a statement furnished an assessor that certain railroad property was "set down as of the value of six thousand dollars per mile, which was a fair valuation thereof," means that \$6,000 per mile was a "just and fair value." The word "valuation," as here employed, signifies value. Valuation is defined as the price set upon anything—the estimated or rated worth of anything. "Value" is generally but an estimate of the worth of a thing, but "valuation," when used in its passive signification, as in this statement, means the estimated value or worth placed on the thing. *State v. Central Pac. R. Co.*, 7 Nev. 99, 104.

"Valuation," as used in an agreement for the sale and purchase of "all soiled or damaged goods at the valuation," means value, and the contract will be deemed incomplete. *Sergeant v. Dwyer*, 46 N. W. 444, 445, 44 Minn. 309.

VALUE.

See "Actual Cash Value"; "Actual Market Value"; "Actual Value"; "Anything of Value"; "Appraised Value"; "Cash Value"; "Clear Annual or Yearly Value"; "Contract Price or Value"; "Current Value"; "Exchange Value"; "Face Value"; "Fair Value"; "Going Value"; "Increased Value"; "Intrinsic Value"; "Just Value"; "Market Value"; "Net Value"; "Nominal Value"; "Par

Value"; "Pecuniary Value"; "Present Value"; "Probable Value"; "Purchaser for Value"; "Rental Value"; "Specie Value"; "Speculative Value"; "Taxable Value"; "Thing of Value"; "True and Full Value"; "True Value"; "Yearly Value."

"Value is the relation of two services. The idea of value entered into the world for the first time when a man said to his brother, 'Do this for me, and I will do that for you.' They had come to an agreement. Then we could say the two services were worth each other." *State v. Yates*, 10 Ohio Dec. 150, 158, 19 Wkly. Law Bul. 150.

The word "value" means the exchange power which one commodity or service has in relation to another. *State v. Yates*, 10 Ohio Dec. 150, 158, 19 Wkly. Law Bul. 150 (citing Walker, Science of Wealth).

The word "value," in its commonly received signification, means the sum of money a thing will produce to the seller when it is sold. We are aware that this is not abstractly the true measure of value. The quantity of labor and capital necessary to produce a given article, or, in other words, the actual cost of its production, is the true criterion of its worth. For instance, if a manufacturer be asked the value of a yard of cloth, his opinion of the value will be determined by his calculation of the expense of producing a yard of cloth of similar quality. If we ask a retail dealer the value of a yard of cloth, his opinion of its value will be determined by the quantity of money such an article will produce in the market. It is apparent that the marketable value may be affected by a multitude of circumstances which will not in their results extend to the cost of production. Value is in its nature so vague and indefinite that no human scrutiny can seize all its constituent parts, and therefore opinions of value are admissible in evidence from the necessity of the case. *Town of Rochester v. Town of Chester*, 3 N. H. 349, 358.

The word "value," it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called "value in use"; the other "value in exchange." *State v. Yates*, 10 Ohio Dec. 150, 158, 19 Wkly. Law Bul. 150 (citing Smith, Wealth of Nations).

The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. *Wells v. City of Savannah*, 21 Sup. Ct. 697, 702, 181 U. S. 531, 45 L. Ed. 986.

Value is any consideration sufficient to support a simple contract. *Ann. Codes &*

St. Or. 1901, § 4427. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time. *Negotiable Instruments Law N. D. § 25*; *Rev. Codes N. D. 1899*, § 1043; *Brewster v. Schrader*, 57 N. Y. Supp. 606, 608, 26 Misc. Rep. 480.

The term "value," as used in revenue laws, means the amount at which the property would be taken in payment of a just debt due from a solvent debtor. *Pol. Code Cal. 1903*, § 3617, subd. 5; *Pol. Code Mont. 1895*, § 3680, subd. 5; *Pol. Code Idaho 1901*, § 1313, subd. 5; *Rev. St. Utah 1898*, § 2505.

The word "value," as used with reference to the value of property stolen by one on trial for the offense, signifies "the sum for which the like goods are at the time commonly bought and sold in the market. If a thing has a value to the owner, though to no one else, to steal it is larceny, its value as to the rest of the world being immaterial. Still, in determining the grade of the offense, the value merely to the owner is not the standard for the jury." 2 Bish. Cr. Proc. § 751. Under this rule, the proper standard of value of a saddle, in a prosecution for the larceny of the saddle, is the market value of the article, if it has any market value, and, if it has none, then the amount that it will cost to replace it will be the standard of its worth. *Martinez v. State*, 16 Tex. App. 122, 128.

The value of the stock of a corporation is the net value of its assets, and is found by deducting its indebtedness from the gross value of its tangible and intangible property. *State v. Karr*, 90 N. W. 298, 300, 64 Neb. 514.

The term "value," in a constitutional provision that property shall be taxed according to value, means the worth of the property as compared with the money of the country—the standard by which all values are regulated. *City of Chattanooga v. Nashville, C. & St. L. R. Co.*, 75 Tenn. (7 Lea) 561, 569.

The value, for purposes of taxation, of property, results from the use to which it is put, and varies with the profitability of that use, present and prospective, actual and anticipated. *Wells, Fargo & Co.'s Express v. Crawford County*, 40 S. W. 710, 713, 63 Ark. 576, 87 L. R. A. 371.

The use of corn as feed for horses and mules constitutes "value" in such corn. *Miller v. State*, 77 Ala. 41, 43.

Under a statute making it an offense for a public officer to receive property or value of any kind upon any agreement that his vote or official action shall be influenced thereby, it is held that the words "value of any kind" are more comprehensive than "property." *People v. Van De Carr*, 84 N. Y. Supp. 461, 464, 87 App. Div. 386.

The words "in value" in St. Kan. c. 33, § 8, providing that one-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, etc., shall be set apart by the executor to his widow in fee simple, are used to negative the idea that it might be one-half in area that is to be set off to the widow. *Ferry v. Burnell* (U. S.) 14 Fed. 807, 810.

The charter of a railway company provided that, in proceedings by it to obtain private property for its use, the commissioners appointed to assess the compensation to be paid to the owners should assess the value at the time of entering on and taking by the company, and that, on appeal, the jury, or, if tried by the court, the court, should assess the value at the time of such entering on and taking, and a judgment should be entered for the amount of such assessment. In order to make the compensation to the owner just, on appeal by him from the award of the commissioners, the court, rendering a verdict for a greater sum than that awarded by the commissioners, should enter judgment for the amount so awarded, together with interest from the date of filing the award of the commissioners to the time of entering the judgment. *Warren v. First Division of St. Paul & P. R. Co.*, 21 Minn. 424, 426.

In *Scott v. St. Paul & S. C. Ry. Co.*, 21 Minn. 322, it was held that the word "value," in a charter provision that commissioners in condemnation proceedings should appraise the value of the land appropriated for right of way, embraces not only the value of the right of way strip as an isolated parcel of land, but such additional value as attached to it by reason of its connection with adjacent land of the same owner. *Wilmes v. Minneapolis & N. W. Ry. Co.*, 29 Minn. 242, 245, 18 N. W. 39, 41.

The word "value," in a railroad charter providing for an appraisal of the value of land taken for railroad purposes, means compensation for the land, not merely the mere value of the land taken. *Hursh v. First Division of St. Paul & P. R. Co.*, 17 Minn. 439, 449 (Gil. 417, 427).

As actual value.

"Value," as used in Const. art. 9, § 12, prohibiting a city from becoming indebted exceeding 5 per cent. of the "value" of its taxable property, cannot be construed to mean necessarily actual value. *City of Chicago v. Fishburn*, 59 N. E. 791, 793, 189 Ill. 367.

"Value," as used in Civ. Code, § 1260, providing that homesteads of not exceeding \$5,000 in value may be selected and claimed by any head of a family, means actual value. *Ham v. Santa Rosa Bank*, 62 Cal. 125, 134, 45 Am. Rep. 654.

"Value," as used in a statute relating to taxation, and requiring the county commissioners, at the time of making county rates and levy, to assess mortgages, money owing by solvent debtors, all articles of agreement, and accounts bearing interest, for the use of the commonwealth, three mills on every dollar of the value thereof, the phrase, "every dollar of the value thereof" means the actual value, and not the face value. *Commonwealth v. Lehigh Valley R. Co.*, 104 Pa. 89, 101.

Amount synonymous.

See, also, "Amount."

In cases of notes current as money, the words "amount" and "value" are ordinarily synonymous terms. *Commonwealth v. Warner*, 54 N. E. 353, 355, 173 Mass. 541 (citing *Commonwealth v. Hussey*, 111 Mass. 432).

As cost price.

In a referee's report finding that the defendant purchased from the plaintiffs a bakery and stock of goods, agreeing to pay therefor the cost price, and finding that the value was a certain amount, "value" is synonymous with the term "cost price." *Neib v. Hinderer*, 4 N. W. 159, 160, 42 Mich. 451.

The use of the word "value," in a fence viewer's certificate stating the value of a division fence, is not a compliance with Rev. St. § 1396, which requires the viewers to examine the fence and ascertain the expense thereof. *Voelz v. Breitenfeld*, 32 N. W. 757, 759, 68 Wis. 491.

As effect or import.

In a statute providing that an indictment for forgery shall be sufficient if it set forth the purport and value of the false writing, the word "value" is not used in the sense of the worth of the instrument in money, but in the sense of the effect the instrument is intended to accomplish, and hence is a synonym of "effect," or "import." *Chidester v. State*, 25 Ohio St. 433, 438; *Santolini v. State*, 42 Pac. 746, 747, 6 Wyo. 110, 71 Am. St. Rep. 906.

As fair valuation.

The words "value thereof," in a provision that a corporation might purchase property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, meant the fair valuation of the property. *Boynton v. Andrews*, 63 N. Y. 93, 94.

A direction that certain legacies should be paid by the testator's executors to the legatees in notes, bonds, and mortgages transferred to them, with their "respective value at the time," means at their fair in-

trinsic value, and not at the amount due upon them. *Beatty v. Cory Universalist Soc.*, 7 Atl. 338, 339, 41 N. J. Eq. 563.

Income synonymous.

In Act April 21, 1846, authorizing trusts for the benefit of the owners and occupants of mill privileges on the Wynantskill, and providing that the annual value or income of the property to be held in trust is not to exceed the sum of \$2,000, etc., "value" and "income" are used as synonymous terms, but, when taken separately and alone, there is a distinction between them. Property may have an annual value without any income. *Troy Iron & Nail Factory v. Corning* (N. Y.) 43 Barb. 231, 247.

As market value.

Bouvier, in his definition of value, says: "This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other articles with it. The first may be called the 'value in use' and the latter the 'value in exchange.' Webster recognizes a difference between extrinsic and exchangeable value." But in condemnation proceedings "value" will be held to mean market value. *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 795, 49 Ark. 381, 4 Am. St. Rep. 51.

When applied to property, and no qualification is expressed or implied, "value" means the price which the property could command in the market. In *re McGhee's Estate*, 74 N. W. 695, 697, 105 Iowa, 9.

The word "value," as defined by Bouvier, has two different meanings. "It sometimes expresses the utility of an object, and sometimes the power of purchasing goods with it. The first may be called the 'value in use'; the latter, the 'value in exchange.'" For the purpose of the law of eminent domain, the term "value" has reference to the value in exchange, or market value. There are some cases which seem to hold that the value in use to an owner is to be taken if it exceeds the market value, but it will generally be found, on careful examination, that such cases either refer to the damages accruing to the owner from the taking, and not to the value of the property itself, or they overlook the distinction between the two things. The consensus of the best-considered cases is that for the purpose in hand the value to be taken is the market value. *San Diego Land & Town Co. v. Neale*, 20 Pac. 372, 374, 78 Cal. 63, 3 L. R. A. 83.

The primary meaning of "value" is worth; and this worth is made up of the useful or estimable qualities of the thing. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the

market price, and the law adopts the latter as the proper evidence of value. This is not, however, because "value" and "price" are really convertible terms, but only because they are ordinarily so in a fair market. *Kountz v. Kirkpatrick*, 72 Pa. (22 P. F. Smith) 376, 386, 13 Am. Rep. 687.

"Value," when applied without qualification to property of any description, necessarily means the price which it will command in the market. It supposes that the purchaser has clear and perfect title, or the unlimited right to dispose of the property at pleasure. The value of a lot of land is the price which can be obtained from a purchaser, conveying to him a fee or the right of absolute dominion over the property. When a testatrix, without any qualification, directed real estate to be valued, she evidently intended that an estimate of its worth should be made in reference to the interest which she had in it. *Fox v. Phelps* (N. Y.) 17 Wend. 393, 399.

By the term "value of stock" is usually meant market value. *B. L. Blair Co. v. Rose*, 60 N. E. 10, 11, 26 Ind. App. 487 (citing *Cook, Stock & S.* § 581, note 2).

Text-writers use the terms "value" and "market value" as interchangeable, and both as being the equivalents of "actual value," "salable value," and, in proper cases, "rental value." *Jonas v. Noel*, 39 S. W. 724, 725, 98 Tenn. 440, 36 L. R. A. 862.

The "value" of property is what it would sell for within a reasonable time from that in which the value is sought to be ascertained. This is held to be a correct definition of the term, at least so far as it goes, and not erroneous as an instruction, where no fuller definition is requested. *Wright v. Solomon* (Tex.) 46 S. W. 58, 60.

Value consists in the estimate or opinion of those influencing the market, attachable to certain intrinsic qualities belonging to the article to be valued. *Washington Ice Co. v. Webster*, 68 Me. 449, 463.

The word "value," in the rule that private property cannot be taken for public use without the payment of value therefor, means value in money in the market, and, when coal land is taken, is to be estimated from the market price of the land, and not from the price of unmined coal. *Searle v. Lackawanna & B. R. Co.*, 33 Pa. (9 Casey) 57, 63.

Under a statute (Rev. St. art. 4876) declaring that where a defendant in sequestration retains possession of the property by giving a bond, and judgment is rendered for plaintiff, final judgment shall be entered against the obligor in such bond for the value of the property replevied, it was held that "the value of the property replevied"

meant the market value at the time of the trial. *Luedde v. Hooper*, 66 S. W. 55, 56, 95 Tex. 172.

In an action to recover for damages sustained by a lessee by the taking of the property leased, by a city in widening a street, the judge correctly instructed the jury as follows: "The value of the leases is their market value. 'Market value' means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessity of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. The fact, therefore, that the lessee did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. The question is, if he wanted to sell his lease, what he could have obtained for it upon the market from parties who wanted to buy and would give its fair price." *Lawrence v. City of Boston*, 119 Mass. 126, 128, 129.

Price synonyms.

All the lexicographers, both law and general, in certain instances, give the words "value" and "price" as convertible and synonymous. As used in Code, c. 145, § 14, requiring an indictment for larceny to state the value of a thing stolen, if not synonymous with, it is at least equivalent to, the word "price," as used in an indictment charging the larceny of property of a certain price. *State v. Sparks*, 3 S. E. 40, 41, 30 W. Va. 101.

Ordinarily, when an article of sale is in the market and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. "Value" and "price" are, therefore, not synonymous, or the necessary equivalents of each other, though commonly "market value" and "market price" are legal equivalents. *Thiess v. Weiss*, 31 Atl. 63, 66, 166 Pa. 9, 45 Am. St. Rep. 638 (citing *Kountz v. Kirkpatrick*, 72 Pa. [22 P. F. Smith] 376, 13 Am. Rep. 687).

The primary meaning of "value" is worth. "Price" is not synonymous with "value," but frequently "market value" and "market price" are used synonymously. *Chicago, K. & W. R. Co. v. Parsons*, 32 Pac. 1083, 1084, 51 Kan. 408.

"Value" is a word more comprehensive than 'price.' By the price of a thing, therefore, we shall henceforth understand its val-

ue in money; by the value or exchange value of a thing its general power of purchase; the command its position gives over purchasable commodities in general." *Marriner v. John L. Roper Co.*, 16 S. E. 906, 907, 112 N. C. 164.

"Value," as used in an act providing that certain designated persons shall have a lien for the value of labor done and materials furnished, is not used in contradistinction to "price" and "agreed value." It was not the intention that a contractor, materialman, or laborer who agreed for a certain sum could have a lien for a greater sum on the ground that the value of what he furnished was greater. *Jewell v. McKay*, 23 Pac. 139, 141, 82 Cal. 144.

A contract between an original contractor and a subcontractor provided that the work should be subject to the supervision and control of a certain engineer; that he should make monthly estimates, four-fifths of which value to be paid to the subcontractor, and, when the work was completed, a final estimate; that the monthly and final estimates as to the quantity, character, and value of the work done should be conclusive between the parties. The term "value," as used in the contract, is to be distinguished from the term "price," as applied to the quantity of any of the different classes of work specified in the contract; and the engineer, in making the monthly estimates, had the right to deduct from the quantity of work done what he considered would equalize the part taken out as to quality and value with the whole work, and was not bound to allow the plaintiff, for all work done, the price specified in the contract for that kind of work. *Faunce v. Burke*, 16 Pa. (4 Harris) 469, 481, 55 Am. Dec. 519.

By the express provisions of Tax Law, § 53, the word "value," as used in such act, means the usual selling price at the place where the property to which such term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. *State Board of Tax Com'rs v. Holliday*, 49 N. E. 14, 17, 150 Ind. 216, 42 L. R. A. 826.

As used in War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 458 [U. S. Comp. St. 1901, p. 2300], requiring stamps on deeds of realty in proportion to the consideration or value of the interest transferred, where it is conveyed subject to incumbrances, means the value of the thing conveyed. The thing conveyed is the equity of redemption and the value of it is its price. *Central Trust Co. v. Columbus, H. V. & T. R. Co.* (U. S.) 92 Fed. 919, 920.

As rate.

The word "value" in Const. art. 10, § 9, providing that an unfunded debt of a city

"shall not be funded nor redeemed at a value exceeding that established by law at the time said debt was contracted," means rate, and not amount. One definition of the word "value" is "rate." If that word had been used instead of "value," the difficulty of construction would disappear. We would understand at once that it was forbidden to fund or redeem the debt at a greater rate of interest than that established by law at the creation of the debt. *Antoni v. Wright* (Va.) 22 Grat. 833, 855.

As rental value.

The terms "value of the use" of the premises, and "rental value," mean substantially the same thing. *Alexander v. Bishop*, 13 N. W. 744, 747, 59 Iowa, 572.

As valuable consideration.

The term "value," as used in the negotiable instrument law, means valuable consideration. *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Code Supp. Va.* 1898, § 2841a [*Ann. Code* 1904, p. 1455]; *Negotiable Instruments Law N. D.* § 191; *Rev. Codes N. D.* 1899, § 1060; *Bates' Ann. St. Ohio* 1904, § 3178; *Ann. Codes & St. Or.* 1901, § 4592.

A valuable consideration is a thing of value parted with, or a new obligation assumed at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply "value." *Rev. Codes N. D.* 1899, § 5130; *Civ. Code S. D.* 1903, § 2464; *Rev. St. Okl.* 1903, § 2803.

VALUE IN CONTROVERSY.

"Value in controversy," as used in a clause of the Bill of Rights authorizing a jury trial when the value in controversy exceeds \$100, means "the amount actually in controversy, not necessarily the amount as shown by the pleadings." *Streeter v. Connecticut River Lumber Co.*, 18 Atl. 651, 65 N. H. 201.

VALUE OF CONTRACT.

The phrase "value of the contract," as applied to a case brought by a party complaining of its breach, means the value of the contract to such party—a value not dependent on speculation or conjecture, but to be ascertained in view of all the circumstances of the case relating to the nature of the contract, its requirements, and the ability of the complaining party to perform it to the end. *United Press v. A. S. Abell Co.*, 80 N. Y. Supp. 454, 460, 79 App. Div. 550.

VALUE OF LAND TAKEN.

The phrase "value of the land taken," in the charter of a railroad company authoriz-

ing it to take land by the exercise of the right of eminent domain, and providing that the value of the land taken shall be determined by commissioners, is of the same meaning as the words "just compensation," in the clause of the Constitution relative to the payment of just compensation for property taken for public purposes. *Parks v. Wisconsin Cent. R. Co.*, 33 Wis. 413, 420; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 174.

"Value of the land," as used in *Sess. Acts* 1849, p. 219, § 9, providing that the benefits that may be charged against landowners adjacent to a railroad, portions of whose lands may be taken and appropriated to public use and deducted from the value of the lands taken in estimating the just compensation to which the landowners are entitled, means its actual value independent of the location of the road. *Pacific R. R. v. Chrystal*, 25 Mo. 544, 546.

The value of land taken for public use is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. *Harrison v. Young*, 9 Ga. 359, 364.

The "value of the land taken," within *Laws* 1857, c. 1, § 13, providing for the appraisal of the value of lands taken by a railroad company for right of way, embraces not only the value of the strip of land taken as an isolated parcel of land, but such additional value as attaches to it by reason of its connection with adjacent land of the same owner. *Scott v. St. Paul & C. Ry. Co.*, 21 Minn. 322, 323.

VALUE OF RAILROAD.

The value of a railroad track at any given time is not the original cost nor its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway, assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends—its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock. *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. 1114, 1118, 154 U. S. 421, 38 L. Ed. 1031.

The value of a railroad for purposes of taxation is not the mere value of its right of way, roadbed, its structure, its depot grounds and structures thereon, considered by them-

selves, but the value of all these as an operating going concern; this value being in general determinable by the profits which result from its operation. *State v. Austin & N. W. R. Co.*, 62 S. W. 1050, 1051, 94 Tex. 530.

VALUE RECEIVED.

As consideration, see "Consideration."

The words "for value received," in setting forth a promissory note in a declaration, are words of description, and not an averment. The term "for value received" does not at all enter into the legal meaning or effect of the promissory note. *McRae v. Raser* (Ala.) 9 Port. 122, 124, 125.

The words "value received," in setting forth a promissory note in a declaration, are words of description, and not an averment, and, if the note produced in evidence is without these words, there is no variance. *McRae v. Raser* (Ala.) 9 Port. 122, 124.

The words "value received," on a promissory note, are merely formal, and are not conclusive. *St. Vrain Stone Co. v. Denver, U. & P. R. Co.*, 32 Pac. 827, 829, 18 Colo. 211.

The words "for value received" are essential to the validity of a bill of exchange. *Coursin v. Ledlie's Adm'rs*, 31 Pa. (7 Casey) 506, 509.

The law is well settled that in a negotiable instrument the words "value received" are not necessary. *Benjamin v. Tillman* (U. S.) 3 Fed. Cas. 190, 191.

Under a statute (Rev. St. Mo. § 547) providing that a promissory note payable in money, expressed to be for value received, shall be negotiable as inland bills of exchange, a certificate of deposit lacking the words "for value received" is held not to be negotiable, the phrase quoted being essential to negotiability. *Savings Bank of Kansas v. National Bank of Commerce* (U. S.) 38 Fed. 800.

The words "for value received," when used in an instrument, do not necessarily import a consideration of money; a promise to pay in the future may be shown to have been the consideration. *Osgood v. Bringolf*, 32 Iowa, 265, 270.

The words "value received" in a negotiable instrument are *prima facie* sufficient to show a consideration. *Austin, Tomlinson & Webster Mfg. Co. v. Helser*, 61 N. W. 445, 447, 6 S. D. 429; *Thrall v. Newell*, 19 Vt. 202, 208, 47 Am. Dec. 682; *Hayes v. Hood*, 10 N. Y. Supp. 265, 266, 57 Hun, 585 (citing *Quimby v. Morrill*, 47 Me. 470).

An instrument whereby the maker in terms guaranteed the payment of a note (describing it), for value received, sufficiently

states the consideration for such guaranty within the meaning of the statute of frauds. The words "value received" are a sufficient expression. *Watson's Ex'rs v. McLaren* (N. Y.) 19 Wend. 557, 563; *Miller v. Cook*, 23 N. Y. 495, 496; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.* (N. Y.) 41 Barb. 9, 21; *Emerson v. O. Aultman & Co.*, 14 Atl. 671, 672, 69 Md. 125; *Citizens' Sav. Bank & Trust Co. v. Babbitt's Estate*, 44 Atl. 71, 72, 71 Vt. 182; *Caldwell v. McKain* (S. C.) 2 Nott & McC. 555, 557; *Cheney v. Cook*, 7 Wis. 413, 423; *Day v. Elmore*, 4 Wis. 190, 196; *D. M. Osborne & Co. v. Baker*, 25 N. W. 606, 607, 84 Minn. 307, 57 Am. Rep. 55.

The words "for value received" in a promissory note signed by the maker *prima facie* import a valid consideration for his promise to pay it. *Town of Grand Isle v. Kinney*, 41 Atl. 130, 132, 70 Vt. 381; *Noyes v. Smith* (Me.) 5 Atl. 529, 530; *Moses v. National Bank*, 13 Sup. Ct. 900, 901, 149 U. S. 298, 37 L. Ed. 743.

The words "value received," in a guaranty expressed to be for value received, without stating what was the value received, cannot have the effect to exclude proof of the consideration, for such proof does not contradict or vary the import of these words in the instrument, it merely showing in what the value consisted. *Jones v. Palmer* (Mich.) 1 Doug. 379, 383.

The words "for value received" in a deed import a sufficient consideration to raise a use to the bargainor under the statute of uses. *Jackson v. Alexander* (N. Y.) 3 Johns. 484, 495, 3 Am. Dec. 517 (cited in *Turner v. Howard*, 42 N. Y. Supp. 335, 338, 10 App. Div. 555).

The words "for value received," in a will declaring a legacy to be for value received, will raise a presumption that the legacy is given in discharge of an obligation, and therefore, in the absence of contrary evidence, the words preclude all lapse of the legacy by reason of the legatee dying before the testator. *Ward v. Bush*, 45 Atl. 534, 59 N. J. Eq. 144.

VALUE UNKNOWN.

The words "value and contents unknown," in the printed part of a bill of lading, apply only to packages mentioned therein, the contents of which are concealed from view, and do not apply to corn in bulk loaded into the car from an elevator. *Tibbits v. Rock Island & P. Ry. Co.*, 49 Ill. App. 567, 571.

The use of the phrase "value and contents unknown," in a bill of lading reciting the receipt of goods for carriage in good order and well conditioned, but that the value and contents are unknown, exclude the in-

ference of any admission by the carrier as to the quantity or quality of the contents of the package at the time of delivery beyond what is visible to the eye from handling the same. *The California (U. S.) 4 Fed. Cas. 1058, 1059.*

VALUED POLICY.

A valued policy is where the parties have agreed on the value of the interest insured in order to save the necessity of further proof, and have inserted the valuation in the policy in the nature of liquidated damages. *Cushman v. Northwestern Ins. Co., 34 Me. 487, 491.*

A valued policy is not understood to be one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of a loss. *Lycoming Ins. Co. v. Mitchell, 48 Pa. (12 Wright) 387, 372.*

The term "valued policy" applies to cases only where a valuation is fixed upon the underwritten property by way of liquidated damages, and for the purpose of avoiding a subsequent valuation of the property in case of loss. *Universal Mut. Fire Ins. Co. v. Weiss, 106 Pa. 20, 27.*

A valued policy is one in which the amount payable in case of loss is fixed by the terms of the policy itself, as where the property is insured, valued at or worth a specific amount. *Riggs v. Home Mut. Fire Protection Ass'n, 39 S. E. 614, 618, 61 S. C. 418.*

Mr. Wood in his *Treatise on Fire Insurance*, section 41, says: "Valued policies are those in which both the property and the loss are valued, and which bind the insurer to pay the whole sum insured in case of total loss." A policy for a certain sum on a building, containing a stipulation that the insurer will pay all loss or damage not exceeding the sum insured, is not a valued, but an open, policy. *Farmers' Ins. Co. v. Butler, 38 Ohio St. 128, 134.*

A valued policy determines beforehand the amount for which the insurer is liable in case of loss, and such amount is inserted in the policy as a fit sum to be paid if loss occurs. It does more than merely value the property insured; it values the loss. To do this the policy must amount to a contract either to pay, in case of loss, a stipulated sum, or that the property shall be estimated at the stipulated sum in case of loss. *Luce v. Springfield Fire & Marine Ins. Co. (U. S.) 15 Fed. Cas. 1071, 1072.*

A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum. *Civ. Code Cal. 1903, § 2596; Rev. Codes N.*

D. 1899, § 4497; Civ. Code S. D. 1903, § 1847.

A valued policy is where the value of the subject insured is agreed upon by the parties. If it is not estimated at any particular amount or rate, it is an open policy. *Cox v. Charleston Fire & Marine Ins. Co. (S. C.) 3 Rich. Law, 331, 332, 45 Am. Dec. 771.*

In a valued insurance policy, the value of the thing insured is fixed by the contract of the parties, and requires no proof; and, this constituting the only difference between an open and a valued policy, the value being agreed on, it is binding on both parties, and cannot be opened unless the value fixed is so exorbitant as to make it a fraudulent or gambling policy. In an action on a valued policy to recover damages for a partial loss, the damage to be assessed by the jury is the difference between the appraisal of the damaged article and that stipulated in the policy with all necessary damages, and the proper method of ascertaining the amount of the policy on a valued policy, by partial loss, is by an appraisal by persons whose experience gives them competent knowledge of the value of the article, and the amount of the injury sustained. *Natchez Ins. Co. v. Buckner, 5 Miss. (4 How.) 63, 79.*

Where a policy for marine insurance was in the form of a valued policy, and after a statement of the subject insured there appeared the phrase, "Valued at \$— as indorsed," but the blank was not filled in, and there was no indorsement as to value, it was held that the failure to fill the blank or to make any indorsement as to value constitutes the policy an open policy, and not a valued policy. *Snowden v. Gulon, 5 N. E. 322, 326, 101 N. Y. 458.*

A policy, after insuring \$1,700 on a mill and machinery and \$150 on the movable machinery therein, proceeded in written words as follows: "Said insured being the lessee of said mill for one year from November 1, 1850, and having paid the rent thereof of \$2,171.01, which interest, diminishing day by day in proportion to the whole rent of the year, is hereby insured." Held, that the policy was a valued one, although in a printed part of the instrument there was a provision that the loss or damage should be estimated according to the cash value at the time of loss. *Cushman v. Northwestern Ins. Co., 34 Me. 487, 491.*

To make a contract of maritime insurance a valued policy, and substitute an agreed valuation of the ship or goods for their actual value, to be ascertained by proof, as the rule of damages or measure of indemnity in case of loss, a special agreement of the parties is, as a general rule, required. And a clause is, in some cases, inserted in the policy, expressing the agreement that the subject insured shall be valued at the sum insured

or a specified sum mentioned. *Laurent v. Chatham Fire Ins. Co.*, 1 Hall (1 N. Y. Super. Ct.) 45, 48.

VARA.

A vara, in Texas, has always been regarded as equivalent to 33 $\frac{1}{8}$ inches. A standard vara is somewhat less than 33 $\frac{1}{8}$ inches. Humboldt, in 1808, found a Mexican vara to be 839.16 millimeters, or a slight fraction over 33 inches. But it seems that a vara measure of somewhat larger dimensions obtained in Texas from an early period. The standard Mexican vara is so near to 33 inches that a standard vara measure laid on an American yard would so nearly correspond with 33 inches that a difference could not be perceived by the naked eye. *United States v. Perot*, 98 U. S. 428, 429, 25 L. Ed. 251.

VARIANCE.

See "Material Variance."

A variance is understood to be a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim. *Kelser v. Topping*, 72 Ill. 226, 229; *Warrington v. State*, 1 Tex. App. 168, 174; *House v. Metcalf*, 27 Conn. 631, 638; *Plumb v. Griffin*, 50 Atl. 1, 2, 74 Conn. 132.

A variance is not now regarded as material, unless it is such as might mislead the defense, or expose the accused to the danger of being put twice in jeopardy for the same offense. *Kruger v. State*, 35 N. E. 1019, 1021, 135 Ind. 573.

A variance, to be material, must actually mislead the adverse party to his prejudice in maintaining his action or defense upon the merits; and, whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and the court may thereupon order the pleading to be amended on such terms as may be just. There is a marked distinction between an immaterial variance and an absolute failure of proof. The former may be cured by amendment of pleading, but the latter is fatal to the action or defense. *Dudley v. Duval*, 70 Pac. 68, 71, 29 Wash. 628.

A variance in a criminal case is an essential difference between the pleading and the proof. *Mulligan v. United States* (U. S.) 120 Fed. 98, 99, 56 C. C. A. 50.

It is an ancient, reasonable, and sound principle of the common law that the declaration should be conformable to the writ, and, in the language of Lord Coke, must not be either narrower or broader. At the earliest period of written pleadings in which we have clear and distinct traces, either in books of precedents or reports, the declaration when

the action was commenced by the original writ contained a recital of it at large. If, therefore, an objectionable variance existed between the writ and the declaration, it appeared on the face of the latter, and the defendant availed himself of it by demurrer, plea in abatement, motion in arrest of judgment, or upon writ of error. *Bank of New Brunswick v. Arrowsmith*, 9 N. J. Law (4 Halst.) 284, 287.

"Variance" means material difference. It is no variance that the proof does not show all the points in a declaration. Where the declaration alleged that plaintiff was a minister, that defendant spoke the words charged, that they were spoken of the plaintiff in that capacity, and that thereby the plaintiff lost his employment, and the depositions of certain witnesses showed the speaking of the words, and the plaintiff's capacity and loss of employment were shown by other testimony, there was no variance. *Skinner v. Grant*, 12 Vt. 456, 462.

A variance is a disagreement between the allegations and the evidence in some matter essential to the charge or claim. A grand juror's complaint charged that A. and B., at the town of P., not being agents of the town of P. to sell spirituous liquors, did on, etc., sell to C. one quart of brandy, one quart of rum, one quart of gin, and one quart of ale. A. was tried alone. The statute provides that no person shall sell, by himself or agent, any spirituous or intoxicating liquors, except as provided in later sections of the act, and that ale is included among intoxicating liquors, within the meaning of the act. Held, that evidence was admissible under the complaint of a sale by A. alone, and that it was not necessary that A. should have owned the liquor or have had authority from the owner to sell it. *State v. Wadsworth*, 80 Conn. 55, 57.

Chitty says, if the consideration or the contract proved in evidence vary from that stated in the pleadings, the plaintiff will be nonsuited. 1 Chit. Pl. 303. Starkey gives the following rule: "Wherever the allegation of place is descriptive of the terms of a contract, the proof must correspond with the averment." In *Drewry v. Twiss*, 4 Term R. 560, Justice Buller says a trifling variation in setting out a contract, a record, or any written instrument is fatal because it does not appear that the written contract given in evidence is that on which plaintiff declares. It is a matter of description. *Obert v. Whitehead*, 11 N. J. Law (6 Halst.) 293, 294.

The numerous cases in slander where the words proved differ from the words charged, and in trespass where the abutments are specifically but erroneously described, show that the doctrine of variance extends to actions of tort as well as of contract. *Brookfield v. Morse*, 12 N. J. Law (7 Halst.) 331.

VARIETY SHOW.

"Variety show," as used in the Houston city charter, authorizing the city council "to prohibit and punish keepers and inmates of bawdyhouses and variety shows," means a disorderly house as defined by statutes, which is any theater or playhouse where intoxicating liquors are sold and woman of bad reputation are employed in any capacity; and an ordinance declaring any place a variety show, where persons engage in music, dancing, or plays, and liquor is sold, offered, or given to any person there present, is unauthorized. *Ex parte Bell*, 22 S. W. 1040, 1041, 32 Tex. Cr. R. 308, 40 Am. St. Rep. 778.

VAULT.

A vault, as defined by Webster, is a cellar; and an indictment charging defendant with breaking and entering a sheriff's office, and also into a vault therein, is sufficient as charging the breaking and entering a house. *Bigham v. State*, 20 S. W. 577, 31 Tex. Cr. R. 244.

A vault, in reference to interment, is but a place to entomb, and, when so used, becomes a tomb, a receptacle for the dead, a last resting place; and a grant of such a place gives an exclusive right. *In re Brick Presbyterian Church (N. Y.)* 3 Edw. Ch. 155, 168.

VEGETABLE.

The tariff act of 1842, providing that a berry or vegetable used principally in dyeing or composing dyes should be admitted free of duty, applies to the vegetables in their native state, and not after they are transmuted, by manufacture, into a substance which takes a different denomination in commerce. *Schneider v. Lawrence (U. S.)* 21 Fed. Cas. 715, 716.

Beans.

Beans may well be included under the term "vegetables." As an article of food, whether baked or boiled or forming the basis of soups, they are used as a vegetable, as well when ripe as when green, and this is the principal use to which they are put, and they will so be denominated, though they are "seeds" in the language of botany or natural history. *Robertson v. Salomon*, 9 Sup. Ct. 559, 130 U. S. 412, 32 L. Ed. 995; *Nix v. Hedden*, 13 Sup. Ct. 881, 882, 149 U. S. 304, 37 L. Ed. 745 (cited in *United States v. Buffalo Natural Gas Fuel Co. (U. S.)* 78 Fed. 110, 112, 24 C. C. A. 4).

"Vegetables," within the meaning of a tariff act fixing a duty on vegetables, includes beans. They are mentioned as ex-

amples of vegetables in Webster's Dictionary. *Windmuller v. Robertson (U. S.)* 23 Fed. 652, 653.

Pickled limes.

Pickled limes, not being vegetables, are not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], fixing the rate for all vegetables, including pickles. *Roche v. United States (U. S.)* 116 Fed. 911.

Tomatoes.

Vegetables are those plants which are grown in kitchen gardens, whether eaten cooked or raw, and which are served at dinner, in, with, or after the soup, fish, or meats which constitute the principal part of the repast, as potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, and are not served like fruits, generally, as a desert, and, as the word is used in the United States tariff act of March 3, 1883, would include tomatoes. *Nix v. Hedden*, 13 Sup. Ct. 881, 882, 149 U. S. 304, 37 L. Ed. 745 (affirming *Id.* [U. S.] 39 Fed. 109).

VEHICLE.

See "Motor Vehicle"; "Public Vehicle"; "Wheeled Vehicle."

"A vehicle is any carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance, transportation, or communication." *Davis v. Petrinovich*, 21 South. 344, 112 Ala. 654, 36 L. R. A. 615 (quoting Cent. Dict.).

The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land. U. S. Comp. St. 1901, p. 4.

Bicycle, tricycle, or motor carriage.

See, also, "Carriage."

"Vehicle," as used in statutes providing that every person traveling with any carriage or other vehicle, who shall meet any other person so traveling, shall seasonably drive his carriage or vehicle to the right of the center of the road, means any machine which is used or driven on the traveling part of the highway for the purpose of conveyance thereon, and, as such, the term includes a bicycle. *Holland v. Bartch*, 22 N. E. 83, 85, 120 Ind. 46, 16 Am. St. Rep. 307; *Mercer v. Corbin*, 20 N. E. 132, 134, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. Rep. 76; *State v. Collins*, 17 Atl. 131, 16 R. I. 371, 3 L. R. A. 394; *Lacy v. Winn*, 4 Pa. Dist. R. 409, 412; *Davis v. Petrinovich*, 21 South. 344, 112 Ala. 654, 36 L. R. A. 615; *Myers v. Hinds*, 68 N. W. 156, 157, 110 Mich. 300, 33 L. R. A. 856, 64

Am. St. Rep. 345; *Laredo Electric & Ry. Co. v. Hamilton*, 56 S. W. 998, 1000, 23 Tex. Civ. App. 480.

A bicycle comes within the term "other vehicle," as used in Code, § 4008, exempting a team or wagon or other vehicle to the head of a family from execution, where such bicycle is used daily by the laborer in connection with his work. *Roberts v. Parker*, 90 N. W. 744, 117 Iowa, 389, 57 L. R. A. 764, 94 *Am. St. Rep.* 316.

The term "vehicle" includes a bicycle, the latter being used very excessively for convenience, recreation, pleasure, and business; and the riding of one upon the public highway in the ordinary manner, as is now done, is neither unlawful nor prohibited, as they cannot be banished because they were not ancient vehicles and used in the Garden of Eden by Adam and Eve. *Thompson v. Dodge*, 60 N. W. 545, 546, 58 Minn. 555, 28 L. R. A. 608, 49 *Am. St. Rep.* 533.

Bicycles come under the definition and description of "vehicles," and sidewalks are not the proper place for them. *Jones v. City of Williamsburg*, 34 S. E. 883, 97 Va. 722, 47 L. R. A. 294.

"Vehicle," as used in a city ordinance providing that no person shall place or draw any wagon, cart or other vehicle on any sidewalk, will be held to include a bicycle, since the word is used in connection with wagon and cart, and will be limited to vehicles of like character. *Gagnier v. City of Fargo*, 88 N. W. 1030, 1031, 11 N. D. 73, 95 *Am. St. Rep.* 705.

The word "vehicle," as used in *How. Ann. St.* § 3582, giving turnpike companies a right to collect certain rates of toll from persons traveling on their roads in vehicles drawn by animals, does not include bicycles, and therefore a turnpike company has no right to charge for the use of its road by persons using bicycles. *Murfin v. Detroit & E. Plank-Road Co.*, 113 Mich. 675, 676, 71 N. W. 1108, 38 L. R. A. 198, 67 *Am. St. Rep.* 489.

The word "vehicle," whenever it occurs in the sections regulating the use of vehicles on the highways, shall be construed to include bicycles, tricycles, and motor carriages. *Gen. St. Conn.* 1902, § 2038.

Dray or wagon.

The owner of a rolling mill situated near, but outside, the corporate limits of the city of Memphis, owned some drays, which were kept in the mill, but used in the free delivery of iron manufactured in the mill, to their customers within the corporate limits. Defendants lived at the mill outside the corporate limits. An ordinance provided a license tax on "every owner of a wagon or other vehicle kept or used for free delivery of goods to customers or others in the city."

In considering the question whether the words "other vehicles," used in the ordinance, included the vehicle commonly called a "dray," the court said: "It seems to us that the common sense of the proposition must be the law of it, and without further discussion we hold that a dray, being a vehicle other than the vehicle named in the ordinance, is necessarily embraced within its provisions and meaning." *City of Memphis v. Battalle*, 55 Tenn. (8 Heisk.) 524, 537, 24 *Am. Rep.* 285.

The word "vehicles," in a license to a livery stable keeper to let out for hire carriages, buggies, or vehicles, except drays for hire, includes wagons, and would possibly include drays also, except for the express provision of the ordinance. *City of Griffin v. Powell*, 64 Ga. 625, 627.

Ferryboat.

Webster states that the word "vehicle" is rarely applied to watercraft. As used in act for the incorporation of cities (section 42), empowering the common council to levy and collect in each year a specific tax on any carriages and vehicles used and run for passengers for hire, "vehicles" does not include a ferryboat. *Duckwall v. City of New Albany*, 25 Ind. 283, 286.

Locomotives or cars.

Railroad locomotives and cars are not "vehicles," within Act Cong. Jan. 26, 1887, giving the commissioners of the District of Columbia power to regulate the moving of vehicles in the streets of Washington. *Baltimore & O. R. Co. v. District of Columbia* (U. S.) 10 App. Cas. 111, 120.

Sleigh.

A covered sleigh, called a "stage," which would carry six passengers inside, with a place under the driver's seat to carry the mail, and was used daily for carrying passengers, was a "vehicle used chiefly for carrying passengers," within the meaning of *Sess. Laws* 1853, p. 535, c. 245, fixing a certain rate of toll over a toll road for such vehicles. *Marsells v. Seaman* (N. Y.) 21 Barb. 319, 323.

Street car.

Rev. St. tit. 13, cl. 20, pt. 1, making the owner of every vehicle running on any public highway for the transportation of persons liable for all damages occasioned by the willful act of any one in his employ as the driver of such vehicle, does not apply to street railways. *Whitaker v. Eighth Ave. Ry. Co.*, 51 N. Y. 295, 298.

Threshing machine.

The words "vehicle and load," in *Highway Law*, § 154, providing that no town should be liable for damages resulting from

the breaking of any bridge by transportation on the same of any vehicle and load together weighing four tons or over, was construed to include both the threshing machine and separator, whose combined weight caused a bridge to break. *Heib v. Town of Big Flats*, 73 N. Y. Supp. 86, 87, 66 App. Div. 88.

VEIN.

See "Fissure Vein"; "Single Vein."

A "vein," as the term is used in the mining law, "is a body of mineral, or mineral-bearing rock, within defined boundaries, in the general mass of the mountain." *Iron Silver Min. Co. v. Chessman* (U. S.) 8 Fed. 297, 307; *Id.*, 6 Sup. Ct. 481, 484, 116 U. S. 529, 29 L. Ed. 712 (cited in *Raisbeck v. Anthony*, 41 N. W. 77, 73 Wis. 572); *Stevens v. Williams* (U. S.) 23 Fed. Cas. 40; *Cheesman v. Shreeve* (U. S.) 40 Fed. 787, 792.

In the case of *Jupiter Min. Co. v. Boddie Consol. Min. Co.* (U. S.) 11 Fed. 668, 675, Circuit Judge Sawyer said: "A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place. The vein, however, may be thin, and it may be many feet thick, or thin in places—almost or quite 'pinched out,' in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich." *Stinchfield v. Gillis*, 30 Pac. 839, 840, 96 Cal. 33.

"Vein," "lode," and "ledge" are synonymous terms, and mean any body of mineral or mineral rock within defined boundaries in the general mass of the mountains. Nor does the fact that it was occasionally found in the general course of this vein or shoot in pockets deeper down into the earth, or higher up, affect its character as a vein, lode, or ledge. *Synnott v. Shaughnessy*, 7 Pac. 82, 84, 2 Idaho, 122 (citing *Stevens v. Williams*, 1 Morr. Min. Rep. 566, 573).

"Vein," as the term is used in mining law, means "a fissure between well-defined boundaries, containing ore, even though the ore is found at considerable intervals and in small quantities." *United States v. King*, 22 Pac. 498, 499, 9 Mont. 75.

A vein is a continuous body of mineral-bearing rock in place, in the general mass of the surrounding formation. If it possess these requisites, and carry mineral in appreciable quantities, it is a "mineral-bearing vein," within the meaning of the law, even though its boundaries may not have been as-

certained. *Beals v. Cone*, 62 Pac. 943, 953, 27 Colo. 473, 83 Am. St. Rep. 92.

Justice Hallett's definition of the word "vein," as used in mining law, is: "A body of mineral or mineral-bearing rock within defined boundaries in the mass of the mountain." Judge Goddard gives this definition: "Any mineralized belt or zone of rock, lying within boundaries clearly distinguishing it from neighboring rock coming from the same source, impressed with the same forms, and appearing to be created by the same process." Justice Field gives the same definition; also the following: "A continuous bed of mineralized rock lying within any other well-defined boundaries on the earth's surface, and under it." And Justice Miller quotes approvingly all the definitions above given. *Duggan v. Davey*, 26 N. W. 887, 896, 4 Dak. 110.

A vein is an aggregation of mineral matter containing ores in fissures of rocks. *Waterloo Min. Co. v. Doe* (U. S.) 82 Fed. 45, 51, 54, 27 C. C. A. 50.

A vein, to the miner, is a body of ore, quartz, or mineral-bearing substance lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width, and extending in length across and through the country for greater and less distances. *King v. Amy & Silversmith Consol. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

Though to constitute a vein it is not required that well-defined walls be developed or paying ore found within them, there must be rock, clay, or earth so colored or decomposed by the mineral elements as to mark and distinguish it from the inclosing country. *Burke v. McDonald*, 33 Pac. 49, 50, 2 Idaho, 646.

"Veins," as used in the mining land laws of the United States, means "lines or aggregations of metal imbedded in quartz or other rock in place. It is intended to indicate the presence of metal in rock." *Wheeler v. Smith*, 32 Pac. 784, 786, 5 Wash. 704; *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

As requiring a fissure.

In *Eureka Consol. Min. Co. v. Richmond Min. Co.* (U. S.) 8 Fed. Cas. 819, it was said: "It is difficult to give any definition to the term 'vein,' as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a 'lode,' in the judgment of geologists; but to the practical miner the fissure and its walls are only of importance to indicate the boundaries of it, within which he may look for and reasonably expect to find the ore he seeks. A con-

tinuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface, or under it, would equally constitute, in his eyes, a lode. We are of the opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks." *Buffalo Zinc & Copper Co. v. Crump*, 69 S. W. 572-575, 70 Ark. 525, 91 Am. St. Rep. 87.

"Veins," as used in reference to mines, are aggregations of mineral matter in fissures of rocks, and the fissure or fracture is an essential element in the definition. Lodes are aggregations of mineral matter containing ores in fissures, and, as used by miners, "lode" is synonymous with vein, and applies to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries. *Hayes v. Lavagnino*, 53 Pac. 1029, 1032, 17 Utah, 185.

In defining "veins" the text-books and several of the decisions speak of them as fissures in the earth filled with quartz in place, carrying gold and silver or other minerals. But true fissure veins often exist and are continuous without having any filling in certain points or places of mineral matter. To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls. Between these walls will be found bodies of quartz, rich or poor; but there is also liable to be found, in many places, short or long distances between the quartz bodies or pay chutes where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* (U. S.) 63 Fed. 540, 544.

While metalliferous rock in place not in a fissure may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode, a broad metalliferous zone having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. *Mt. Diablo Mill. & Min. Co. v. Callison* (U. S.) 17 Fed. Cas. 918.

Placer claim.

"Veins," in the language of miners, are narrow plats of rock intersecting other rocks, and are the fillings of cracks or fissures. The term, in a statute providing for the location and recording of mining claims or veins or lodes bearing valuable deposits, does not include a placer mining claim. *Moxon v. Wilkinson*, 2 Mont. 421, 424.

VEINS IN PLACE.

See "In Place."

VELOURS.

Velours is an imitation of sealskin, used for manufacturing hats and caps, and is composed of cow or calf hair, vegetable fiber, and cotton. *Arthur v. Fox*, 2 Sup. Ct. 371, 108 U. S. 125, 27 L. Ed. 675; *Herrman v. Miller*, 8 Sup. Ct. 1090, 1098, 127 U. S. 363, 32 L. Ed. 186.

VENALES.

The word "venales" means either things held or procured to be sold, or things necessary to be quickly sold, from their perishable character. *Pettee v. Orser*, 19 N. Y. Super. Ct. (6 Bosw.) 123, 133.

VEND.

"Vend," as used in the granting part of a patent, authorizing the patentee to exclusively make, use, exercise, and vend his invention, does not prohibit another from both a selling and an exposing to sale. "Vend" means the habit of selling and offering for sale. Selling and exposing to sale are not coextensive. The former may include the latter; but a mere exposure to sale, i. e., with intent to sell or for the purpose of selling, is not only not equivalent to a sale, but, as regards the patentee, may be attended with wholly different consequences. *Minter v. Williams*, 4 Adol. & El. 63, 65.

Gen. Laws 1885, c. 296, § 4, making it criminal to "vend, sell, deal, or traffic" in intoxicating liquors, etc., without a license therefor, includes the sale of a keg of beer as an original package by the agent of a brewer, as the plain meaning of the words includes such sale. *Peltz v. State*, 32 N. W. 763, 68 Wis. 538.

VENDEE.

In contract for sale as owner, see "Owner."

VENDER—VENDOR.

See "Traveling Vendor"; "Itinerant Vendor."

In contract of sale, as owner, see "Owner."

The word "vendor," in its ordinary signification, means one who sells, regardless of the character of the property sold. *Lumbert v. Woodward*, 43 N. E. 302, 304, 144 Ind. 335, 55 Am. St. Rep. 175.

Under McClain's Code, § 2532, providing that any itinerant vender of any drug, etc., a physician who gives medicine to his own

patients, though he may do so at different places, is not a "vender" in the sense in which the word is used in the statute. *State v. Bonham*, 65 N. W. 154, 155, 96 Iowa, 252.

Grantor distinguished.

The cases have established a distinction between the vendor and the grantor. He is the vendor who negotiates the sale, and becomes the recipient of the consideration, though the title comes to the vendee from another source, and not from the vendor. *Rutland v. Brister*, 53 Miss. 683, 685.

VENDOR'S LIEN.

A vendor's lien is the right which the vendor of land has, at any time after an obligation given in payment for the land becomes due, to enforce the obligation and to cut off the maker's equitable interest arising out of the agreement. *Morgan v. Dalrymple*, 46 Atl. 664, 665, 59 N. J. Eq. 22.

Where one sells property to another and conveys the same by deed, a lien arises in equity in favor of the vendor for the purchase money, or for such part thereof as remains unpaid. This lien is a vendor's lien. *Gee v. McMillan*, 12 Pac. 417, 419, 14 Or. 268, 58 Am. Rep. 315.

"Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title, he cannot be said to have any implied lien on the land. The security which he has then on the purchase money is created by express reservation, and cannot be impaired by any act of the vendee." *Kent v. Williams*, 46 Pac. 462, 114 Cal. 537.

The lien for the purchase money of land sold was described in Act May 12, 1862, as a "vendor's lien," and it has continued to be so described ever since. *Lee v. Murphy*, 51 Pac. 549, 552, 119 Cal. 364.

So shadowy a right as the claim of the vendor of land to have the unpaid purchase money after default charged upon the land by a court of equity is not a "lien," within the provisions of the practice act, which precludes the right to attach. It is not a lien acquired by express contract, but is one of a very imperfect character, at least inchoate, not recognized at all in a court of law, where attachments are enforced, but fastened upon the land by a court of equity upon application duly made, even against the apparent intention of the parties. The vendor has no present, indefeasible right to have his debt charged upon the land. It is not a present, specific lien. He is simply in a condition which may or may not, at some future time, depending upon contingencies over which he has no control, enable him to acquire a lien, or obtain an appropriation of

the proceeds of the land to the payment of the debt through the intervention of a court of equity. It seems to be a misnomer to call this imperfect, contingent, unassignable, personal privilege, before suit brought, a present, subsisting lien in any sense. It is but a possible capacity to acquire a lien at some future day. It is not a lien by which a debtor can be said to be secured, within the meaning of those terms as used in the practice act with reference to attachments. *Porter v. Brooks*, 35 Cal. 199, 204, 205.

Lord Eldon, in defining the vendor's lien, uses the following language: "Where the vendor conveys without more, though the consideration is on the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is a simple case of a conveyance, the money or part of it not being paid as between the vendor and the vendee and persons claiming as volunteers, on the doctrine of this court, which, where it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail." *Mackreth v. Symmons*, 15 Ves. 329. There is nothing in this definition that justifies the inference that a vendor has a lien resulting from a breach of a contract. It merely secures the payment of the promised price. *Graham v. Moffett*, 78 N. W. 132, 133, 119 Mich. 303, 75 Am. St. Rep. 393.

A vendor's lien is always in the nature of a mortgage, and one having a vendor's lien has an insurable interest in the property. *Balow v. Teutonia Farmers' Mut. Fire Ins. Co.*, 43 N. W. 924, 926, 77 Mich. 540.

Ordinarily a vendor's lien is understood to arise only out of the sale of land; but if, in any event, there can exist a vendor's lien in favor of the unpaid vendor of chattels, it is only in those cases where the possession of the chattel remains with the vendor. *Parlin & Orendorff Co. v. Davis' Estate (Tex.)* 74 S. W. 951, 952 (citing *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84).

As an equitable right.

A vendor's lien is a lien which the vendor of real estate has on the property sold, to secure the purchase price. "This lien is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee." *Sparks v. Hess*, 15 Cal. 186, 193.

The lien which the vendor of real property retains after an actual conveyance for the unpaid price is not a specific and actual charge on the land, but a mere equitable right to resort to it on failure of payment by the vendee. It is in its nature a personal privilege, nonassignable, which the vendor can assert only in a suit for the purpose

of having it decreed and enforced. *Fitzel v. Leaky*, 14 Pac. 198, 201, 72 Cal. 477.

There is perhaps no subject of equity jurisprudence on which there is a greater diversity of opinion than exists in relation to the origin, nature, and effect of a vendor's lien, against whom and in whose favor it avails, and how it may be discharged or waived. The various definitions given and principles applied to it by the court are hopelessly irreconcilable, and if we take the decisions found in decisions and text-books without observing the distinctions between the lien imposed by law in favor of a vendor who has parted with the legal title and taken no security for the purchase money, and the security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will appear to be great confusion and inconsistency. The former—the implied lien—is properly known as a "vendor's lien." It is the creature of courts of equity, founded upon the equitable presumption that, where the vendor has parted with his title and taken no security for the payment of the purchase money, the parties intended that the property itself should remain as a privilege for the payment of the purchase price of the land. The lien thus created by implication is not a specific, absolute charge upon the property. It is personal to the vendor, and does not pass by a transfer of his claim for the purchase money. The latter is improperly designated as a "vendor's lien." Where the vendor holds the legal title under an unexecuted contract for the conveyance of land upon the payment of the purchase money, the transaction shows upon its face that he holds it as security. *Gessner v. Palmateer*, 26 Pac. 789, 790, 89 Cal. 89, 13 L. R. A. 187.

A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by courts for the benefit of vendors of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor. *Clalborne v. Castle*, 32 Pac. 807, 808, 98 Cal. 30.

A vendor's lien is not recognized by our statutes. It is a creature of the courts of equity. It does not grow out of any agreement, but is created in equity without an express agreement of the parties. It is an implied agreement existing between the vendor and vendee that the former shall hold a lien on the land for the payment of the purchase money. *Blomstrom v. Dux*, 51 N. E. 755, 757, 175 Ill. 435.

A vendor's lien is a mere creature of equity. It rests upon the principle that when one gets the estate of another he ought not to keep it without paying the consideration. *Chilton v. Braiden's Adm'x*, 67 U. S. (2

Black) 458, 17 L. Ed. 304; *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802. The implied lien will not be enforced when it would operate as a means of deception or in prejudice of good faith of those affected by it. *Venner v. Farmers' Loan & Trust Co.*, 90 Fed. 348, 355, 33 C. C. A. 95.

The equitable lien of a vendor of land is not founded on matter of record, nor on expressed contract, but is merely implied from the presumed intentions of the parties. It is purely a creature of equity; but, whether it be regarded as a natural equity or a trust, its very nature implies the evidence in the vendor of a title, either legal or equitable, to the land on which it attaches; and hence where the vendor executes only a bond to make title on the payment of the purchase money, retaining the title in himself as security for the purchase money, no lien exists. *Servis v. Beatty*, 32 Miss. 52, 81.

A vendor's lien is that lien which is equity is implied to belong to a vendor for the unpaid purchase price of land sold by him, where he has not taken any other lien or security for the same beyond the personal obligation of the purchaser. Such lien is not the result of any agreement between vendor and vendee, but is simply an equity raised by the courts for the benefit of the former. *McKeown v. Collins*, 38 Fla. 276, 21 South. 103. In 2 *Warvelle on Vendors*, § 676, it is said that, a vendor's lien being created by inference alone, it is in effect a mere equity raised and administered by the courts, by whom it will be enforced or denied between parties as the exigencies of each particular case may seem to require. *Johnson v. McKinnon* (Fla.) 34 South. 272, 275.

A vendor's lien is the lien for purchase money of land remaining unpaid. "The lien of a vendor is not founded on arbitrary principles that require a rigid construction. It is not of such a nature as should induce the court to lay violent hands on it whenever a plausible pretext can be found for so doing. It is founded on principles of justice, and ought, therefore, to be protected. It originated in the care which the law has for the preservation of equitable rights. It was intended to prevent one man from enjoying the property of another without consideration, and therefore it applies as well to the representative of a deceased vendor as to the vendor himself. It is in the nature of a mortgage provided by the benignity of the law for those who may have been too confiding." *Tiernan v. Beam*, 2 Ohio (2 Ham.) 383, 388, 15 Am. Dec. 557.

A vendor's lien is founded in natural justice and the presumed intent of the parties to the contract. Both forbid that the vendee shall enjoy the property without payment of the consideration. This lien of the vendor

is a kind of equitable mortgage, inherent in the contract of sale, and qualifying the ownership of the vendee, whether that ownership be legal or merely equitable. It is paramount to the right of the vendee, and of all succeeding to his interest, in whole or in part, by operation of law. In equity the vendee is not the owner adversely to the lien of the vendor, but is treated as a trustee for him until payment of the purchase money. *Wilson v. Davisson* (Va.) 2 Rob. 384, 403.

As an estate in land.

A vendor's lien upon land is not an estate in the land, but is a charge or right which has its inception only on bill filed. The lien is not confined to a legal title or title in fee. It applies to leaseholds, and appears to be received as to all recognized titles. It arises in favor of one who has merely an equitable interest. It attaches to a pre-emption claim on the public lands. *Shrimsher v. Newton*, 64 S. W. 534, 535, 3 Ind. T. 555 (citing *Stephens v. Shannon*, 43 Ark. 464; *Pierson v. David*, 1 Iowa [1 Clarke] 23).

As arising by implication of law.

A vendor's lien is one arising by implication of law between a vendor and vendee, and not by contract. *Lewis v. Shearer*, 59 N. E. 580, 582, 189 Ill. 184.

A vendor's lien on real estate for the unpaid purchase price is created by implication of law. But when a lien for the purchase money is expressly reserved by the vendor in his deed of conveyance, a lien is created by contract. It is a contract that the land shall be subject to a lien until the purchase money is paid, and is really a mortgage. *Warford v. Hankins*, 50 N. E. 468, 469, 150 Ind. 489 (citing *Bever v. Bever*, 144 Ind. 157, 162, 163, 41 N. E. 944, and authorities cited).

A vendor's lien is not the result of a direct contract therefor. It arises by implication of law out of the sale of land, and exists in favor of the grantor against the grantee as a security for what remains of the purchase money unpaid and otherwise unsecured. If, at the time of the sale, other security is given, the law will not imply a lien on the land sold. *Jones v. Rush*, 57 S. W. 118, 120, 156 Mo. 364 (citing *Pom. Eq. Jur.* 1250, 1252).

A vendor's lien is that lien which in equity is implied to belong to a vendor for the unpaid purchase price of land sold by him, where he has not taken any other lien or security for the same beyond the personal obligation of the purchaser. Such lands are the creatures of equity, and not by contract of the parties. A lien created by express written contract between the vendor and

vendee is not a vendor's lien, but is a security more in the nature of a mortgage. The lien of the vendor on lands for the purchase money is lost in all cases where any security is taken on the land or otherwise for the whole or a part of the purchase money, unless there is an express agreement to the contrary. That the additional security so taken should prove unavailing does not affect the question. The lien is waived by the taking of the security because it shows the intention of the vendor not to rely upon his implied equitable lien. *McKeown v. Collins*, 21 South. 103, 106, 38 Fla. 276.

Other liens distinguished.

The artisan or innkeeper acquires his lien by having and retaining goods in his possession. When his possession is gone, his lien is gone, and the owner's right of possession instantly reverts to him. The vendor's lien is not a right that he acquires, but a right which he retains; the vendee never having had either possession or right of possession in default of payment in tenure. It is in the nature of an undisposed right in and to the property sold to the defaulting vendee. An unpaid vendor with the goods in his possession has more than a mere lien on it. He has a special property analogous to that of a pawnee. *Arnold v. Carpenter*, 18 Atl. 174, 175, 16 R. I. 560, 5 L. R. A. 357.

It is characteristic of a vendor's lien, as distinguished from a contract lien, that it arises on a transfer of title. It is the doctrine of equitable jurisprudence which says that land which is immovable is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security. *Slide & Spur Gold Mines v. Seymour*, 14 Sup. Ct. 842, 845, 153 U. S. 509, 38 L. Ed. 802.

VENDITIONI EXPONAS.

Venditioni exponas is a writ of execution directed to the sheriff to sell goods and chattels, and, in some states, lands which he has taken in execution by virtue of a fieri facias. *Borden v. Tillman*, 39 Tex. 262, 273 (citing *Lockridge v. Baldwin*, 20 Tex. 306, 70 Am. Dec. 385); *Hastings v. Bryant*, 115 Ill. 69, 75, 3 N. E. 507. The object of this writ, so far as it regards personal property, is to force the sheriff to sell when he has returned a levy unsold for want of buyers, and to bring him into contempt for not selling it. He cannot, therefore, again return "Not sold for want of buyers." *Ritchie v. Higginbotham*, 26 Kan. 645, 648 (citing *Herman on Executions*).

A venditioni exponas is in its nature and operation, as to the property on which the levy may have been made, an alias execution; it merely commands and authorizes, as

to real estate, the completion of the execution already begun. *Beebe v. United States*, 18 Sup. Ct. 532, 535, 161 U. S. 104, 40 L. Ed. 636.

A writ of venditioni exponas is undoubtedly a writ of execution. It was so denominated in *Kane v. McCown*, 55 Mo. 196, and in *Wood v. Augustine*, 61 Mo. 46. In *Webb v. Armstrong*, 24 Tenn. (5 Humph.) 379, it was held that a writ of venditioni exponas was an execution, within the meaning of the statute authorizing motions against sheriffs for failure to return executions. It is an execution or writ to satisfy the judgment on behalf of the plaintiff. *Hicks v. Ellis*, 65 Mo. 176, 186.

VENIRE.

See "Open Venire"; "Special Venire."

The word "venire," Latin, the infinitive of "venio," "to come," is of not very well-defined legal meaning. Its practical significance is a writ directed to the sheriff, commanding him to cause to come from the body of the county a certain number of qualified citizens to act as jurors. *Bouv. Dict.*; *Worcester. Dict.* According to this definition it is the writ directed to the sheriff, and not the body of names which constitutes the venire, though sometimes popularly used in the latter sense. *Posey v. State*, 73 Ala. 490, 493.

Rev. St. c. 135, § 10, requires the clerk of the courts to issue venires in due form for the purpose of summoning grand jurors. The venire so required is a judicial writ, and to be in due form must bear the seal of the court from which it issues. Persons selected as grand jurors under a venire without the seal have no authority to act as grand jurors, though impaneled and sworn in court without objection, and therefore all indictments found by them may be quashed on motion. *State v. Lightbody*, 38 Me. 200, 201.

VENIRE FACIAS DE NOVO.

See "Motion for Venire de Novo."

"A venire facias de novo, commonly termed a 'venire de novo,' is a second writ of venire to summon another jury for another trial. This is the old common-law mode of proceeding to a second trial, and differs from the granting of a new trial in this: the venire de novo is awarded for some defect appearing upon the face of the record; a new trial is granted for some matter extrinsic to the record. Again, a venire facias de novo and a new trial are very different things, though alike in some points. They agree in this: that a new trial takes place in both, and that the court may or may not grant either. They differ in this: that the venire facias is the ancient proceeding of the

common law; the new trial a modern invention to mitigate the severity of the proceeding by attain. The most material difference between them is that a venire de novo must be granted upon matters appearing upon the record, but a new trial may be granted upon things out of it, as if the verdict be contrary to the evidence, or the judge has given wrong instruction. 2 *Graham, New Trials*, 36, 38. A venire de novo is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by any error in assessing damages." *Bosseker v. Cramer*, 18 Ind. 44, 46 (quoting 2 *Tidd, Pr.* 922).

In Alabama it is said that a "venire facias de novo" means, according to the practice in that state, nothing more than submitting the case to another jury for trial. *Sewall v. Glidden*, 1 Ala. 52, 58.

A venire de novo is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing the damages. *Maxwell v. Wright*, 67 N. E. 267, 160 Ind. 515 (citing *Bosseker v. Cramer*, 18 Ind. 44).

"Strictly speaking, the term 'venire de novo' is only applicable when applied to a verdict, but, as there is such a close similarity between verdict by the jury and findings by the court, the term as well as the motion is applied to both. * * * A motion for a venire de novo can only be entertained when the verdict or finding is so defective, uncertain, or ambiguous that no judgment can be rendered on it." *Waterbury v. Miller*, 41 N. E. 383, 386, 13 Ind. App. 197.

In Indiana it is said that the office of a motion for a venire de novo, under the practice in that state, was to test the sufficiency of the special finding to sustain the conclusions of law or of the special verdict to support a judgment, and to determine whether the findings are within the issues. *Sheeks v. State*, 60 N. E. 142, 143, 156 Ind. 508.

A venire de novo is only proper when there is some defect in the verdict of the jury or finding of the court, and is not allowable on the ground that the trial court allowed plaintiff to amend his complaint to conform to the evidence, or refused to direct the jury to find a special verdict. *Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 206, 27 N. E. 448.

VENIRE FACIAS JUDICATIONIS.

"Venire facias judicationis is the writ by which the sheriff causes to come from the

body of his county a certain number of qualified citizens who are to act as jurors in the court." *Durrah v. State*, 44 Miss. 789, 796 (quoting Steph. Pl. 104).

VENOM.

Venom is something applied externally or discharged from animals, as by the bite or sting of serpents, scorpions, etc. Preferred Mut. Acc. Ass'n v. Beidelman (Pa.) 1 Monag. 481, 482.

VENTE A REMERE.

"Vente à réméré" is defined to be "an agreement or paction by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it." Civ. Code La. art. 245; *Livingston v. Story*, 36 U. S. (11 Pet.) 351, 387, 9 L. Ed. 746.

VENUE.

The word "venue" is defined to mean a neighboring place; the place from which a jury are to come for the trial of cases. The word was used as synonymous with "place of trial" by all legal writers both in England and in this state up to 1847. The venue in a complaint is to be fixed, irrespective of convenience of witnesses, where some or one of the parties resides, if either reside in the state, and a change of the place of trial for the convenience of witnesses is properly made when the venue has been fixed in the proper county. *Moore v. Gardner* (N. Y.) 5 How. Prac. 243.

The word "venue," as used in the statute prior to the Code, was well adapted to designate the county where the action was to be tried. Its meaning was well understood. No other single word can be made to express the same thing, and I never could understand why it should have been so carefully excluded from the diction of the Code. It is declared that motions must be made within the district in which the action is triable, or else in a county adjoining the county in which the action is triable, etc. *Bangs v. Selden* (N. Y.) 13 How. Prac. 374, 377.

The venue of a case is the county or district in which an action is brought for trial, and which is to furnish the panel of jurors; and to change the venue is to transfer the cause for trial to another county. *Armstrong v. Emmet*, 41 S. W. 87, 16 Tex. Civ. App. 242.

When we speak of "venue," we mean the county or jurisdiction in which the acts are alleged to have occurred, and from which

the jury are to come to try the issue. *Konold v. Rio Grande W. Ry. Co.*, 51 Pac. 256, 257, 16 Utah, 151.

The term "venue" means, primarily, the county in whose clerk's office the proceedings in a cause are conducted. The venue may be in one county, and the place of trial in another. A change of venue is a change of the county where the proceedings are to be had. *Barnard v. Wheeler* (N. Y.) 3 How. Prac. 71, 72.

In legal phraseology, "venue" means the county where a cause is to be tried, and originally a venue was employed to indicate the county from which the jury was to come. *Sullivan v. Hall*, 48 N. W. 646, 647, 86 Mich. 7, 13 L. R. A. 556.

The word "venue," as used in the Constitution, prohibiting the Legislature from passing local or special laws providing for changing the venue in civil or criminal cases, means the county wherein the action is brought and the jury are to be obtained. Act 1869, providing for the transfer of certain records and suits from the county seat of Lander county to the county seat of White county, created out of a portion of the county of Lander, does not provide for changing the venue in any case, even if the act directs that suits relating to property in the new county are to be tried in the new county. *State v. McKinney*, 5 Nev. 194, 198.

The venue at common law regulates the process of summoning a jury, who anciently were always returned from the vicinage; but it was held in Massachusetts that venues are of no use. In the early days of the law they were not averred, and it is held that a declaration without a venue, or with a wrong one, is bad in form, when specially demurred to, for no other reason but because of long usage. *Briggs v. Nantucket Bank*, 5 Mass. 94, 96.

VERACITY.

"According to the best lexicographers of our language, at least in this country, the words 'truth,' 'veracity,' and 'honesty' are almost synonymous, very nearly the same definitions being given to each of the words. Truth is so nearly allied to honesty and moral soundness, it seems to us, that, where a witness has testified in chief that the reputation of a person for truth and veracity is good, it is competent to ask him on cross-examination if he has not heard of a certain matter which would seriously affect the reputation of the party for honesty and moral soundness, as being necessarily inconsistent and at variance with the reputation he has given the party." *Wachstetter v. State*, 99 Ind. 290, 297, 50 Am. Rep. 94.

VERBAL

"Parol; by word of mouth; as verbal agreement, or verbal evidence." *Black, Law Dict.*

VERBAL CONTRACT.

"There is no difference between the character of a written and verbal contract; the only difference being that in the one case the evidence of the terms of the contract is in writing, while in the other it is not." *Musgrove v. City of Jackson*, 59 Miss. 390, 392.

VERBAL PROCESS.

"A verbal process is a true relation in writing in due form of law of what has been done and said verbally in the presence of a public officer, and what he himself does on the occasion." *Hall v. Hall*, 11 Tex. 528, 539 (quoting 2 Bouv. 300).

VERDICT.

See "Adverse Verdict"; "Chance Verdict"; "Gambling Verdict"; "General Verdict"; "Partial Verdict"; "Privy Verdict"; "Quotient Verdict"; "Separate General Verdict"; "Special Verdict"; "True Verdict."

"A verdict is the answer of a jury given to the court concerning the matters of fact committed to them for trial." *Davis v. Delaware Tp.*, 41 N. J. Law (12 Vroom) 55, 56; *Withee v. Rowe*, 45 Me. 571, 586; *Shaw v. State*, 2 Tex. App. 487, 491; *Morton v. State*, 3 Tex. App. 510, 513.

A "verdict" may be defined to be the answer of the jury to the questions of fact contained in the issue formed by the pleadings of the parties. *Day v. Webb*, 28 Conn. 140, 144.

A verdict is a decision of an issue by a jury. *Froman v. Patterson*, 10 Mont. 107, 113, 24 Pac. 692.

A verdict is the ascertained truth to which effect is given by the judgment of the court. *Vaughan v. Cade* (S. C.) 2 Rich. Law, 49, 52.

A verdict is a declaration of the truth as to the matters of fact submitted to the jury. *Shenners v. West Side St. Ry. Co.*, 78 Wis. 382, 387, 47 N. W. 622, 623; *McBean v. State*, 83 Wis. 206, 211, 53 N. W. 497.

A verdict is the compound result of the legal instructions given to the jury by the court, and of their findings of fact applied to the legal principles laid down for their guidance. *Bonham v. Bishop*, 23 S. C. 96, 105.

A verdict is a declaration by a jury of their decision of the issues submitted to them in the case, and it must be in writing and concurred in by each member of the jury. *Code Cr. Proc. Tex.* 1895, art. 743.

A verdict is the conclusion of a jury on controverted questions of fact. It is a conclusion of fact, and not of law. *United States v. O'Neal* (U. S.) 10 App. Cas. 205, 236.

A verdict is defined in *Rap. & L. Law Dict.* to be "the opinion of a jury, or a judge sitting as a jury, on a question of fact." After a case is decided, propositions cannot be held or refused in the decision of the case. Propositions of law, to be held or refused by a court sitting as a jury, must be presented before verdict. *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325, 338.

A rightful verdict is the answer of the jury, given to the court concerning the questions of fact committed to their trial and examination. Whatever they find beyond this is inoperative and immaterial, and must be rejected. In a proceeding by attachment, when an interplea has been filed, the only issue submitted to the jury is as to the title of the property levied on. The jury have no right then to assess the value of the property, or damages for its detention or destruction. *McLean v. Douglass*, 28 N. C. 233, 235.

A verdict is the unanimous decision made by the jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause. *Hawley v. Barker*, 5 Colo. 118, 120; *Smith v. Paul*, 45 S. E. 348, 349, 133 N. C. 66; *Simmons v. Hamilton*, 56 Cal. 493, 495. It should be the result of sound judgment, dispassionate consideration, and conscientious reflection. *Williams v. Pressler*, 65 Pac. 934, 11 Okl. 122. It is a very important act. It is the culmination of the trial, and embodies the conclusions of the jury on the questions of fact litigated on the trial. It can only be delivered to a court legally constituted to receive it. *French v. Merrill*, 50 N. Y. Supp. 776, 777, 27 App. Div. 612.

A verdict is supposed to be, and ought to be, a deliberate conclusion of the mind of each and every juror, when uninfluenced and unprejudiced by the opinions or knowledge outside the jury. *Campbell v. Chase Granite Co.*, 42 Atl. 228, 229, 92 Me. 90.

The general rule is that the verdict must comprehend the whole issue or issues submitted to the jury in the particular cause; otherwise the judgment on it may be reversed. *Patterson v. United States*, 15 U. S. (2 Wheat.) 225, 4 L. Ed. 224. In subservience to this rule, however, it has been held that though the verdict may not be expressed formally and punctually in the words of the

issue, yet if the point in issue can be concluded from the finding of the jury, the court will work the verdict into form and make it serve. *Middleton v. Quigley*, 12 N. J. Law (7 Halst.) 352, 354.

Within the provisions of St. Mont. 1879, § 408, providing that an exception to the decision or a verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal unless, etc., the verdict or decision referred to relates exclusively to findings alleged to be erroneous for want of sufficient support in the evidence. *Kleinschmidt v. McAndrews*, 6 Sup. Ct. 761, 763, 117 U. S. 282, 29 L. Ed. 905.

The exact meaning of the word "verdict" is "a true saying." *Anthony v. Anthony*, 29 S. E. 923, 103 Ga. 250.

A verdict is the act of the jury, and cannot be aided either by intentment or a reference to extrinsic facts. *Sewall v. Glidden*, 1 Ala. 52, 58.

A verdict must be pronounced by open voice in open court, and a verdict written down and delivered in writing to the justice is improper. *Johnson v. Depuy*, 2 N. J. Law (1 Penning.) 165.

Conclusiveness.

A verdict concludes the parties as to the facts of the case, whereas a new trial merely places them together as they stood originally, with the right of further investigation, and the opportunity of having any errors corrected by the second trial. A verdict settles the facts, and is final; a new trial opens the issue without prejudice. The first belongs to the jury; the second is under the control of the court. *Altee v. South Carolina Ry. Co.*, 21 S. C. 550, 558.

A verdict is no precedent, and settles nothing but the immediate controversy to which it relates. *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466, 472, 13 N. W. 819.

As affecting debt.

A verdict does not annihilate or extinguish a debt or change the nature of it, or the rule of law. It only amounts to a conclusive evidence of the debt, so that the creditor has the same right to set it off after the verdict as he had before. And where the creditor is sued by the debtor after a verdict for the debt has been obtained, the creditor may set up the debt as a set-off, as he could have done had no suit been brought thereon. *Bell v. Cowgell* (Pa.) 1 Ashm. 7, 9.

As the concurrence of individual judgments.

"A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the

theory of jury trials that the individual conclusions shall be added up, and the sum divided by 12, and the quotient declared the verdict. * * * Before the state can demand the conviction and punishment of an alleged criminal, the 12 jurors should each be led from the testimony to a clear conviction of his guilt." *State v. Ivanhoe*, 57 Pac. 317, 320, 35 Or. 150.

As decision of a jury.

The word "verdict" has a well-defined signification in law. It means the decision of a jury, and it never means the decision of a court or a referee or a commissioner. In common language the word "verdict" is sometimes used in a more extended sense, but in law is always used to mean a decision of the jury; and, when used in a statute, it must be supposed that the Legislature intended to use the word as it is used in law. *Kerner v. Petigo*, 25 Kan. 652, 656.

Although the word "verdict," in a philological sense, embraces the idea of the finding of a referee as well as of a jury upon the question of fact submitted, yet as used in the Code of New York, and in a legal sense generally, it is understood to be the determination of a jury upon the matters of fact in issue in a cause upon the evidence. *Otis v. Spencer* (N. Y.) 8 How. Prac. 172, 173.

None but a jury can render a verdict. The finding of a court can only be expressed by an order or judgment. *Bearce v. Bowker*, 115 Mass. 129.

As a determination made out of court.

A verdict of the jury is commonly spoken of and regarded as a determination made out of court and reported to the court, and it would be a peculiar, if not an unprecedented, definition to describe the verdict of the jury as a determination in a trial court. *Henavie v. New York Cent. & H. R. R. Co.*, 48 N. E. 525, 527, 154 N. Y. 278.

Findings of fact.

The word "verdict" includes not only the verdict of the jury, but also the finding, upon the facts, of a judge, or of a referee appointed to determine the issues in a cause. *Comp. Laws S. D.* § 5080; *Lone Tree Ditch Co. v. Rapid City Electric & Gas Light Co.* (S. D.) 93 N. W. 650; *Rev. St. Okl.* 1903, § 2804; *Rev. Codes N. D.* 1899, § 5131; *Civ. Code S. D.* 1903, § 2465.

The word "verdict," as it is used in law, is not applicable to the findings of fact by the jury. *McCullagh v. Allen*, 10 Kan. 150, 154.

As either general or special.

"A verdict is the finding of the facts of a case by the jury. It may be either general or special. In either case it is the response

of the jury to the issues of fact submitted to them by the court. To ascertain, then, the intent and meaning of a verdict, we must look back to the issues submitted." *Eason v. Miller*, 15 S. C. 194, 202.

"Pennington Small Causes, 177, 178, when speaking of verdicts, says: 'A verdict should always be positive and general, and not conditional or special. A conditional verdict, or a special one, or one in the form of an award, would be erroneous.' I am persuaded, however, that such an opinion is, as to special verdicts, hasty and inaccurate. The right of juries to find special verdicts has existed in England since the passage of St. Westm. II, 18 Edw. I, c. 30, § 2, and in this state since the first establishment of our judicial department." *Springer v. Reeves*, 4 N. J. Law (1 Southard) 207.

Judgment distinguished.

Under the statute providing that a motion to discharge an order of arrest may be made before judgment, a motion made after verdict, and before the judgment is entered, is made in time. A verdict is not a judgment. A verdict may be had, and yet no judgment be entered upon it. The judgment is that final determination from which an appeal may be taken, and which is evidenced by the former entry by the clerk of the court. *Fuentes v. Mayorga* (N. Y.) 7 Daly, 103, 104.

A statute granting a new trial in cases where the "verdict or other decision" is against law refers to the issue of facts tendered by the pleadings, and does not refer to the judgment; and hence that the judgment is against law would not be ground for a new trial. *Froman v. Patterson*, 24 Pac. 692, 694, 10 Mont. 107.

Nonsuit.

Under 6 Geo. IV, c. 50, providing that the party who shall apply for a jury shall pay the costs thereof unless the judge before whom the cause is tried shall, "immediately after verdict," certify, etc., the word "verdict" does not include a nonsuit directed against plaintiff on his opening, so as to entitle defendant to the costs of a jury previously applied for by him. *Wood v. Greenwood*, 10 Barn. & C. 689.

As either public or private.

A verdict, according to the common law, was either privy or public. *Willard v. Sharfer* (Pa.) 6 Phila. 520.

A verdict is either privy or public, and a privy verdict is where the judge has left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court. Such a verdict is of no force unless afterwards affirmed by a

public verdict given openly in court, whereat the jury may vary from the privy verdict; so that a privy verdict is indeed a mere nullity; and it is held that a sealed verdict partakes of all the characteristics of a privy verdict, and is no verdict in itself, but must be affirmed by the jury in open court. *Young v. Seymour*, 4 Neb. 88, 89.

The only effectual verdict is a public verdict, in which the jury openly declare they have found the issue for the plaintiff or for the defendant. *Withee v. Rowe*, 45 Me. 571, 586.

As a record.

See "Record."

As affected by separation of jury.

The separation of a jury before bringing in their verdict in a capital case does not per se render the verdict void, but it will be set aside or not, according to the circumstances. *Davis v. State*, 3 Tex. App. 91, 101.

As requiring signing.

Signing is not a requisite to the validity of a verdict. *Morton v. State*, 3 Tex. App. 510, 513 (citing *Commonwealth v. Ripperdon*, 16 Ky. [Litt. Sel. Cas.] 195; *Burton v. Bondies*, 2 Tex. 203).

VERDICT AGAINST LAW.

See "Against Law."

VERIFICATION—VERIFY.

See "Duly Verified."

A "verification" is an affirmation by the party making the pleading that he is prepared to establish the truth of the facts which he has pleaded. In pleadings, literally, a making out to be true. The old formula was, "And this the said plaintiff (or defendant) is ready to verify." *Harp v. State*, 26 S. W. 714, 715, 59 Ark. 113.

Where a statute requires that a certain statement be verified before an officer authorized to administer oaths, no form of solemnities are necessary, other than the signature of the affiant and the statement of the officer that the affidavit was sworn to before him. A verification does not mean an authentication by the official seal of the office. *Ashley v. Wright*, 19 Ohio St. 291, 296.

Under Rev. St. Ill. 1889, c. 82, §§ 4, 28, which provide that every lien claimant, in order to obtain a lien, must file a statement "setting forth the times when such material was furnished or labor performed, verified by affidavit," an affidavit stating that the claimant has performed the labor and furnished the materials set forth in the above

statement is not sufficient verification to sustain a lien, since it does not verify the dates given in the statement. *McDonald v. Rosengarten*, 25 N. E. 429, 134 Ill. 126.

One "verifies" an account by merely adding up or doing the other work of mathematical calculation, and finding the figures correct, or by such comparison of entries and items as one may make and find correct, and any extent of this is examination, however superficial. *Guarantee Co. v. Mechanics' Sav. Bank & Trust Co. (U. S.)* 80 Fed. 766, 777, 26 C. C. A. 146.

The word "verified," when applied to any pleading or paper required in any criminal cause, means supported by oath or affirmation. *Rev. St. Mo. 1899, § 2402*; *Hornor's Rev. St. Ind. 1901, § 1285*.

As requiring oath.

The words "duly verified," in an insurance policy containing a clause requiring that, if the claim of loss was for a building, the insured should procure and attach to the preliminary proofs of loss a duly verified certificate of a builder as to the actual cash value of the building immediately before the fire, does not require an attestation by affidavit. While the term "verified," applied to legal papers, generally means or implies an oath, it does not always or necessarily do so; and as affidavits are usually made to facts, not to opinions—expenditures, not to estimates—the estimate of the value of the building, signed by the architect and builders, will be sufficient. *Summerfield v. Phoenix Assur. Co. (U. S.)* 65 Fed. 292, 296.

The word "verify" sometimes means to confirm and substantiate by oath, and sometimes by argument. When used in legal proceedings, it is generally employed in the former sense; thus, a plea in abatement, which concludes with what is called a verification, does so in these words: "All which the defendant is ready to verify"—clearly meaning to prove to be true or establish by evidence. *De Witt v. Hosmer (N. Y.)* 3 How. Prac. 284.

The term "verified," as applied to pleadings and statements of claims filed with municipal officers, has a settled meaning, and refers to an affidavit, attached to such a statement of claim, as to the truth of the matters therein set forth. *Patterson v. City of Brooklyn*, 40 N. Y. Supp. 581, 582, 6 App. Div. 127.

VERIFIED BY AFFIDAVIT.

A provision of the mechanic's lien law that a statement of account must be "verified by affidavit" plainly means certifying that the statement as made is true; and an affidavit that a statement contains a true account of materials furnished and that there

is a stated sum due thereon is insufficient, in so far as it fails to state that the time set forth when the material was furnished was truly stated. *Orr & Lockett Hardware Co. v. Needham Co.*, 48 N. E. 444, 445, 169 Ill. 100, 61 Am. St. Rep. 151.

VERILY BELIEVES.

The words "verily believes," in an affidavit that the affiant "verily believes," etc., is a sufficient compliance with the statute requiring such affidavit to state that the affiant has good reason to believe. "This court has frequently held that the true test of the sufficiency of an affidavit which employs the language of the statute is whether perjury can be assigned upon it." *Miller v. Munson*, 34 Wis. 579, 581, 17 Am. Rep. 461; *Mairet v. Marriner*, 34 Wis. 582. The rule being thus established, it remains to be determined whether the words here employed are such that perjury could be assigned, if the person making the affidavit knew them to be false at the time. What do the words "verily believes" import? In *Election Cases*, 65 Pa. (15 P. F. Smith) 20, the act of the assembly required an affidavit that the statements in the petition were true; but the affiants stated that they were true to the best of their knowledge and belief, and it was held sufficient, as the law did not require absolute verity. Webster defines "verily" as meaning "with great confidence; really; truly; in truth; in fact; certainly." It seems to be synonymous with "verity," which he defines to be "the quality of being very true or real; consonance of a statement, proposition, or other thing with fact; truth." "Verily believes," therefore, includes good reason in fact to believe. "If we are correct in this construction, then the words import more than the statutory requirement; for, while a person might have a good reason to believe, and yet disbelieve, he could not verily believe, without also having good reason in fact to believe." *Russell v. Ralph*, 10 N. W. 518, 519, 53 Wis. 328. See, also, *Penn Nat. Bank v. Altoona Mfg. Co.*, 15 Pa. Co. Ct. R. 320, 322.

"Verily believes" is equivalent to "firmly believes," as used in Act March 20, 1810, § 11, relating to appeals, and providing that the appellant shall swear or affirm that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done; for "verily" is as strong a word as "firmly." If the belief be a strong or firm one, it is within the meaning of the law. *Thompson v. White (Pa.)* 4 Serg. & R. 135, 138.

VERITY.

"Verity" is defined by Webster to be "the quality of being very true or real; con-

sonance of a statement, proposition, or other thing to fact; truth." It seems to be synonymous with "verily," which Webster defines as meaning "with great confidence; really; truly; in truth; in fact; certainly." *Russell v. Ralph*, 10 N. W. 518, 520, 53 Wis. 328.

VERMILION.

"Vermilion" is a mercurial preparation, though duty is not to be imposed on it under that head in Tariff Act July 30, 1846, schedule D, 9 Stat. 42, for the reason that it is specifically enumerated in schedule E. *Boying v. Lawrence* (U. S.) 3 Fed. Cas. 1023, 1024.

VERTICAL FINING.

"Vertical fining" is a term used with reference to the manufacture of glass, and means the vertical finding by each particle of the glass when in a molten condition of its natural relative position by reason of its increased specific gravity, caused by the expulsion of gases from such particles by the influence of heat. *Siemens v. Chambers & McKee Glass Co.* (U. S.) 51 Fed. 902, 909.

VERY FAST.

To say that a train is running "very fast" is equivalent to saying that it is running at a speed of more than eight miles an hour. *Indianapolis & St. L. R. Co. v. Peyton*, 76 Ill. 340, 341.

VERY FINE STOCK.

The expression "very fine stock," in a written offer for the sale of roses, is held not to constitute an express warranty of title. *Stumpp & Walker Co. v. Lynber*, 84 N. Y. Supp. 912.

VERY GOOD COMPANY.

A contract to obtain a policy of fire insurance "in a very good company" implied that the insurance was to be obtained from a company able and willing to pay in the event of a loss. *Landusky v. Beirne*, 80 N. Y. Supp. 238, 239, 80 App. Div. 272.

VERY SLIGHT FAULT.

The "very slight fault" is that which is excusable, and for which no responsibility is incurred. Civ. Code La. 1900, art. 3556, subd. 13.

VERY WELL.

"Very well," as used in a reply to an offer by one party, may mean assent, and again may mean the strongest dissent. The

tone, inflection, gesture, and manner are the only indicators by which the phrase may be properly interpreted. *Oullahan v. Baldwin*, 35 Pac. 310, 312, 100 Cal. 648.

VESSEL.

A refrigerator is not a "vessel" or bottle, though it may betimes contain liquor, and is not within Gen. St. 1899, § 2420, authorizing a warrant to issue to seize intoxicating liquors and vessels or bottles containing the same. *J. D. Iler Brewing Co. v. Campbell*, 71 Pac. 825, 826, 66 Kan. 361.

VESSEL.

See "Armed Vessels"; "Cartel Vessel"; "Coasting Vessel"; "Ex Vessel"; "Foreign Vessel"; "Sail Vessels."

Other vessel, see "Other."

Seagoing vessel, see "Seagoing."

Vessel in distress, see "Distress."

Vessels in coasting trade, see "Coasting Trade."

Vessels plying coastwise, see "Coastwise Trade."

Vessel regularly employed, see "Regularly Employed."

The word "vessel," as applied to maritime affairs, is understood to mean any vehicle used for transportation on the water. *United States v. Open Boat* (U. S.) 27 Fed. Cas. 846, 352.

The word "vessel" means any structure which is made to float upon the water for purposes of commerce or war, whether impelled by wind, steam, or oars, as used in the Code, declaring that commercial partners are those who are engaged in carrying personal property for hire, in ships or other vessels; and the act cannot be extended to railroads. *Chaffe v. Ludeling*, 27 La. Ann. 607, 611 (citing *Webst. Dict. "Vessel"*).

"A vessel is a locomotive machine for transportation over rivers, seas, and oceans; and it is the purpose and business of the craft, and not its form or its means of propulsion, that determines whether it is a vessel." *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620, 622.

As used in St. 1 & 2 Vict. c. 101, § 4, imposing a penalty on the seller of coals if they are delivered without a proper ticket, and applying only to cases of a delivery by a lighter, vessel, barge, or other craft, the meaning of the word "vessel" is limited, by the words "other craft," to mean "craft," and the section does not apply where the cargo has been delivered bodily out of the vessel in which the coals were shipped onto the wharf of the purchaser. "Vessel" may denote a large or small vessel. Its meaning

must be regulated by the context. *Blanford v. Morrison*, 15 Q. B. 724, 731.

"Vessels" making the capture, within Rev. St. § 4680, are vessels within signal distance and able to render effective aid. *United States v. Officers, etc., of The Mangrove*, 23 Sup. Ct. 343, 345, 188 U. S. 720, 47 L. Ed. 664.

The word "vessel," as defined by Rev. St. § 3 [U. S. Comp. St. 1901, p. 4], has included every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. *Arnold v. Eastin's Trustee*, 76 S. W. 855, 857, 25 Ky. Law Rep: 895.

The term "vessel" includes ships, steamers, and every boat or structure adapted to navigation or movement from place to place by water, either upon the lakes, rivers, or artificial waterways. Gen. St. Minn. 1894, § 6842, subd. 6.

The term "vessel," as used in the Penal Code, includes ships, steamers, canal boats and every boat or structure adapted to navigation or movement from place to place by water, either upon the ocean, lakes, rivers, or artificial waterways. Pen. Code N. Y. 1903, § 718.

"Vessel," as used in the Penal Code, when used with reference to shipping, includes ships of all kinds, steamboats, steamships, canal boats, and every structure adapted to be navigated from place to place. Rev. St. Okl. 1903, § 2692; Pol. Code Mont. 1895, § 16, subd. 7; Rev. St. Utah 1898, § 2498; Pol. Code Cal. 1903, § 17, subd. 7; Rev. Codes N. D. 1899, § 7719; Pen. Code S. D. 1903, § 814.

The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canal boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons. Pen. Code Ariz. 1901, par. 7, subd. 7; Pen. Code Mont. 1895, § 7, subd. 7; Pen. Code Cal. 1903, § 7, subd. 7.

The word "vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water. U. S. Comp. St. 1901, p. 4.

In the construction of the title relating to merchant seamen, the term "vessel" shall be understood to comprehend any description of vessel navigating on any sea or channel, lake, or river to which the provisions of the title may be applicable. U. S. Comp. St. 1901, p. 3120.

The term "vessel," as used in an act for the protection of submarine cables, unless the context otherwise requires, shall be taken to mean every description of vessel used in navigation, in whatever way it is propelled. U. S. Comp. St. 1901, p. 3589.

Barge.

A barge, though without means of self propulsion, is subject to a maritime lien for breach of a contract of hiring as a vessel. *The New York* (U. S.) 93 Fed. 495, 497.

That species of watercraft known on the western rivers of Pennsylvania as "barges" are neither ships, boats, nor vessels, within an act giving lien for work furnished in the construction or repair of such vessels. Appeal of Nease & Co. (Pa.) 3 Grant, Cas. 110.

A "barge" is a boat or vessel, and hence is within the letter of a law relating to "boats and vessels." *The Resort v. Brooke*, 10 Mo. 531, 534.

Boat distinguished.

See "Boat."

Canal boat.

Acts 1862, c. 482, providing for the collection of demands against ships and vessels, should be construed to include a canal boat. *Fralick v. Betts* (N. Y.) 13 Hun, 632, 633 (citing *Emmons v. Wheeler* [N. Y.] 3 Hun, 545); *King v. Greenway*, 71 N. Y. 413, 419; *Crawford v. Collins* (N. Y.) 45 Barb. 269, 271.

A canal boat, which is a boat designed to make a transit over the artificial waters of a canal from port to port, similar to the vehicles on a railroad between two points, is not a vessel in the merchant service performing voyages, within the meaning of Code Civ. Proc. § 317, declaring an action in favor of a person belonging to a vessel in the merchant service for services during a voyage. *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620, 622.

A canal boat is not a ship or vessel, within the meaning of 2 Rev. St. pp. 493, 494, authorizing proceedings for the collection of demands against ships and vessels. Such provision applies only to ships and vessels which navigate the ocean and such as are required to have a coasting license under the laws of the United States. *Many v. Noyes* (N. Y.) 5 Hill, 34, 35.

A canal boat or scow is not a "vessel of the United States" within the meaning of the act of Congress declaring that no bill of sale, mortgage, etc., of any vessel or part of a vessel of the United States shall be valid, unless the same shall be recorded in the office of the collector of the customs, where such vessel is registered or enrolled. *Hicks v. Williams* (N. Y.) 17 Barb. 523, 529.

The term "vessel" would include both canal boats and scows. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

Dredge.

A steam dredge, adapted to be an instrument of transportation on navigable wa-

ter, transporting from place to place the steam shovel and engine, and maintaining the same afloat while being used for the purpose of deepening channels, is within Rev. St. § 3 [U. S. Comp. St. 1901, p. 4], defining a "vessel" as an artificial contrivance used or capable of being used as a means of transportation on water. *The Pioneer* (U. S.) 30 Fed. 206, 207; *Saylor v. Taylor* (U. S.) 77 Fed. 476, 477, 23 C. C. A. 343.

The term "vessel" is defined by Congress as including every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on the water. A dredge is incapable of being used as a means of transportation, and hence is not a vessel, and is not subject to a maritime lien. *Bartlett v. Steam Dredge No. 14*, 64 N. W. 951, 952, 107 Mich. 74, 61 Am. St. Rep. 314.

A dredge boat, without power of self-propulsion and capable of use as a dredging machine only, cannot be regarded as a "vessel," but as a manufacture or machine, within the meaning of Rev. St. § 2511, entitling a manufacture or machine, after exportation from the United States, to be reimported without duty, if returned in the same condition as exported. *United States v. Dunbar* (U. S.) 67 Fed. 783, 784, 14 C. C. A. 639.

Dredges and scows are vessels, and are not dutiable as "goods, wares, and merchandise" under the tariff laws. *The International* (U. S.) 83 Fed. 840.

Ferry boat.

A ferry boat is a "vessel," within the meaning of Laws 1862, c. 482, as amended by Laws 1863, c. 422, providing that, whenever a debt shall be contracted by the builder of a vessel on account of work done or materials furnished, said debt shall be a lien on such vessel, etc. *Phoenix Iron Co. v. Hopatcong*, 27 N. E. 841, 844, 127 N. Y. 206.

Flatboat with pile driver.

A flatboat, with a pile driver and its engine erected thereon, which is mainly used in constructing bulkheads for the erection of channel lights, and which is also employed in transporting materials used in the work, is to be classed as a "vessel," within the maritime jurisdiction, and so subject to maritime liens. *Lawrence v. Flatboat* (U. S.) 84 Fed. 200, 201.

A pile driver, consisting of a floating platform carrying a derrick, engine, and pile-driving apparatus, and also furnished with a wheel by which it may propel itself, and which is not fitted for the purposes of transportation, is not a vessel. *Pile Driver E. O. A.* (U. S.) 69 Fed. 1005, 1007.

Floating bathhouse.

A floating bathhouse, moored to the shore, the house being secured to the shore

by means of bolts and chains, and so arranged as to allow it to rise and fall with the tide, and so constructed that the tide flowed freely through it, was not a vessel, though so described in a libel brought against a steamer that collided with it. *The M. R. Brazos* (U. S.) 17 Fed. Cas. 951.

A bathhouse, built on boats and designed for navigation and transportation, is within the admiralty jurisdiction of the United States. *The Public Bath No. 13* (U. S.) 61 Fed. 692, 693.

Floating dry dock.

"Vessel," as used in Laws 1875, c. 405, declaring that wharfage is collectible from any vessel that uses or makes fast to any pier, etc., embraces every floating structure, so that a floating dry dock is a vessel, within the meaning of that word as used. *Walsh v. New York Floating Dry Dock Co.* (N. Y.) 8 Daly, 387, 389.

Floating elevator.

The term "vessel," as used in admiralty, applies to a floating elevator used in New York Harbor, and consisting of a canal boat on which has been built an apparatus for hoisting grain, although not enrolled or licensed, and having no motive power of its own, nor capacity for other cargo than that of the elevator. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

Floating marine pump.

A marine pump, weighted with heavy ballast, so as to rest on piles, but capable of floating and being towed from place to place, and which is used for sucking mud from beneath the water or from scows alongside, and forcing it by steam power on the adjacent land, is not a vessel, so as to be the subject of admiralty jurisdiction. *The Big Jim* (U. S.) 61 Fed. 503.

Floating wharf.

A floating structure, designed to be moored alongside a wharf, so that carts containing refuse to be dumped into boats can be driven over it from the wharf, is not a "vessel," within the meaning of the maritime law, so that a lien for wharfage cannot attach to it under such law. *Ruddiman v. A Scow Platform* (U. S.) 38 Fed. 158.

Foreign vessel.

The term "vessel," as used in section 4606 of the Revised Statutes [U. S. Comp. St. 1901, p. 3118], providing for the punishment of any person who without the consent of the master goes on board an arriving vessel before she reaches her place of destination, and is moored thereat, applies to foreign vessels, as well as domestic vessels. *United States v. Sullivan* (U. S.) 43 Fed. 602, 604.

Incomplete boat.

"Vessel," as used in Misc. Laws, c. 13, § 17, relating to liens of materialmen for materials furnished in building a vessel, means one that is complete and capable of being used to carry freight or passengers. The hull of a vessel, without the other parts necessary to its use, does not come within the meaning of the statute. *Northrup v. The Pilot*, 6 Or. 297, 299.

A lapstreaked boat, which was unfinished and still in the hands of the builder, and wholly unfit for carrying men or goods on water, is not a "vessel," within Rev. St. c. 126. *Commonwealth v. Francis* (Mass.) 1 Thacher, Cr. Cas. 240, 242.

A vessel is any structure made to float on the water for the purpose of commerce or war, whether impelled by wind, steam, or oars, and does not apply to an incomplete portion thereof, as a hull or other part, requiring construction of other parts. *Yarnberg v. Watson*, 4 Pac. 296, 297, 13 Or. 11.

An old steamboat, from which the boilers, wheels, engines, and machinery had been removed, and which had been changed into a pleasure barge, having no independent means of propulsion, but intended to be towed by a towboat, and to be used in the transportation of excursion parties in the neighborhood of a city, and having her cabins fitted up and used as dancing halls by those who engaged her, is a vessel, within the language of Act Pa. April 20, 1858 (P. L. 363), and Act Pa. June 13, 1836 (P. L. 616), and as such subject to a lien for materials furnished and work done in fitting and repairing her. *The City of Pittsburg* (U. S.) 45 Fed. 699.

A mariner rendering services on board a vessel carrying coal between Philadelphia and New York on tide waters, though she be stripped of sails and masts and be towed by steamboats, may proceed in rem against such vessel for his wages. *The D. C. Salisbury* (U. S.) 7 Fed. Cas. 279.

Open boat.

As used in 3 Stat. 602, declaring that the ports of the United States shall be and remain closed against every vessel owned wholly or in part by a subject of his Britannic majesty coming or arriving from any port in Canada, the term "vessel" does not include open boats without decks. *United States v. Open Boat* (U. S.) 27 Fed. Cas. 354, 355.

As used in Act May 15, 1820, providing that after the 30th of September the ports of the United States shall remain closed against every "vessel," etc., the term "vessel" does not include an open boat. *Id.* 27, Fed. Cas. 346, 352.

Pleasure yacht.

"Vessel," as the term is used in the limited liability act, is properly limited to ships

and other seagoing craft, and does not include vessels employed in inland navigation, which are especially designated by the name of "boats," such as a small pleasure yacht. *The Mamie* (U. S.) 5 Fed. 813, 817.

Raft.

The general term "vessels" includes rafts. *United States v. Marthinson* (U. S.) 58 Fed. 765, 766.

The term "vessel" does not include a log raft constructed to be towed down a river to sawmills. *Moores v. Louisville Underwriters* (U. S.) 14 Fed. 226, 236.

A log raft is a "vessel," and entitled to the same rights in navigable streams as other vessels. *The Mary* (U. S.) 123 Fed. 609, 612.

A raft made of cross-ties, used as a convenient mode of bringing them to market, manned by a pilot, crew, and cook, who lived and had shelter thereon during a voyage which lasted many days, and propelled by the tides and by poles and large oars, was a "vessel," within Rev. St. U. S. § 3 [U. S. Comp. St. 1901, p. 4], defining a vessel as including every description of water craft or other artificial contrivance used or capable of being used as a means of transportation by water. *Seabrook v. Raft of Railroad Cross-Ties* (U. S.) 40 Fed. 596, 598.

A steam tug towing a raft of logs must carry the lights provided by Rev. St. § 4233, rule 4 [U. S. Comp. St. 1901, p. 2894], relating to the carrying of lights by steam vessels when towing other vessels, though such raft may not come strictly within Rev. St. U. S. § 3 [U. S. Comp. St. 1901, p. 4], declaring that the word "vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water. *The Annie S. Cooper* (U. S.) 48 Fed. 703, 704.

The word "vessel" does not include a raft, so as to enable persons to maintain a libel in rem for services in navigating a raft of logs, under an act giving such right for the navigation of a vessel. *Raft of Cypress Logs* (U. S.) 20 Fed. Cas. 169, 170.

A "raft" is a pile of lumber fastened together and placed on the water, and hence is not a vessel, and any assistance rendered to a raft is not a salvage service. *Salvor Wrecking Co. v. Sectional Dock Co.* (U. S.) 21 Fed. Cas. 281.

Rowboat or sailboat.

In common parlance, small rowboats, or small sailboats, are not included in the designation of "vessel," as used in the regulations of the harbor masters of New York Harbor, providing that no vessel shall anchor within certain prescribed limits. *Lambert v. Staten Island R. Co.*, 70 N. Y. 104, 110.

A rowboat is not a "vessel," within the steering and sailing rule (Rev. St. U. S. rule 21 [U. S. Comp. St. 1901, p. 2891]), requiring that every steamer, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop or reverse. Of all water craft rowboats are most easily handled. A few strokes of the oars in the hands of any competent man will take a rowboat out of the path of an approaching steamer. The latter is confined to a channel, often narrow, while the rowboat requires but a few inches of water to float it. To apply the above rule to such craft would wholly ignore the risk upon which it is founded. *Fischer v. Camden Ferry Co.*, 16 Atl. 634, 635, 124 Pa. 154.

Scow.

Scows are properly to be construed vessels, instruments of commerce and navigation, a contract for the repair of which is maritime, because of its relation to trade and commerce and "some connection with a vessel employed in trade." *Endner v. Greco* (U. S.) 3 Fed. 411, 413 (citing *The Kate Tremaine* [U. S.] 14 Fed. Cas. 144; *The Onorere* [U. S.] 18 Fed. Cas. 728; *The Bob Connell* [U. S.] 1 Fed. 218; *New England Marine Ins. Co. v. Dunham*, 78 U. S. [11 Wall.] 1).

A scow is not a "vessel of the United States," within the meaning of the act of Congress declaring that no bill of sale, mortgage, etc., of any vessel of the United States, shall be valid unless the same shall be recorded in the office of the collector of customs. *Hicks v. Williams* (N. Y.) 17 Barb. 523, 529.

A vessel is any structure intended to float upon the water, and a scow is a vessel within the act relating to the harbor master. *Adams v. Farmer* (N. Y.) 1 E. D. Smith, 588, 589.

The term "vessel" would include both canal boats and scows. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

Small lighter.

"Vessel," as used in a statute providing that the proprietors of a certain bridge shall constantly keep some suitable person at the bridge, who shall raise the draw for any vessel that shall be passing up or down the river, etc., includes all vessels of every description, if they cannot conveniently pass unless such draw is raised. Small lighters with movable masts, so circumstanced in their passage through the bridge that their masts can be conveniently taken down and be replaced after the passage, are not within the contemplation of such statute. *Hood v. Proprietors of Dighton Bridge*, 3 Mass. 263, 267.

Steamboat.

The term "vessel" includes a ship of any magnitude, and includes a steamboat. *Tisdell v. Combe*, 7 Adol. & E. 788, 796.

A steam vessel is none the less a vessel, in respect to her being water borne, because she is propelled in whole or in part by steam. *The Manhattan* (U. S.) 16 Fed. Cas. 596, 597.

A vessel is none the less one on account of the manner of her propulsion, whether by oars, sails, or steam; and, as used in the act relating to construction and occupation of berths, "vessel" includes steam vessels. *The Devonshire* (U. S.) 13 Fed. 39, 41.

A steamboat, registered and enrolled as a coasting vessel, is within the description of vessels provided for by 2 Rev. St. p. 493, as to the collection of the demands against "ships and vessels." *Pendleton v. Franklin*, 7 N. Y. (3 Seld.) 508, 512.

The word "vessel," as used in the act relating to immigrants and seamen, shall include vessels propelled by steam. Civ. Code S. C. 1902, § 2302.

As structure.

See "Structure."

VESSEL OF COMMERCE.

A whaling ship is a "vessel of commerce," within a statute abolishing punishment by flogging in the navy and in "vessels of commerce." *United States v. Cutler* (U. S.) 25 Fed. Cas. 740.

VESSEL OF THE NAVY.

The term "vessels of the navy," as used in the title on prize, shall include all armed vessels officered and manned by the United States, and under the control of the Department of the Navy. U. S. Comp. St. 1901, p. 3126.

VESSEL OF THE UNITED STATES.

A foreign-built vessel, the property of citizens of the United States, which had not been registered in the manner prescribed by the statute of 1792, is not a vessel of the United States. *The Merritt*, 84 U. S. (17 Wall.) 582, 585, 21 L. Ed. 682.

The term "vessels of the United States," as used in Act Cong. July 29, 1850, providing that no bill of sale or mortgage of any vessel of the United States shall be valid, as against any other than the parties thereto, unless recorded, was intended to protect the claims of persons dealing with the vessel as a vessel of the United States, connected with the commerce and navigation of the

nation, and a steamboat properly enrolled under the acts of Congress was not such a vessel and within the scope of the act. *Brammell v. Hart*, 59 Tenn. (12 Heisk.) 366, 368.

VEST.

The word "vest" is defined to give an immediate right of present or future enjoyment. *Stewart v. Harriman*, 56 N. H. 25, 29, 22 Am. Rep. 408.

The word "vest" has a well-established and well-recognized meaning. In the *Standard Dictionary* the verb "to vest" is defined as meaning to confer ownership of a property on a person, or invest a person with full title to property, and in the *Century Dictionary* as meaning to pass or devolve as a matter of right or title, irrespective of any immediate right of possession. The ordinary and popular, and, indeed, the legal, meaning of a provision that personal property shall be vested in a certain person, is that the title to the property passes to and rests in him. *Smith v. Proskey*, 79 N. Y. Supp. 851, 853, 39 Misc. Rep. 385.

The term "vested" is not the exact opposite of "contingent," but is in a measure confused with it. It has the quality of opening and sharing, of ending and shifting, in such way that he who yesterday was the only person vested to-day has others sharing with him, and to-morrow may be wholly divested, and this, too, against his consent. *McGillis v. McGillis*, 42 N. Y. Supp. 921, 924, 11 App. Div. 359.

As used in an insurance policy, the terms "interest" and "title" are not synonymous. A mortgagor in possession and a purchaser holding under a deed defectively executed have both of them absolute as well as insurable interests in the property, though neither of them has the legal title. "Absolute" is here synonymous with "vested," and is used in contradistinction to "contingent" or "conditional." *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 116, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17.

The word "vest," in a deed providing that at the death of one the premises thereby conveyed were to vest in another, was effectual on such death to give such other person the property. He became the owner of it by the use of that word. *Lewis v. Howe*, 64 App. Div. 572, 577, 75 N. Y. Supp. 851, 854.

Testator gave his residuary estate to his nephews and nieces and the issue of any of them that may be deceased, living at his death, such issue taking their parents' share, and in default of issue such share to be divided among the survivors. By a subsequent clause he directed that no nephew or

niece or representative of such should have a right to call the trustees under the will to an accounting until he might be entitled to receive the share of his residuary estate, nor should any estate vest until such time. Held, that the word "vest" was used in the sense of "payable," and that the nephews and nieces took an estate the title of which vested in them on the death of testator. *In re Phillips' Estate*, 55 Atl. 210, 205 Pa. 504, 97 Am. St. Rep. 743.

As equivalent to possession.

Some confusion has arisen in the use of the word "vested" when applied to personal property. Originally the word referred only to real estate. It signified the acquisition of a portion of the actual ownership. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus "vested" is nearly equivalent to possession. The only definition that can be given to the word "vested" in English Law, as applied to future interests other than remainders, is that it means not subject to a condition precedent. Hence legacies payable at a future time certain to arise, and not subject to a condition precedent, are vested. On the other hand, legacies only payable on an event which may never happen, and hence subject to a condition precedent, are contingent. *Scott v. West*, 24 N. W. 161, 170, 63 Wis. 529.

VESTED ESTATE.

"An estate is vested when there is a person in being who will take if the precedent estate terminates." *Sheridan v. House*, *43 N. Y. (4 Keyes) 569, 587, 4 Abb. Dec. 218, 225.

A vested estate is an estate when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of some intermediate or precedent estate. *Taylor v. Gould* (N. Y.) 10 Barb. 388, 389, 393; *Hersee v. Simpson*, 46 N. Y. Supp. 755, 756, 20 App. Div. 100; *Hopkins v. Hopkins* (N. Y.) 1 Hun, 352, 354; *Thornton v. Zea*, 55 S. W. 798, 799, 22 Tex. Civ. App. 509; *Smaw v. Young*, 20 South. 370, 375, 109 Ala. 528; *Rev. St. Wis.* 1898, § 2037.

An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. *Flanner v. Fellows*, 68 N. E. 1057, 1058, 206 Ill. 136; *Smith v. West*, 103 Ill. 332, 337; *Bennett v. Garlock* (N. Y.) 10 Hun, 328, 338; *Hopkins v. Hopkins* (N. Y.) 1 Hun, 352, 354; *In re Moran's Will*, 96 N. W. 367, 370, 188 Wis. 177; *Clarke v. McCreary*, 20 Miss. (12 Smedes & M.) 347, 353; *Hayes v. Goode*

(Va.) 7 Leigh, 452, 496. The law favors vested estates and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. For the same reasons estates are held to be vested at the earliest possible period, unless a contrary intention is clearly manifested in the grant. *Tindall v. Tindall*, 66 S. W. 1092, 1094, 167 Mo. 218; *Strode v. McCormick*, 41 N. E. 1091, 1093, 158 Ill. 142.

By a vested estate, in relation to interests of the freehold quality, is to be understood an interest clothed, as to legal estates with a legal seisin, or as to equitable estates with an equitable seisin, which enables the person to whom the interest is limited to exercise the right of present or future enjoyment immediately in point of estate. A vested estate is an interest clothed with a present, legal, and existing right of alienation. *Thornton v. Zea*, 55 S. W. 798, 799, 22 Tex. Civ. App. 509.

The term "vested estate" includes all estates which are not contingent, whether in possession, reversion, or remainder, as used in Civ. Code, § 490, subsec. 2, providing that, if the estate be in possession and the property cannot be divided without materially impairing its value, a vested estate in real property jointly owned by two or more persons may be sold. *Ward v. Edge*, 39 S. W. 440, 443, 100 Ky. 757.

VESTED FUTURE ESTATE.

Future estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or preceding estate. *Sage v. Wheeler*, 37 N. Y. Supp. 1107, 1109, 3 App. Div. 38; *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468; *Wadsworth v. Murray*, 51 N. Y. Supp. 1038, 1043, 29 App. Div. 191; *Livingston v. New York Life Ins. & Trust Co.*, 13 N. Y. Supp. 105, 107, 59 Hun, 622; *Dana v. Murray*, 122 N. Y. 604, 616, 26 N. E. 21, 24; *Leslie v. Marshall* (N. Y.) 81 Barb. 560, 564; *Gen. St. Minn.* 1894, § 4374; *Comp. Laws Mich.* 1897, § 8795.

VESTED FUTURE INTEREST.

A "future interest" is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent estate. Civ. Code Cal. 1903, § 694; *Rev. Codes N. D.* 1899, § 3293; *Civ. Code S. D.* 1903, § 209; *Civ. Code Idaho* 1901, § 2357; *Civ. Code Mont.* 1895, § 1115.

VESTED IN INTEREST.

An estate is "vested in interest" when there is a present, fixed right of future en-

joyment. *Smith v. West*, 103 Ill. 332, 337. One of the tests, though not exclusive, is the right of alienation. Some of the authorities hold that the policy of the law against clogging the free alienation of estates is the reason for the rule against perpetuities. *Gray, Perpetuities*, § 205, says: "A vested interest is not subject to the rule against perpetuities, for *ex vi termini* it is not subject to a condition preceding it. A remainder is vested, if it is ready to take effect whenever and however the particular estate determines." *Gates v. Seibert*, 57 S. W. 1065, 1066, 157 Mo. 254.

A remainder is vested in interest where the person is in being and ascertained who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, providing the estate limited to him by the remainder shall so long continue; in other words, where the remainderman's right to an estate in possession cannot be defeated by third persons, the contingent evidence, or by the felony of a condition precedent if he lives, and the estate limited to him by way of remainder continues until all the precedent estates are determined, his remainder is vested in interest. *Hawley v. James* (N. Y.) 5 Paige, 317, 466.

VESTED IN POSSESSION.

An estate is "vested in possession" when there is a right of present enjoyment. *Smith v. West*, 103 Ill. 332, 337; *Gates v. Seibert*, 57 S. W. 1065, 1066, 157 Mo. 254.

VESTED INTEREST.

See "Absolute Vested Interest."

A vested interest is where there is an immediate fixed right of present or future enjoyment, whereas an executory interest *ex vi termini* implies that something further is to be done for the completion of the trust and the vesting of an estate in a party. *Hayes v. Goode* (Va.) 7 Leigh, 452, 496.

A "vested estate" gives a certain and fixed right of present or future enjoyment; that is, an interest clothed with a present, legal, and existing right of alienation. An interest, when vested, and whether it entitles the owner to the possession now or at a future period, is fixed and present, so that the right of ownership over the land or other subject of property to the extent of the estate may be aliened. *Allison v. Allison's Ex'rs*, 44 S. E. 904, 915, 101 Va. 537, 63 L. R. A. 920.

It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which makes the difference between a vested and a contingent interest. *Hawkins v. Behling*, 48 N. E. 94, 95, 168 Ill. 214 (citing 4 Kent, Comm. 205; Tem-

ple v. Scott, 143 Ill. 290, 296, 32 N. E. 366); Lewis v. Howe, 66 N. E. 975, 977, 174 N. Y. 340; Smaw v. Young, 20 South. 370, 371, 109 Ala. 528.

At common law, before the contingency happened, contingent remainders could not be conveyed, except by way of estoppel. Yet they were assignable in equity, since theoretically such a remainder was not an estate, but a mere chance of having one. Under the statutes in various states, if the person who is to take the estate is ascertained, he has what is called a "vested interest in a contingent remainder" which may be alienated by deed. *Bunting v. Speck*, 21 Pac. 288, 292, 41 Kan. 424, 3 L. R. A. 690.

"Vested interest" can mean nothing else than an interest in respect of which there is a fixed right of present or future enjoyment. The power of a testator over his will to destroy it, make a new one, or appoint another executor, seems to leave narrow ground for the contention that the interest of the executor named therein is a vested interest. *Stewart v. Harriman*, 56 N. H. 25, 29, 22 Am. Rep. 408.

A policy of life insurance, the moment it is issued, creates a vested interest in the beneficiary named. *Laughlin v. Norcross*, 53 Atl. 834, 835, 97 Me. 83.

A testator, by his will, after making specific bequests, ordered that the rest of his estate should be sold by his executors and turned into money as soon after his death as convenient and distributed among his children in the following proportions: Two shares to each of his sons, and one share to each of his daughters—and provided that none of the legacies should lapse by the death of any of his children, but in the case of such death the share of the deceased child or children should go to his or their issue in the proportions stated, and if such a deceased child should leave no issue then his or her share should go to and among his surviving children in like proportions. It was held under the will that on the death of the testator his children took vested interests in their respective shares, though no payment could be made until after the land was sold, but it in nowise affected the vesting of the title. *Herbert v. Smith*, 1 N. J. Eq. (Saxt.) 141, 145.

VESTED LEGACY.

On the subject of what constitutes a vested or contingent legacy, this court has in many cases iterated and reiterated the rule of the courts in England that where there is a substantive bequest or gift of a sum of money to be paid at a future time the legacy is vested, but where there is no antecedent debt or bequest independent of the

period fixed for payment then it is not vested, but contingent. *Magoffin v. Patton* (Pa.) 4 Rawle, 113; *Appeal of Selbert*, 19 Pa. (7 Harris) 49, 56; *Lamb v. Lamb* (Pa.) 8 Watts, 184 (cited in *Appeal of Bowman*, 34 Pa. [10 Casey] 19, 23).

The term "vested" is constantly used of legacies to indicate more than not being "contingent," in the common use of that term as to estates in real property, namely, to indicate one which is not subject to be divested, or one that is not defeasible by lapse of time or otherwise. A legacy is not said to be vested, except where a legatee has power to extinguish by release or give perfect title by assignment. Where words of futurity are annexed to the substance of the gift, and there is nothing in the will to manifest a different intention, the gift itself will be deemed future, and the question of who is the beneficiary will be deemed dependent on the state of facts when that future time shall arrive. And in this class of cases the legacy is said meanwhile not to be vested, although, if it were an estate in real property given by the same language, it would technically be called a "vested," as distinguished from a "contingent" remainder. *Talmadge v. Seaman*, 32 N. Y. Supp. 906, 908, 85 Hun, 242 (citing *Delafield v. Shipman*, 18 Abb. N. C. 300, note).

When a legacy is directed to be paid at a future time or on a future event, it is vested or contingent, according to the intent of the testator as expressed in his will. If the time or event is annexed to the payment of the legacy, it is vested; if to the substance or gift of the legacy, it is contingent. Therefore if a legacy be given to a person, payable or to be paid at or when he shall attain the age of 21 years, or at any other definite period or event, the legacy becomes vested immediately upon the testator's death, and is transmissible to the will or administration of the legatee, though he die before the time of payment. But if the words "payable" or "to be paid" are omitted, and the legacy is given at 21, or at or upon any other future period, the interest is contingent, and depends for its vesting on the legatee being alive at the period or event specified. *Rubencane v. McKee*, 6 Atl. 639, 641, 6 Del. Ch. 40 (citing *Conwell's Adm'r v. Heavilo's Adm'r* [Del.] 5 Har. 296).

A legacy is contingent, and not vested, when the payment thereof is deferred for reasons personal to the legatee. Thus a will directing the trustee, on the death of a life tenant, to pay out of the residuary estate a certain amount to each of two nephews of testatrix when they shall reach majority, and, in case either die before that age, to pay his legacy to the survivor, creates contingent, and not vested, legacies. In *re Engles' Estate*, 81 Atl. 76, 78, 166 Pa. 645.

If a legacy, charged upon the personal estate only of the testator, be given unconditionally, and dependent upon no future contingency, then, though the day of payment be postponed, as if it is to be paid when the legatee attains the age of 21 years, or marries, or some other contingency happens, yet, if the legatee die before that day, his representatives shall take. It is a vested legacy,—it cannot fall. *Fairly v. Kilne*, 3 N. J. Law (2 Penning.) 754, 758, 4 Am. Dec. 414.

Where a testator, among other things, directed and bequeathed as follows: "All the residue of my estate, after payment of my debts, etc., I give and bequeath to my children, to wit," naming them, "equally to be divided among them, share and share alike. Nevertheless my intent and meaning is that if my said daughter Anna should die, but leaving no child or children, then her dividend out of my estate shall be equally divided among my sons and my daughter Mary"—this was a "vested legacy." *Hull v. Eddy*, 14 N. J. Law (2 J. S. Green) 169, 178.

VESTED REMAINDER.

A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, or eo instante that it determines. *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869; *Cuyler v. Ferrill* (U. S.) 6 Fed. Cas. 1088, 1090; *Byrne v. France*, 33 S. W. 178, 180, 131 Mo. 639; *Bunting v. Speck*, 21 Pac. 288, 296, 41 Kan. 424, 3 L. R. A. 690; *Haward v. Peavey*, 21 N. E. 503, 505, 128 Ill. 430, 15 Am. St. Rep. 120; *Hauptman v. Carpenter*, 16 App. D. C. 524, 528; *Richardson v. Penicks*, 1 App. D. C. 261, 264; *Phinix v. Foster*, 7 South. 836, 837, 90 Ala. 262; *Allison v. Allison's Ex'rs*, 44 S. E. 904, 915, 101 Va. 537, 63 L. R. A. 920.

A remainder is vested when there is a person in being who would have an immediate right to the possession of the lands on the ceasing of the intermediate or precedent estate. *Taylor v. Gould* (N. Y.) 10 Barb. 888, 396; *Hennessy v. Patterson*, 85 N. Y. 91, 100; *Minot v. Minot*, 45 N. Y. Supp. 554, 557, 17 App. Div. 521; *Dana v. Murray*, 84 N. Y. St. Rep. 611, 617; *Bennett v. Garlock* (N. Y.) 10 Hun, 328, 338; *Williams v. Peabody* (N. Y.) 8 Hun, 271, 272; *Kingsley v. Broward*, 19 Fla. 722; *Croxall v. Sherrerd*, 72 U. S. (5 Wall.) 268, 288, 18 L. Ed. 572; *Chapin v. Crow*, 147 Ill. 219, 222, 35 N. E. 536, 37 Am. St. Rep. 213; *Forsythe v. Lansing's Ex'rs*, 59 S. W. 854, 855, 109 Ky. 518; *Curtis v. Zutavern* (Neb.) 93 N. W. 400, 405; *Wood v. Griffin*, 46 N. H. 230, 234.

The term "vested," as applied to remainders, has unfortunately been used in English

and American law with two meanings: (1) It may signify simply a remainder so far vested as to be capable of alienation, and the subject of succession by inheritance. (2) It may also signify a remainder so absolutely vested that the remainderman is certain to come into possession immediately on the determination of the precedent estate. *Johnson v. Edmond*, 33 Atl. 503, 505, 65 Conn. 492, 499.

A vested remainder is an immediate right of present enjoyment or a present fixed right of future enjoyment. *Bufford v. Holliman*, 10 Tex. 560, 572, 60 Am. Dec. 223; *Havens v. Sea Shore Land Co.*, 20 Atl. 497, 501, 47 N. J. Eq. 365; *Mercer v. Safe Deposit & Trust Co.*, 45 Atl. 865, 869, 91 Md. 102.

A vested remainder is one limited to a certain person at a certain time or upon the happening of a necessary event. *Civ. Code Ga.* 1895, § 3100; *Olmstead v. Dunn*, 72 Ga. 850, 860; *Fields v. Lewis*, 45 S. E. 437, 438, 118 Ga. 573.

"A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent." *Paul v. Frierson*, 21 Fla. 529, 533; *Hempstead v. Dickson*, 20 Ill. (10 Peck) 193, 195, 71 Am. Dec. 260.

A vested remainder is an estate fixed to remain in a determinate person after the particular estate is spent or comes to an end. *Marvin v. Ledwith*, 111 Ill. 144, 150.

"Vested remainders are remainders which pass by the conveyance to certain persons, but the possession and enjoyment only are postponed until a particular estate is determined." *Bunting v. Speck*, 21 Pac. 288, 290, 41 Kan. 424, 3 L. R. A. 690.

"Vested remainders" (or remainders executed, whereby a present interest passes to the party, though to be enjoyed in future) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. In re *Moran's Will*, 96 N. W. 367, 369, 118 Wis. 177; *Ducker v. Burnham*, 146 Ill. 9, 22, 34 N. E. 558, 37 Am. St. Rep. 135; *Hawley v. James* (N. Y.) 16 Wend. 61, 137; *Jackson's Adm'r v. Sublett*, 49 Ky. (10 B. Mon.) 467, 470.

A vested remainder is a remainder limited to a certain person and on a certain event, so as to possess a present capacity to take effect in possession should the possession become vacant. *Wallace v. Minor*, 10 S. E. 423, 425, 86 Va. 550; *Lantz v. Massie's Ex'x*, 40 S. E. 50, 99 Va. 709; *Chippis v. Hall*, 23 W. Va. 504, 515.

Gray, *Perpetuities*, § 209, says: "A remainder is vested if it is ready to take effect whenever and however the particular estate determines, and it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or

lives in being." *Gates v. Seibert*, 57 S. W. 1065, 1066, 157 Mo. 254.

A "vested remainder" is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person, who was in esse and answered the description of the remainderman during the continuance of the particular estate, would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. *Woodman v. Woodman*, 35 Atl. 1037, 1038, 89 Me. 128; *Chapin v. Nott*, 67 N. E. 833, 835, 203 Ill. 341 (citing *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81); *Weehawken Ferry v. Sisson*, 17 N. J. Eq. (2 C. E. Green) 475, 479.

A "vested remainder" is a present fixed right of future enjoyment, depending on no dubious or uncertain event. *Rickey v. Hillman*, 7 N. J. Law (2 Halst.) 180, 187.

A vested remainder is a remainder which is limited to a person in being and ascertained to take effect by words of express limitation on the determination of the preceding particular estate. When it is ascertained that the remainder may take effect in possession on the determination of the preceding estate, at whatever time, and however early, and by whatever means these estates may determine, the remainder must be considered as vested. *Kemp v. Bradford*, 61 Md. 330, 335.

A vested remainder is one that takes effect in the interest and right immediately on the death of the testator, although it may not take effect—indeed, if it be a remainder, it cannot take effect—in possession and enjoyment until the death of the devisee for life or other determination of the particular estate. In a case of a devise of an estate for life to testator's son, with remainder to testator's heirs, such heirs were ascertained at the moment of the event of the testator's decease, and by the same event the will took effect. There was no contingency as to who was to take, and the court held that the remainder vested in testator's children equally, including the one to whom the life estate was devised. *Brown v. Lawrence*, 57 Mass. (3 Cush.) 390, 397.

Contingent remainder distinguished.

"The broad distinction between vested and contingent remainders is this: In the first there is some person in esse, known and ascertained, who by the will or deed creating the estate is to take and enjoy the estate, and whose right to such remainder no contingency can defeat. In the second it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may

not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect." *Bunting v. Speck*, 21 Pac. 288, 296, 41 Kan. 424, 3 L. R. A. 690.

It is the present capacity of taking effect in possession, if the possession should ever become vacant, not the certainty that it ever will become vacant while the remainder continues, that distinguishes a vested from a contingent remainder. *Kinkead v. Ryan*, 53 Atl. 1053, 1055, 64 N. J. Eq. 454 (citing *Van Dyke's Adm'r v. Vanderpool's Adm'r*, 14 N. J. Eq. 198); *Havens v. Sea Shore Land Co.*, 20 Atl. 497, 501, 47 N. J. Eq. 385; *Ralley v. Milam*, 5 S. W. 367, 368, 9 Ky. Law Rep. 409; *Johnson v. Robertson*, 45 S. W. 523, 524, 20 Ky. Law Rep. 135; *Walters v. Crutcher* (Ky.) 15 B. Mon. 2, 10; *Chew v. Keller*, 100 Mo. 368, 13 S. W. 395; *Patrick v. Blair*, 24 S. W. 767, 769, 119 Mo. 105; *Smaw v. Young*, 20 South. 370, 381, 109 Ala. 528; *Paul v. Frierson*, 21 Fla. 529, 533; *Kingsley v. Broward*, 19 Fla. 722; *Croxall v. Sherrerd*, 72 U. S. (5 Wall.) 268, 288, 18 L. Ed. 572; *Heilman v. Heilman*, 129 Ind. 59, 65, 28 N. E. 310.

It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to this extent every remainder is and must be liable, since the remainderman may die without heirs before the distribution of the particular estate. The present capacity to take effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested from a contingent remainder. *Moore's Adm'r v. Sleet*, 68 S. W. 642, 643, 113 Ky. 600; *Forsythe v. Lansing's Ex'rs*, 59 S. W. 854, 855, 109 Ky. 518; *Evans v. Davis* (Pa.) 1 Yeates, 332, 340; *Bruce v. Bissell*, 119 Ind. 525, 528, 22 N. E. 4, 12 Am. St. Rep. 436.

The term "remainder" is a relative expression, and implies that some part of the thing is previously disposed of. Vested remainders, or remainders executed, whereby a present interest passes to the party, are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. And contingent or executory remainders, whereby no present interest passes, are where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. *Hudson v. Wadsworth*, 8 Conn. 348, 359.

A "vested remainder" is an estate in present, although to be enjoyed in the future, while a contingent remainder is an estate to vest upon the happening of some future event. A contingent, and not a vested, remainder is created in the children of the devisees by a will in which the testatrix gives property to her sisters, to hold the same

during their lives and at their decease to descend to their children, respectively, and to be equally divided among them or the survivors of them. *Spear v. Fogg*, 32 Atl. 791, 792, 87 Me. 132.

Estates created by a testator will be regarded by the courts as vested estates, and not contingent, unless it is manifest that a contrary result was intended. A power given a life tenant to sell and convey the fee did not render the remainder contingent, but it was a vested remainder. *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267. And though a power is given to a trustee to pay or deliver over the estate to the life tenant, yet the remainder is vested. *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543. In 4 Kent, Comm. p. 228, the author says: "A remainder limited upon an estate tail is held to be vested, though it must be uncertain whether it will ever take place." *Boatman v. Boatman*, 65 N. E. 81, 83, 198 Ill. 414.

As estate of inheritance.

See "Estate of Inheritance."

As property.

See "Property."

VESTED RIGHT.

A "vested right" is defined to be an immediate fixed right to present or future enjoyment, or where the interest does not depend on a period or an event that is uncertain. *Clarke v. McCreary*, 20 Miss (12 Smedes & M.) 347, 353; *Marshall v. King*, 24 Miss. (2 Cushm.) 85, 90; *Oriental Bank v. Freeze*, 18 Me. 109, 36 Am. Dec. 701; *Edworthy v. Iowa Savings & Loan Ass'n*, 86 N. W. 315, 316, 114 Iowa, 220 (citing *Louisville & T. Turnpike Road Co. v. Boss* [Ky.] 44 S. W. 981); *Gladney v. Sydnor*, 72 S. W. 554, 556, 172 Mo. 318, 60 L. R. A. 880, 95 Am. St. Rep. 517.

A vested right is a right to do or possess certain things which the parties had already begun to exercise, which is either authorized by the statute or to the exercise of which no obstacle exists in the laws which have been enacted. *Day v. Madden*, 48 Pac. 1053, 1057, 9 Colo. App. 464.

A vested right is held subject to the laws for the enforcement of public duties, and though the privileges and rights of heirs and legatees who can take and receive shares of the property of a decedent are vested immediately on the death of the testator or intestate, and the right to such share vests in those entitled directly on his death, yet the right to take a legacy is subject to the laws for the assessment and collection of a tax, as a premium on the right and privilege to receive the inheritance, as much as it is subject to laws which authorize the taxation of the very property bequeathed. *Gelsthorpe*

v. Furnell, 51 Pac. 267, 270, 20 Mont. 299, 39 L. R. A. 170.

The term "vested rights," within the meaning of the rule that vested rights cannot be taken away by retrospective legislation, includes the right in property which one owns. A vested right is property, as tangible things are property, when they spring from contract or the principles of the common law. There is a vested right in an accrued cause of action, in a defense to a cause of action, or even in the statute of limitation, when the bar has attached, by which an action for a debt is barred. When a writ has been approved by judgment, the fruits of recovery cannot be divested by new legislation or subjected to new hazard by reviving a new writ of appeal or some other mode of review. *Cassard v. Tracy*, 27 South. 368, 374, 52 La. Ann. 835, 49 L. R. A. 272.

A "vested right" is property which the law protects. *Hoelt v. Supreme Lodge Knights of Honor*, 45 Pac. 185, 186, 113 Cal. 91, 33 L. R. A. 174.

A "vested right" is the privilege to enjoy property legally vested, or to enforce contracts and enjoy the rights of property conferred by the existing law. To take property from A. and give it to B.; to deny validity to contracts legal when made; to prevent their enforcement according to the terms stipulated; to compel a party to perform in a different manner from his contract—in these and like cases, rights will be divested; but a privilege or right to resort to this or that particular court is not such a right as the Legislature is prohibited from changing. *Fisher's Negroes v. Dabbs*, 14 Tenn. (6 Yerg.) 119, 154.

At the common law, the husband immediately on his marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away. *Holliday v. McMillan*, 79 N. C. 315, 318.

Where one who contracts to build a bridge for a county draws an order in payment of a valid debt on the fund to be earned, which is accepted by the county, the order is an equitable assignment of so much of the fund as is necessary to pay it, and creates a valid contract between the payee and the county, which is a vested right that cannot be affected by a mechanic's lien law subsequently passed, giving parties furnishing material to the contractor a lien on money due or to become due under his contract. *Young v. Jones*, 54 N. E. 235, 236, 180 Ill. 216.

A "vested right" has been defined briefly as an immediate, fixed right of posses-

sion or future enjoyment. *Young v. Jones*, 54 N. E. 235, 236, 180 Ill. 216.

When the right to a patent becomes perfect, the full equitable title passes to the purchaser, with all the benefits, immunities, and burdens of ownership. A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. A patent certificate protects the purchaser's rights as fully as a patent. A "vested right to a patent" for public land is equivalent to a patent issued. The execution and delivery of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty. As a matter of law officers of the Land Department of the government are agents of the law. They cannot act beyond its provisions, nor make any disposition of land not sanctioned by law; and where, after a purchaser of government land has acquired a vested right to the patent, the officers of the land department wrongfully cancel his entry and issue a patent to another person, such act does not deprive the officer of his right to the land. *Stimson Land Co. v. Rawson* (U. S.) 62 Fed. 426, 429.

A "vested right" is defined as the power one has to do certain actions or to possess certain things according to the laws of the land. The Act of Assembly of 1837 authorizing a railroad company to erect a bridge over a creek is constitutional, and gives no right of action to the owner of a mill above, though damage results to him from a loss of navigation and obstructing the flowage of water; and an act giving the right of action for the unauthorized obstructions, passed after the obstructions were made, which act was not accepted by the railroad company, interferes with the vested rights of the company, being a violation of their charter and of the obligations of the contract with them, and hence unconstitutional. *Bailey v. Philadelphia, W. & B. R. Co.* (Del.) 4 Har. 389, 400, 44 Am. Dec. 593.

When "vested rights" are spoken of by the courts as being exempt from legislative interference, they mean those rights to which a party may adhere, and upon which he may insist, without violating any principle of sound morality. In the language of Judge Duncan, in *Satterlee v. Matthewson* (Pa.) 16 Serg. & R. 169, 191: "There can be no vested right to do wrong." In the nature of things, there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation. *Grinder v. Nelson* (Md.) 9 Gill, 299, 309, 52 Am. Dec. 694.

Exemption.

Privileges extended to debtors by existing exemption laws are not, as to particular property which comes within their protection, "vested rights." *Bull v. Conroe*, 13 Wis. 233, 238.

"Vested rights," in the widest sense, are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them. A statutory exemption from performance of service upon juries or from militia duty, or exemption from taxation, and numerous other rights which will suggest themselves, are vested rights equally with the right to the writ of habeas corpus, the right to trial by jury, and the right of private property; yet there are but two classes for which immunity against the encroachment of the lawmaker can be claimed. The first class are those expressly protected by the constitutional provisions, either federal or state, such as the right of trial by jury and the privilege of the writ of habeas corpus. The other class is not expressly shielded by the fundamental law, and is limited to two or three instances. These are the title to private property, the incompetency of the Legislature to pass a law denying to a man notice, actual or constructive, of a suit against him or a right to be heard therein, and a principle that a man shall not be made a judge in his own case. *Moore v. State*, 43 N. J. Law (14 Vroom) 203, 243, 39 Am. Rep. 558.

The term "vested right" relates to property rights, and does not embrace within its meaning the immunity or exemption created by an omission, in the statute under which a corporation is effected, to impose a liability for the paving of streets used and occupied by the corporation as a street surface railroad. *Weed v. Common Council of City of Binghamton*, 56 N. Y. Supp. 105, 108, 28 Misc. Rep. 208.

Expectant and contingent rights distinguished.

A vested right is an immediate, fixed right of present or future enjoyment. Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend on the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting. *Pearsall v. Great Northern Ry. Co.*, 16 Sup. Ct. 705, 713, 161 U. S. 648, 40 L. Ed. 838.

Expectation.

A right cannot be considered as vested, unless it is something more than a mere expectation, and has already become a title, legal or equitable, to the present or future enforcement of a demand or a legal exemption from a payment made by another. *Richardson v. Akin*, 87 Ill. 138 (citing *Cooley*,

Const. Lim. 359); *Toronto v. Salt Lake County*, 37 Pac. 587, 588, 10 Utah, 410.

A "vested right," to be within the protection of the Constitution against interference therewith, must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property in some way or another. *Steers v. Kinsey*, 58 S. W. 1050, 1053, 68 Ark. 360 (citing *Black*, St. Const. 430; *Suth. St. Const.* § 164).

A mere expectation is not a "vested right," and the right of officers who are not appointed under the Constitution to compensation becomes vested only as it accrues, so that an act reducing their salaries may be made to apply to services rendered after the passage of the act in proceedings commenced prior thereto. In re Mayor, etc., of City of New York, 53 N. Y. Supp. 875, 876, 33 App. Div. 365.

A right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws. It must have become a title, legal or equitable, to the present or future enjoyment of the property, and it is because the mere expectation of property in the future is not considered a vested right that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. *Stratton Claimants v. Morris Claimants*, 15 S. W. 87, 91, 89 Tenn. (5 Pickle) 497, 12 L. R. A. 70.

A mere expectation is not a vested right, under Greater New York Charter, Laws 1897, c. 378, § 998, fixing the compensation of commissioners in street-opening proceedings at six dollars per day. Commissioners appointed before the charter took effect are entitled to only such sum for services performed after the taking effect of the charter. In re Wilkins Place, 54 N. Y. Supp. 65, 68.

Inchoate right to dower.

It is said in *Mason v. Mason*, 140 Mass. 63, 3 N. E. 18, that an inchoate right of dower is a vested right of value, but it would seem that the word "contingent," which was used in *Bullard v. Briggs*, 24 Mass. (7 Pick.) 533, 537, 19 Am. Dec. 292, would more accurately describe the nature of the estate. *Flynn v. Flynn*, 50 N. E. 650, 651, 171 Mass. 312, 42 L. R. A. 98, 68 Am. St. Rep. 427.

Penalty.

The law recognizes no vested rights in penalties. *Parmelee v. Lawrence*, 48 Ill. 331, 339.

The repeal of a penal statute pending an appeal from judgment thereunder is not a deprivation of a vested right, since no one has a vested right in an unenforced penalty. *Anderson v. Byrnes*, 54 Pac. 821, 822, 122 Cal. 272.

A vested right is one perfect in itself, and which does not depend upon a contingency or the commencement of a suit. It was held that a county did not have a vested right in a statutory penalty before judgment was obtained therefor. *Coles v. Madison County*, 1 Ill. (Breese) 154, 157, 12 Am. Dec. 161.

A right cannot be regarded as vested in the constitutional sense until it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general laws. Thus the right of a municipality to the penalties and interest accruing on delinquent taxes cannot be said to be a vested right. *City of New Whatcom v. Roeder*, 61 Pac. 767, 769, 22 Wash. 570.

Remedies or matters of procedure.

Parties have no vested rights in remedies or matters of procedure, and there is nothing in attachment proceedings that constitutes a vested right on the part of the plaintiffs therein to the property attached. *Steers v. Kinsey*, 58 S. W. 1050, 1053, 68 Ark. 360.

A "vested right" is property arising from contract, or from the principles of the common law, which cannot be destroyed, devested, or impaired by legislation. In cases where a contract is made in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made; but imperfect and inchoate rights are subject to future legislation, and may be extinguished while in that condition. *Royston v. Miller* (U. S.) 76 Fed. 50, 53.

VESTURE.

The term "vesture," according to Lord Coke, was used to denote corn, grass, underwood, and the like. Co. Litt. 46. Shepherd, in his Touchstone, seems to speak of the terms "vesture" and "herbage," as having the same meaning. But this is not the sense of the passage. Shepherd is enumerating the words by which particular interests, and the words by which the land itself, will pass, and he mentions grants of the vesture or herbage and instances grants of particular

interests, and a grant of all the profits and an instance of a grant of the land itself. The terms "vesture" and "herbage" are coupled by Touchstone, not because they mean the same thing, but because they are words by which a particular interest will pass. *Simpson v. Coe*, 4 N. H. 301, 303.

VETERAN.

In the rules adopted by the state civil service commission, the word "veterans" is defined as relating to "honorably discharged soldiers and sailors of the army and navy of the United States in the late Civil War, who are citizens and residents of this state." *People v. Stratton*, 80 N. Y. Supp. 260, 273, 79 App. Div. 149; *People v. Burch*, 80 N. Y. Supp. 274, 275, 79 App. Div. 156.

"Veterans," as used in Laws 1883, c. 354, as amended by Laws 1884, c. 14, and Laws 1886, c. 29, giving a preference in public employment to veterans of the Civil War, etc., means those who have had much experience, who have grown old in service, and does not include a member of a military regiment temporarily called out for a few days' service only. *People v. Adams*, 18 N. Y. Supp. 806, 897, 64 Hun. 634.

The word "veteran," in the chapter relating to the civil service, shall mean a person who served in the army or navy of the United States in the War of the Rebellion and was honorably discharged therefrom, or a citizen of the commonwealth who distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the President of the United States. *Rev. Laws Mass. 1902*, p. 327, c. 19, § 20.

VETERINARY SURGEON.

A "veterinary surgeon" is a person lawfully practicing the art of treating and healing injuries and diseases of domestic animals. As used under Gen. St. 1894, § 7948, a person cannot lawfully practice such arts without a license. Evidence that a person was a veterinary surgeon is sufficient evidence that he is a licensed veterinary surgeon. *Lyford v. Martin*, 82 N. W. 479, 480, 79 Minn. 243.

A veterinary surgeon lawfully engages, and is bound, to use in the performance of his duties and in his employment such reasonable skill, diligence, and attention as may be ordinarily expected of persons of that profession. He does not contract to use the highest degree of skill, nor extraordinary amount of diligence, but to exercise a reasonable degree of knowledge, diligence, and attention. *Barney v. Pinkham*, 45 N. W. 694, 29 Neb. 350, 26 Am. St. Rep. 389.

VETO.

The word "veto" is of Latin extraction, and, literally translated, means "I forbid" or "I deny." These words have a singularly ominous sound when they are applied in a democratic government, and at once call attention to the fact and challenge the authority. There are, in constitutional governments, two fundamental theories upon which the grant of the power of "veto" rests: First, to preserve the integrity of that branch of government in which the vetoing powers are vested, and thus maintain an equilibrium of governmental powers; second, to act as a check upon corrupt or hasty and ill-considered legislation. These theories have entered into all debates touching the power. The right, when given at all, is usually lodged in the executive branch of government. Rome vested it in the tribune, and the salutation, "I forbid," pronounced by a tribune, stationed at the door of the Roman senate, meeting a bill, nullified it. The crown, in England, possesses the same power. French philosophers exhausted their learning and ingenuity upon the constitution of 1791, and saw it fall apart, for the reason, among others, that the king possessed the power of suspension of legislation, unless adopted by three successive assemblies. The Spanish king might twice refuse his sanction to the action of the Cortes before it could find a place in the law, under the Constitution of 1812; and the Norwegian constitution of 1814 was like it in this respect. The early colonial legislatures felt the same power both from crown and governor, for it was the practice of the latter to have money orders in his favor injected into or accompanying bills to be signed, so that he might receive the former at the time or before he signed the latter, which accompaniment was much preferred; while the grievance against the crown found expression in the declaration, "He has refused his assent to laws the most wholesome and necessary for the public good." It was thought by Blackstone that this absolute power of veto was needful for equilibrium, and so he wrote: "Here, then, is lodged the sovereignty of the British constitution, and lodged as beneficially as is possible for society; for in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme powers were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy, and so want two of the three principal ingredients of good polity—either virtue, wisdom, or power. If it were lodged in any of the two branches—for instance, in the king and House of Lords—our laws might be providently made and well executed, but they might not always have the good of the people in view; if lodged

in the king and commons, we should want that circumspection and mediatory caution which the wisdom of the peers is to afford; if the supreme rights of legislature were lodged in the two houses only, and the king had no negative on their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded that nothing can endanger or hurt it but destroying the equilibrium of power between one branch of the legislature and the rest." *Bl. Comm. (Chase's Ed.)* 17. It is to be noticed in this connection that the British constitution makes the crown a constituent part of the legislature, which does not find place in this government. The truth of the statement that one generation has not foresight sufficient to legislate for the next finds vivid confirmation from this quotation, for it remains as a fact that since 1692 the right of veto by the crown has not been exercised, and it is asserted by some writers that its exercise at this day would lead to a revolution. The veto power was regarded with great distrust and disfavor by the framers of our government, both state and national, and its right of exercise is by no means universal now. Only one of the original state Constitutions—Massachusetts—gave even a qualified veto, while the Articles of Confederation withheld it entirely, reaching the other extreme of requiring the assent of nine states to important acts of legislation, thus giving to a minority of five states an absolute right of veto. The happy solution of this question by the framers of the federal Constitution had for its basis the integrity of the executive branch of the government, and very little consideration was given to the theory of a check upon ill-considered and hasty legislation. As late as 1884, and, so far as I possess the information at this date, Delaware, North Carolina, Ohio, and Rhode Island still, withhold the veto power from the executive; while in eight others a majority vote of the whole number of members elected to the Legislature constitutes all that is required to override a veto. By the constitution of 1871 the German Empire vests its legislative powers in the federal council and the imperial diet. No mention is made of the emperor, but in certain specified bills concerning the army, taxes, etc., the proposal of the federal council only was accepted, and this gives to the emperor as king of Prussia the right of veto against its actions. The Swiss federal constitution gives the president no "veto" power, but in certain cantons the right rests with the voters. In the kingdom of Poland the objection of a single deputy was sufficient to nullify the bill. This history, and these illustrations, serve to show that the people of all

constitutional governments are extremely solicitous and jealous of this power, and have at all times hedged it about by carefully expressed limitations. Consequently it follows that the right of this exercise by an executive must always be supported by plain and undoubted authority. It has of recent dates been the gradual and growing belief that this power is wisely placed in the executive head of municipal authority, not as essential to preserve an equilibrium of governmental powers, but for almost the sole purpose of a check upon any corrupt and hasty actions of ill-considered legislation. This is not a new idea, but it was not accepted until experience has shown it to be, usually, for the best interests of the people in the government of cities. Franklin long ago stated one reason for the lodgment of this power in an executive: "A single man may be afraid or ashamed of doing injustice. A body is never either one or the other, if it is strong enough. It cannot apprehend assassination, and, by dividing a shame among them, it is so little apiece that no one minds it." While, for these and other reasons, it is doubtless the tendency of modern legislation to bestow this power upon the executive head of municipal government with much liberality, yet it is equally true, and always to be borne in mind, that the power must be express or necessarily implied, and, without it, it does not exist. *People v. Board of Councilmen*, 20 N. Y. Supp. 51, 54 (citing *Dill. Mun. Corp.* [4th Ed.] §§ 208, 331; *Martindale v. Palmer*, 52 Ind. 413; *Nat. Bank of Commerce v. Town of Grenada* [U. S.] 41 Fed. 91; *MacKenzie v. Wooley*, 39 La. Ann. 949, 3 South. 128).

The Governor's disapproval of a bill is commonly known as a "veto." *Commonwealth v. Barnett*, 48 Atl. 976, 199 Pa. 161, 55 L. R. A. 882.

VEX.

"Vexing or harassing," as used in a statute requiring the affidavit for a distress warrant to state that it is not sued out for the purpose of vexing or harassing the defendant, is equivalent to the phrase "injuring or harassing," and hence an affidavit using the latter phrase is a compliance with the statute. *Biesenbach v. Key*, 63 Tex. 79, 81.

VEXATION.

Vexation may mean, within a mere dictionary definition, trouble or annoying inconvenience to which a party is put in going to law. *Williamson v. Liverpool, L. & G. Ins. Co. (U. S.)* 105 Fed. 31, 38.

"Vexation," as applied to the element of damages to which a party whose property has been attached is entitled, applies to the instances where there is no reasonable found-

dation for believing that a statutory ground for an attachment exists, or if the process be sued out wantonly or recklessly without probable cause, or if it be resorted to in a mere race of diligence to obtain a first lien, when no statutory ground exists in fact or is reasonably believed to exist. *City Nat. Bank v. Jeffries*, 73 Ala. 183, 191.

VEXATIOUS DELAY.

Gen. St. § 1707, providing that interest may be recovered on money withheld by an "unreasonable and vexatious delay," should be construed as meaning something more than delay in the payment of a sum due. *Corson v. Neatheny*, 11 Pac. 82, 84, 9 Colo. 212.

VEXATIOUS REMOVAL.

"Vexatious removal," as used in the statute for preventing the vexatious removal of an indictment into the court of Queen's Bench, would not include removal which the prosecution was compelled to make in order to secure any trial. *Reg. v. City of Manchester*, 7 El. & Bl. 453, 460.

VEXATIOUSLY.

The word "vexatiously," as used in Rev. St. Mo. 1899, § 8012, providing that in any action against any insurance company to recover the amount of any loss under a policy, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court may allow the plaintiff certain damages, is a vague term. It is little more than an epithet. The Supreme Court of Missouri has held that no direct proof of its existence is exacted of the plaintiff. *Williamson v. Liverpool, L. & G. Ins. Co. (U. S.)* 105 Fed. 31, 38 (citing *Lockwood v. Atlantic Mut. Ins. Co.*, 47 Mo. 50).

VI.

Mr. Goddard, in discussing an enjoyment of an easement which is not peaceable, defines "vi," in the phrase "vi clam aut precario," to mean violence, or force and strife, or contention of any kind; and the illustration he gives is where the enjoyment has been during a period of litigation about the right claimed, or the user has been continually interrupted by physical obstacles placed with a view of rendering user impracticable. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law (14 Vroom) 605, 622 (citing *Goddard, Easem.* 172).

VI ET ARMIS.

See "Trespass Vi et Armis."

"Vi et armis," with force and arms, usually used in indictments for trespasses and

wrongs, etc., with actual violence. Mr. Chitty, in his *Criminal Law* (volume 1, p. 241), says "that although, since St. 27 Henry VIII, c. 8, many indictments for trespasses and other wrongs accompanied with actual violence have been deemed insufficient for want of the words 'with force and arms,' the court has refused to quash proceedings where such words have been omitted," and this seems to be the better opinion; for otherwise the terms of the statutes making the offense would be destitute of meaning. *Taylor v. State*, 25 Tenn. (8 Humph.) 285, 286.

The words "vi et armis" have been held to be unnecessary in several American cases cited in notes to the point as to their necessity in an information when other words implying force are used. Chitty says that it seems to be generally agreed that, where there are other words implying force, the omission of the phrase "vi et armis" is sufficiently supplied. Such was the decision in *State v. Hanley*, 47 Vt. 290. *State v. Pratt*, 54 Vt. 484, 485.

The offense of "forcible trespass" must be done with a strong hand, or, as otherwise expressed, "manu forti," which it is held implies greater force than is expressed by the phrase "vi et armis." Consequently it is held that a charge that the trespass was committed vi et armis is insufficient to charge a forcible trespass. *State v. Ray*, 32 N. C. 39, 40.

VIA.

In England the word "via" signified a kind of public way over which the public passed on foot and on horseback and on vehicles with wheels, and "via" was called "the highway." *Boyden v. Achenbach*, 79 N. C. 539, 541.

"Via" means by the way of, and as used in shipping bills never designates a terminal point, but designates the route by which the thing is to be carried, where there are two or more available routes. *Denver & R. G. Ry. Co. v. De Witt*, 29 Pac. 524, 1 Colo. App. 419.

"Via," as used in a draft drawn on a newspaper of M., via E. Nat. Bank, will not be given a meaning of "by the way of," but will be held to import a presentation at the bank of E. *Bartholomew v. First Nat. Bank*, 52 Pac. 239, 18 Wash. 683.

The words "via a port for orders," in a marine policy on a voyage via a certain port for orders, was construed not to render a stay of the vessel in such port for a longer time than necessary to receive orders a deviation; but it was held that the vessel had a right to stay a reasonable time to sell a portion of its cargo, and whether the time of its stay was unreasonable or not was held

a question for the jury. *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7, 16.

VIADUCT.

As bridge, see "Bridge."

A "viaduct" is an extensive bridge for the purpose of conducting a road for a roadway over a valley where an embankment would be impracticable or inconvenient—an elevated roadway or a bridge; and hence a statute authorizing the building of a viaduct within one county is within the constitutional provision forbidding the Legislature from enacting any special or private laws for laying out or opening highways, except in case of state roads extending into more than one county. *Wagner v. Milwaukee County*, 83 N. W. 577, 579, 112 Wis. 601.

VIBRATE.

"Oscillate" is defined as to vibrate as a pendulum; to move backward and forward; to swing. "Oscillatory" is defined as moving alternately one way and another as a pendulum; swinging; vibrating. "Vibrate" is defined as to move or play to and fro as a pendulum; to oscillate; to swing. So a machine for treatment of disease by producing an oscillating or vibratory motion in the limbs of the patient is infringed by a machine producing substantially the same motions in the limb by a rotary motion in the machine. *Taylor v. Wood* (U. S.) 23 Fed. Cas. 807, 812.

VICAR.

"Vicar," as used in the ninety-first of the canons of 1603, providing that the parish clerk was to be appointed "by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being," describes the functionary, whatever title he may bear, who for the time being has the cure of the parish as principal. *Pinder v. Barr*, 4 El. & Bl. 105, 115, 28 Eng. Law & Eq. 235, 239.

VICE.

(Lat.) In the place or stead; "vice mea," in my place. *Black, Law Dict.*

VICE COMMERCIAL AGENT.

"Vice consuls" and "vice commercial agents," when used in the title relating to diplomatic and consular officers, shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls general, consuls, or commercial agents, when they shall be tempo-

rarily absent or relieved from duty. *U. S. Comp. St.* 1901, p. 1150.

VICE CONSUL.

"Vice consuls" are consular officers substituted temporarily to fill the place of consuls when temporarily absent or removed from duty. *Schunior v. Russell*, 18 S. W. 484, 485, 83 Tex. 83.

"Vice consuls" and "vice commercial agents," when used in the title relating to diplomatic and consular officers, shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty. *U. S. Comp. St.* 1901, p. 1150.

VICE PRESIDENT.

Of corporation as agent, see "Agent."

A vice president is an officer next in rank below a president. *Pond v. National Mortgage & Debiture Co.*, 50 Pac. 973, 974, 6 Kan. App. 718.

VICE PRINCIPAL.

A "vice principal" is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible because the duty is his own. *Durkin v. Kingston Coal Co.*, 33 Atl. 237, 238, 171 Pa. 193, 29 L. R. A. 808, 50 Am. St. Rep. 801; *Peirce v. Oliver*, 47 N. E. 485, 488, 18 Ind. App. 87 (citing 3 Elliott, R. R. § 1317).

He is a "vice principal" who is intrusted by the master with power to superintend, direct, or control the workman in his work, so that for negligence in such superintendence, direction, or control the master is liable. *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588, 596.

The satisfactory evidence of "vice principalship" is his supervision, control, and subjection to his orders and directions. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 87 N. W. 27, 31, 62 Neb. 180.

At first a vice principal was limited to be a person who had the right to employ and discharge the servants, but this rule has since been relaxed, and the rule now is that it is a question of authority to represent the master which determines the question of whether a person is vice principal. *Grattis v. Kansas City, P. & G. R. Co.*, 55 S. W. 108, 111, 153 Mo. 380, 48 L. R. A. 399, 77 Am. St. Rep. 721.

A vice principal is one who is intrusted by the master with the authority to super-

intend, control, or command other persons employed by the master, or with the authority to direct any other employé in the performance of his duty. *Mexican Nat. Ry. Co. v. Finch*, 27 S. W. 1028, 1030, 8 Tex. Civ. App. 409.

A vice principal, for whose negligence an employer will be liable to other employées, must be either: First. One in whom the employer has placed the entire charge of the business or of a distinct branch of it, giving him, not merely authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or oversight of his own. *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50. Secondly. One to whom he delegates a duty of his own, which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him. *Lewis v. Seifert*, 116 Pa. 628, 647, 11 Atl. 514, 2 Am. St. Rep. 631; *Prevost v. Citizens' Ice & Refrigerating Co.*, 40 Atl. 88, 89, 185 Pa. 617, 64 Am. St. Rep. 659; *Casey v. Pennsylvania Asphalt Pav. Co.*, 47 Atl. 1128, 1130, 198 Pa. 348; *Johnson v. Western N. Y. & P. Ry. Co.*, 49 Atl. 794, 795, 200 Pa. 314.

A vice principal is the representative of the master, and for his acts and negligence the master is responsible. An employé of a corporation may become such a representative in two ways: First. He may be intrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, and in such a case he may be termed a "general vice principal," because in all his acts relative to the business of the corporation he stands in the place of the master, and the latter is liable for his negligence in their performance. Second. One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow servants, and in such a case he may be termed a "special vice principal." He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employé he is not the representative of the master, nor is the master liable for his negligence in the performance of them. Whether or not the master is liable for the negligence of such a servant in a given case must be determined by the nature of the duty in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise, it is not. *City of Minneapolis v. Lundin* (U. S.) 58 Fed. 525, 527, 7 C. C. A. 344 (citing

Baltimore & O. R. Co. v. Baugh, 13 Sup. Ct. 914, 919, 921, 149 U. S. 368, 37 L. Ed. 772; *What Cheer Coal Co. v. Johnson*, 56 Fed. 810, 6 C. C. A. 148; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 165, 166, 6 N. W. 484, 38 Am. Rep. 285; *Brown v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 553, 18 N. W. 834).

A vice principal is one vested with the entire management, control, and supervision of a particular work to be done, so as to say, not only what shall be done, but how it shall be done, and has full power and authority to command the men under him in the work, and the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and there is ordinarily no one else present and authorized to superintend and direct the work of the men. He then represents the employer—stands for the employer. When the foreman of a gang of men is invested with such control, he is a vice principal. *Lindvall v. Woods* (U. S.) 44 Fed. 855, 857.

An employé or servant who is clothed with special powers and authority with respect to the management of the master's business and the control of his fellow servants in the matter of the performance of their work, and to whom is delegated the performance of the master's absolute duties to other servants with reference to the obligation to provide them with the several instruments and several places to work, is as to such, either servants or employées, a vice principal, when engaged in the performance of the said powers and authority conferred upon him. He is a fellow servant when engaged in the common employment of the master. *Perras v. A. Booth & Co.*, 84 N. W. 739, 741, 82 Minn. 191.

Where an employer provides some other person than himself to see that his servants are furnished with a safe place to work, and with suitable machinery and appliances kept in good repair, the person to whom such duty is delegated, no matter what his rank or grade, cannot be a servant in the sense or nature of the rule applicable to injuries occasioned by fellow servants. Such person is an agent, and is generally called in the law a vice principal. Under this definition one employed to see that docks on which lumber was moved, and which were from 7 to 16 feet above the ground, were kept in good repair, was a vice principal, and not a fellow servant as to such duties. *Van Dusen v. Letellier*, 44 N. W. 572, 575, 78 Mich. 492.

A foreman of a gang at a factory, who, while performing the duties of a common laborer, directs a workman to go into an inclosure and assist him, is not a vice principal in giving the order, though he had

power to employ and discharge men. *Casey v. Pennsylvania Asphalt Pav. Co.*, 47 Atl. 1128, 1130, 198 Pa. 848.

The chief engineer of a refrigerator company, having general charge of the engine room and freezing department, of which he is foreman, and in which capacity he gives orders to the men in that department, and having authority to engage men for short jobs, in the manager's absence, is not a vice principal, so as to make the master liable for his negligence in directing certain work, resulting in injury to an employé. *Prevost v. Citizens' Ice & Refrigerator Co.*, 40 Atl. 88, 89, 185 Pa. 617, 64 Am. St. Rep. 659.

One in charge of a gang of men erecting poles and a telegraph line along a railroad is a fellow servant of the members of such gang, so that one of them, injured through his negligence, cannot recover therefor of the railroad company, though they were employed by the company, which was paying for the work, and he was employed by the telegraph company and allowed by the railroad company to superintend the gang. *Johnson v. Western N. Y. & P. Ry. Co.*, 49 Atl. 794, 795, 200 Pa. 314.

In determining whether an employé occupies the position of vice principal, the mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants, is not a mark by which to distinguish whether or not the former is a vice principal. The most general test is that, in order to be a vice principal, a servant must so far stand in the place of his master as to be charged in the particular matter with the performance of a duty toward the inferior which, under the law, the master owes to such servant, as, for example, furnishing tools or machinery and appliances, or giving orders with respect to work to be done by the subordinate. *Ohio River & C. R. Co. v. Edwards (Tenn.)* 76 S. W. 897, 899.

The controlling consideration in determining whether an employé is a vice principal is not his comparative rank or his authority to command, nor to employ or discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them. *Southern Indiana Ry. Co. v. Harrell*, 68 N. E. 262, 264, 161 Ind. 689, 63 L. R. A. 460.

One to whom a master gives the entire charge of the selection of the materials and the construction of a runway used in carting coal from the hatchway of a vessel to a bin on the dock, and who also employs and directs the laborers in unloading the coal, is the representative of the master. *Brown v. Gilchrist*, 45 N. W. 82, 84, 80 Mich. 56, 20 Am. St. Rep. 496.

A yardmaster, in charge of switchyards of a railroad, who is subordinate to a general yardmaster, who is in turn subordinate to a trainmaster, and he to a superintendent, is not a "vice principal," but a "fellow servant," in his relation to other employés engaged in switching in the yard. *Pennsylvania Co. v. Fishack (U. S.)* 123 Fed. 465, 471, 59 C. C. A. 269.

A "vice principal" is one intrusted by the master with power to superintend, direct, or control the workmen in their work. If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employé, as to that service, stands in the master's stead with relation to other persons. *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588, 594.

A vice principal is one to whom is deputed the discharge of some duty or the exercise of some power which belongs to the master as such, and he does not act as a vice principal, nor engage in any work which does not pertain to the duty or peculiar power of the master, just as an agent does not act as an agent, when doing some act entirely outside of his agency. *Decatur Cereal Mill Co. v. Gogerty*, 80 Ill. App. 632, 636.

One in charge of a number of laborers at night, and invested with the power of directing them in their work and looking after the business of his employer, whether he was called "foreman" or not, was a "vice principal" of his employer. *Fox v. Jacob Dold Packing Co.*, 70 S. W. 164, 167, 96 Mo. App. 173.

All persons engaged in the service of any railroad corporation doing business in the state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection or other duty owing by the master to the servant, are "vice principals" of such corporation, and not fellow servants. *Rev. St. Mo. 1899, § 2874.*

All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employé in the performance of any duties of such employé, are vice principals of such employer, and not fellow servants. *Rev. St. Utah 1898, § 1842.*

As affected by actual assistance.

A "vice principal" in charge of workmen does not become a co-workman whenever he actually assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer, he may do so, and does not thereby divest himself of his responsibility as foreman or superintendent, and his duty to see that the work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are being taken to take care of his gang continues to be exacted of him by law, although he may have stepped down from his pedestal for an interval. *Haworth v. Kansas City Southern R. Co.*, 68 S. W. 111, 114, 94 Mo. App. 215.

One, while acting as a vice principal and standing in the place of a master, may lay aside that character and occupy for a time the place of a fellow servant, and while thus engaged he is in law a fellow servant. *Gann v. Nashville, C. & St. L. R. Co.*, 47 S. W. 493, 494, 101 Tenn. 380, 70 Am. St. Rep. 687.

As determined by duty performed.

A vice principal is one whom the master has clothed with power to act in his stead in the performance of a duty owing from the master to his servants, and for all his acts or omissions in respect of the matters in which he acts in the place of the master, in performing the master's duty, the master is liable. Simply because one servant is superior in grade, rank, or authority does not make him any more the representative of the master than those lower in position. It is not grade or position that determines whether a servant is acting for and instead of the master, but the duty he is performing. *Cole Bros. v. Wood*, 36 N. E. 1074, 1083, 11 Ind. App. 37.

In every case the position of vice principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged by the master upon the servant; in other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. *New Pittsburgh Coal & Coke Co. v. Peterson*, 35 N. E. 7, 8, 136 Ind. 398, 43 Am. St. Rep. 327.

The test whether in a given case an employé is to be regarded as a "vice principal" or a fellow servant is, not his title or rank or power to employ or discharge servants of the master, but the nature of the services which he performs. An employé, authorized to perform duties which are clearly the master's, is to that extent a vice principal. *Pearce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485. In every case the controlling inquiry must be whether the act or omission

resulting in injury involved the duty owing by the master to the injured servant. *Southern Indiana Ry. Co. v. Harrell*, 66 N. E. 1016, 1019, 161 Ind. 689, 63 L. R. A. 460 (citing *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486, 45 N. E. 656.)

As determined by power to hire and discharge.

The power to hire and discharge is the test of a vice principal, when the question involved is that of selecting or retaining proper servants, for in this respect the servant would properly represent the master; but in no other sense is it a test. The power to summarily discharge unworthy servants and hire new ones is often a very necessary power for the safety of other servants, but it does not change the character of the foreman's duties from that of a servant to those of a principal, nor impose upon him the master's responsibility in other respects. A servant is a vice principal only when he stands in place of the principal with reference to the principal's duty or in the exercise of the principal's functions. Anything beyond this is inconsistent with the well-settled rule of the master's duty. *Hanna v. Granger*, 23 Atl. 659, 660, 18 E. I. 507.

Where a railroad foreman had power to, and did, employ and discharge the men, who were under his directions and subject to his orders, and subject to the orders of no one else, he was a "vice principal," and not a fellow servant of one of such men. It is well settled in this state that where the master appoints an agent, with superintending control over the work, and with power to employ and discharge hands, and direct and control their movements in and about the work, the agent, in respect to such matters, stands in the place of the master. His negligence is the negligence of the principal, and for it the latter is liable. *Stephens v. Hannibal & St. J. R. Co.*, 86 Mo. 221, 229.

VICINAGE.

The word "vicinage" is defined as meaning neighborhood or vicinity, and does not mean county. *Ex parte McNeeley*, 36 W. Va. 84, 90, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

The term "vicinage" at common law meant the county where the act in question was committed. The term was usually applied to the trial of criminal offenders; the common law requiring that the trial should be had in the vicinage. *State v. Crinklaw*, 59 N. W. 370, 371, 40 Neb. 759 (citing with approval *Olive v. State*, 11 Neb. 1, 7 N. W. 444).

"Vicinage," as used in Acts 1859, p. 559 (general railroad law), requiring jurors in

appraisement proceedings to be of the vicinage of the property, means the county, and not the town or neighborhood in which the land to be taken lies. *Convers v. Grand Rapids & I. Ry. Co.*, 18 Mich. 459, 468.

The word "vicinage" means the neighborhood. As used in this state, in the legal phrase that a trial by jury means a trial by the jury of the vicinage, it means the county. *Taylor v. Gardiner*, 11 R. I. 182, 184.

"Vicinage," within the rule that the jury is to come from the vicinage, means district. *Rice v. Sims* (S. C.) 3 Hill, 5, 7.

VICINETUM.

The word "vicinetum," as employed in stating the fact that at common law a jury was required to be returned from the vicinetum, meant from the neighborhood, or the place where the cause of action was laid or the crime charged to have been committed. *State v. Kemp*, 34 Minn. 61, 63, 24 N. W. 349.

"Vicinetum" is derived of this word 'vicinus,' and signifieth neighborhood or a place neere at hand, or a neighbor place; and the reason whereof the jury must be of the neighborhood is for that vicinus facta vicini præsumitur scire, all of which is implied in this word." *State v. Sawtelle*, 66 N. H. 488, 505, 82 Atl. 831, 835 (quoting Co. Litt. 158b).

VICINITY.

See "Immediate Vicinity."

"Vicinity" is defined as that which is near, or not remote. It is said to be derived from "vicus," a village, and to signify the place which does not exceed in distance the extent of a village. As used in P. L. 1885, p. 74, § 1, providing that a gaslight company shall have power to make and sell gas in a certain town and its vicinity, the power is given to lay its gas pipes in the streets of a borough the outer limits of which were not more than a mile distant from those of the other places. *Borough of Madison v. Morristown Gaslight Co.*, 52 Atl. 158, 159, 63 N. J. Eq. 120.

The term "vicinity" does not express any definite idea of distance. A few feet, or several hundred yards, or even a greater distance, from an object, would be in its vicinity. *Schmidt v. Kansas City Distilling Co.*, 2 S. W. 417, 90 Mo. 284, 59 Am. Rep. 16.

It is very usual to read or speak of "vicinity" and "immediate vicinity," "neighborhood" and "near neighborhood"; the latter expression uniformly denoting closer proximity than the former. These words

have no fixed standard of meaning, and denote no particular distance; but our ideas of them shift and vary to correspond with the relative position of their objects, and they have no precise or practical meaning of themselves, but only when applied to something else. We would say that Germantown was in the vicinity of Philadelphia, and Brooklyn of New York, Manchester in the vicinity of Pittsburgh, and the moon in the vicinity of the earth, when compared with planets more remote. "Vicinity," when applied to a practical matter, might very readily cause disagreement in honest minds, for vicinity is not a matter of eyesight only, but for the judgment also. In *re Hancock St. Extension*, 18 Pa. 26, 31.

"Vicinity," as used in a contract by which it was agreed that if a party decided to drill any more wells upon certain premises, or in the vicinity, up to a certain number, the other party should have the contract for drilling, cannot be construed to include lands two miles distant from the premises mentioned. *Sparks v. Pittsburg Co.*, 28 Atl. 152, 153, 159 Pa. 295.

In considering the question as to whether two pieces of property situated about one mile from each other can be considered as in the vicinity or neighborhood of each other, or as constituting adjoining premises, within the meaning of the rule that the keeping of gunpowder upon private premises may be a nuisance, when in case of explosion it would be liable to injure persons or property of those residing in the vicinity, neighborhood, or upon adjoining premises, the court said that, where property is injured directly and without any intervening cause by the force of an explosion, it is legally within the neighborhood or vicinity of the scene of the explosion, and that adjoining premises may in contemplation of law be defined in the same way. *St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co.*, 14 Ohio Cir. Ct. 522, 527, 7 O. C. D. 582, 585.

The word "vicinity," as used in a statute granting a gas company the right to manufacture gas for the purpose of lighting the streets and buildings in a certain town and its vicinity, applies only to the streets, avenues, alleys, and public places adjoining the town, and does not embrace other places and territories constituting an independent municipal government. *English's Law Dictionary* defines "vicinity" as adjacent; that which is near. Webster defines "vicinity" as the quality or state of being near, or not remote; nearness; that which is adjacent to anything; neighborhood. *Borough of Madison v. Morristown Gaslight Co.*, 54 Atl. 439, 440, 65 N. J. Eq. 356.

The word "vicinity" is not technical, with a precise legal meaning, as the word "county," or the ancient word "visne," vic-

inage would be held to be; and Acts 1795, c. 45, providing that, where the cause of death happens in one county and death in another, an indictment may be found in the latter, is not repugnant to the declaration in the Constitution that in criminal prosecutions the verification of facts in the vicinity where they happen is one of the greatest securities of the life, etc., of the citizen. *Com. v. Parker*, 19 Mass. (2 Pick.) 550, 553.

The meaning of the word "vicinity," as employed in a decree restraining defendant from practicing as a physician in a certain city and vicinity, necessarily depended upon the size of the city and its location and particular surroundings; and in view of the size of the city, its location and surroundings, it was held that the territorial surrounding of the city for a distance of 10 miles from corporate boundaries was a reasonable limitation. *Timmerman v. Dever*, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240.

Where land is described as lying in the "vicinity of, and on the margin of" a bay, it is considered to have a boundary on the bay, and includes a shore ownership. *State v. Brown*, 27 N. J. Law (3 Dutch.) 13, 17.

The terms "local" and "vicinity," used in connection with assessments for improvements, are not to be taken as indicating any definite limits, but are usually understood to extend to the real property reported by the assessors to be actually benefited to a certain amount. *State v. Ramsey County*, 23 N. W. 222, 229, 33 Minn. 295.

"Vicinity," as used in Rev. St. 1881, § 3168, providing that city commissioners should meet at the time and place designated and examine the property sought to be appropriated for a public improvement, and should also view and examine the real estate in the vicinity thereof to be benefited or injured by such proposed improvement, is a word of limitation. In regard to local improvements, property benefited by the improvement will be held to be within its vicinity. *Mock v. City of Muncie (Ind.)* 32 N. E. 718, 719.

As neighborhood.

"Neighborhood" is Anglo-Saxon. "Vicinity" is Latin. Hence they differ in degree and strength. "Vicinity" does not denote so close a connection as "neighborhood." A neighborhood is a more immediate vicinity. Houses immediately adjoining a square are in the neighborhood of the square. Those somewhat further removed are in the vicinity. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584, 593.

"Vicinity," as used in a plea by defendant in an action for the infringement of a patent to the effect that the alleged invention had been in use generally in London and the

vicinity thereof, meant the same as "neighborhood." *Palmer v. Wagstaffe*, 20 Eng. Law & Eq. 527.

"Vicinity" means neighborhood, and signifies nearness as opposed to remoteness. Whether a place is in the vicinity or the neighborhood of another depends upon no arbitrary rule of distance or topography. *State v. Meek*, 67 Pac. 76, 77, 28 Wash. 405; *Langley v. Barnstead*, 63 N. H. 246 (approved in *Territory v. Lannon*, 22 Pac. 495, 496, 9 Mont. 1).

"Etymologically and by common understanding the phrase 'in the vicinity' means 'in the neighborhood.' Whether a place is in the vicinity or in the neighborhood of another place depends upon no arbitrary rule of distance or topography. One village may be said to be in the vicinity of another village, without being joined or incorporated with it; and one house may be said to be near, in the vicinity of, or in the neighborhood of, another house, and not structurally adjoin it. 'Vicinity' admits of a more indefinite and wider latitude in place than 'proximity' or 'contiguity,' and as applied to territory may embrace a more extended space than that lying contiguous to the place in question, and as applied to towns and other territorial divisions may embrace those not adjacent." As used in Gen. Laws, c. 68, § 10, requiring towns which have been greatly benefited by public improvements made by another town in the vicinity to pay a portion of the expense, it means towns in the neighborhood of that in which the improvement is made, and is not confined to adjoining towns. *Langley v. Barnstead*, 63 N. H. 246, 247.

VICIOUS.

A horse is of "vicious disposition" when it is possessed of those habits and propensities which are dangerous in their character to persons coming in contact with it. *Brown v. Green (Del.)* 42 Atl. 991, 993, 1 Pennewill, 535.

Within the meaning of the rule that an owner of a domestic animal is not, in general, liable for an injury committed by it, unless it be shown that he had notice of its vicious propensities (*Van Leuven v. Lyke*, 1 N. Y. [1 Comst.] 515, 49 Am. Dec. 346), by "vicious propensity" is included a propensity to do any act that might endanger the safety of the persons and property of others in a given situation; not such as would impair the utility of the animal for the purpose for which it was kept. *Dickson v. McCoy*, 39 N. Y. 400, 403.

A "vicious animal" is any individual of a vicious species, or a vicious individual of a harmless species; and hence a horse which

is not shown to be individually vicious cannot be construed a vicious animal. *Phillips v. De Wald*, 7 S. E. 151, 152, 79 Ga. 732, 11 Am. St. Rep. 458.

A dog which is accustomed to attack and bite other dogs without being incited to do so is a "vicious animal," whether it has been trained to such habits or not. *Wheeler v. Brant* (N. Y.) 23 Barb. 324, 325.

VICIOUS CONDUCT.

See "Excessively Vicious Conduct."

"Vicious conduct," as used in Code, art. 16, § 37, authorizing a divorce for excessively vicious conduct, means conduct constituting grave offenses, and is not made out by mere proof of drunkenness by the wife, though frequent, and accompanied by abuse and indecent language, occasioning domestic broils. *Shutt v. Shutt*, 17 Atl. 1024, 71 Md. 193, 17 Am. St. Rep. 519.

VICTIM.

The use of the word "victim" in an instruction in a homicide case that the fact that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, did not give defendant any right to take his life, is calculated to create prejudice against the accused, and is erroneous. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. When the deceased is referred to as a victim, the impression is naturally created that some unlawful power or dominion has been exerted over his person. It is nearly equivalent in fact to an expression characterizing the defendant as a criminal. *People v. Williams*, 17 Cal. 142, 147.

VICTUAL—VICTUALS.

"Victual," as used in an agreement by which a son agreed to maintain his father and mother during their natural lives—that is, to victual, clothe, pay doctor bills, and keep house and care for them, suitable to their condition—does not mean to furnish whisky and tobacco also. *Wisehart v. Grose*, 71 Ind. 260, 261.

Rev. Laws, § 997, prohibiting any person from treating a juror by giving him "victuals or drink," included the giving of cigars, though they were not within the strict letter of the statute. *Baker v. Jacobs*, 23 Atl. 588, 64 Vt. 197.

Lord Tenterden, C. J., in *Rex v. Hodgkinson*, 10 Barn. & C. 74, in considering St. 50 Geo. III, c. 41, which provides that nothing in the act should prohibit persons from selling any fish, fruit, or victuals, said: "I

think the word 'victuals' comprises everything which constitutes an ingredient in the food of man, and all articles which, mixed with others, constitute food." And it was held that barm or yeast was victuals, within the meaning of the clause. *State v. Angelo*, 51 Atl. 905, 907, 71 N. H. 224.

VIDELICET.

The words "to wit" and "that is to say," as used in a pleading, are termed a "videlicet." The natural and proper use of a videlicet is to particularize that which is general before, and to explain that which is indefinite, doubtful, or obscure; but it must neither be contrary to the premises nor increase or diminish the precedent matter, and therefore if a man seised in fee of black acre, white acre, and green acre in D. should grant all his lands in D., viz., black acre and white acre, yet green acre shall also pass by the grant. *Stukeley v. Butler*, Hob. 168, 171.

The office of "to wit" is to particularize what is too general in a preceding sentence, and render clear and of certain application that which might seem otherwise doubtful or obscure. *Buck v. Lewis*, 9 Minn. 314, 317 (Gil. 298, 300).

The words "to wit" are used to call attention to a more particular specification of what has preceded. *Gilligan v. Commonwealth*, 37 S. E. 962, 964, 99 Va. 816 (quoting Web. Int. Dict.).

The use of the "videlicet" is to avoid a variance, and to avoid a positive averment, which must be strictly proved. *Brown v. Berry*, 47 Ill. 175, 177.

The office of a "videlicet" is to explain what goes before, and, when it is repugnant to or inconsistent with the preceding matter, it is inoperative and void. *Cotton v. Ward* (3 T. B. Mon.) 19 Ky. 304, 310.

The precise and legal use of a "videlicet" in every species of pleading is to enable the pleader to distinguish and fix with certainty that which was before general, and which without such explanation might with equal propriety have been applied to different objects. *Commonwealth v. Hart*, 76 Mass. (10 Gray) 465, 468.

The office of the "videlicet" is to mark that the party does not undertake to prove the precise circumstances alleged, and in such cases—I. e., when the circumstances are not essential in their nature—he is ordinarily not held to prove them. *State v. Heck*, 23 Minn. 549, 550.

The office of a videlicet is to explain what went before, and where it is repugnant or contradictory it is material and traversable; and as such an averment coming

after a *videlicet* is traversable, so it must be proved when material, if averred without a *videlicet*. The general rule in relation to allegations under a *videlicet* or a *scilicet* seems to be that, if they be impossible or contrary or repugnant to the preceding matter, they shall be rejected as surplusage; but where they are used to explain what goes before them, and are consistent with the preceding matter, they are material and traversable. *Gleason v. McVickar* (N. Y.) 7 Cow. 42, 43.

The common office of a "*videlicet*" is to state time, place, or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made; but it may be and is frequently used as particularizing the more general antecedent matter. *Sullivan v. State*, 87 Miss. 846, 354, 7 South. 275, 277.

The proper office of a "*videlicet*" is to particularize or explain what goes before it. It may restrain the generality of preceding words, but cannot enlarge or diminish the preceding subject-matter. In the former case it is merely explanatory of the thing which precedes it, while in the latter it is repugnant to it. When a material *videlicet* is preceded by words of direct averment, the *videlicet* is regarded as a direct allegation, and therefore is traversable; and, being regarded as traversable, it follows that, if traversed, it must be proved. *Gould*, Pl. c. 3, §§ 35-41. The pleader cannot relieve himself from the necessity of proving unnecessary allegations or irrelevant matter by putting them under a *videlicet*. Where, in an action on an accident policy, the complaint, after alleging the accidental death of the insured, alleged, under a *videlicet* clause, the cause and manner of the accident in such a manner as to make one complete and consistent allegation, the general issue traverses, not only the general allegation, but also the allegations under the *videlicet*. *Clark v. Employers' Liability Assur. Co.*, 48 Atl. 639, 642, 72 Vt. 458.

The precise and legal use of a *videlicet* in every species of pleading is defined to be to enable the pleader to isolate, to distinguish, and to fix with certainty that which was before general, and without which explanation might with equal propriety be applied to different objects. *Commonwealth v. Quinlan*, 153 Mass. 483, 484, 27 N. E. 8.

VIEW.

See "Immediate View and Presence"; "In View of"; "Within His View"; "Servitude of View."

We understand by "view" every opening which may more or less facilitate the

means of looking out of a building. *Civ. Code La.* 1900, art. 715.

As hears.

"View," as used in Gen. St. § 836, authorizing a justice to arrest any person who in his "view" engages in disorderly conduct, etc., does not limit the officer to cases in which he acquires his knowledge of the disorder by seeing it, to the exclusion of cases where he hears it. *State v. Williams*, 15 S. E. 554, 36 S. C. 493.

As inspect.

"The courts are frequently called upon to act upon evidence addressed to the senses, often called 'view' or 'inspection,' and to recognize without further proof that the person before them is an aged person, male or female, a child, a boy or girl, white or black, a person with or without visible deformity of limbs, or the like. In *People v. Justices of Court of Special Sessions* (N. Y.) 10 Hun, 224, decided in 1877, the court held that evidence of age may be received from any person capable of giving it for the purpose of proving the fact, or where the appearance of the party sufficiently indicates his probable age that may be acted upon as evidence of the fact." *Garbarsky v. Simkin*, 73 N. Y. Supp. 199, 200, 36 Misc. Rep. 195.

In the case of *Wakefield v. Boston & M. R. R.*, 63 Me. 385, the court adopted the definition of the word "view" given by Webster. We quote from the opinion in that case the following: "To view," says Webster, "means to look at with attention, or for the purpose of examining; to inspect; to explore. It differs," says the same author, "from look, see, or behold, in expressing more particular or continued attention to the thing which is the object of sight." In the course of the same opinion, it was declared that, in order to enable the appraisers to form a correct judgment, they should see the premises from such a standpoint as will give them an accurate knowledge of the premises. Under 3 Rev. St. p. 538, § 3, providing that assessors shall view all the lands within 1½ miles of the line of the proposed road, and make a list of the same, a minute inspection is not required, but some personal inspection, made from points affording a fair sight of the land and its surroundings, is required. The assessors should make an examination of the lands upon which it is proposed to lay the tax from such points of observation as will enable them to accurately ascertain the location of said lands and in what manner the proposed road will affect each separate tract. *Hendricks v. Gilchrist*, 76 Ind. 369, 370, 371.

"View," as used in Rev. St. c. 18, §§ 12, 13, providing that in certain cases the jury should be sworn and view the premises in-

jured by the location of a railroad, means to inspect or explore. Webster says to view means to look at with attention, or for the purpose of examining; to inspect; to explore. "It differs," says the same author, "from look, see, or behold, in expressing more particular or continued attention to the thing which is the object of sight." Wakefield v. Boston & M. R. R., 63 Me. 385, 387.

"Viewing," as used in Comp. St. c. 23, § 7, fixing the fees of the coroner for viewing a dead body, means something more than mere looking, seeing, or beholding; and it requires inspection, investigation, and inquiry into the cause of the death of the person, and the coroner alone cannot make this inquiry, and he is not entitled to his fees unless he has with a jury held an inquest as provided by law. Lancaster County v. Hol-yoke, 55 N. W. 950, 952, 37 Neb. 328, 21 L. R. A. 394.

As intent.

"View," as used in a charge of a court defining burglary to be the breaking and entering of a dwelling house in the nighttime with a view to commit a felony, is synonymous with the word "Intent." To say that a certain thing was done with a view to commit a felony is the same thing as to say that it was done with intent to commit a felony. State v. Clary, 24 S. C. 116, 117.

The word "view," in an instruction that, to constitute a warranty, there must not only be an affirmation by the seller respecting the quality of the thing, but the affirmation must be made with a view of assuring the buyer of the truth of the fact, is equivalent to intention, purpose, or design. Halliday v. Briggs, 18 N. W. 55, 56, 15 Neb. 219.

VIEWERS.

"Viewers," as used in the Code, imports that the decision of the officers is to be made on their special inspection of the thing in controversy; but it does not necessarily imply that they must make the inspection together. Tubbs v. Ogden, 46 Iowa, 134, 135.

VIGILANCE.

See "Active Vigilance"; "Strictest Vigilance."

VILE.

"Vile," as used in a complaint for divorce, alleging that defendant cursed and abused plaintiff by calling her vile names, means debased, lost to decency, and entirely wanting in everything that goes to make a woman respectable, so that the allegation al-

leges a fact constituting cruel treatment. Irwin v. Irwin, 37 Pac. 548, 551, 2 Okl. 180.

VILL.

"Vill" and "hamlet" are in common acceptance used as synonymous terms, and where an order is made concerning the overseers of the poor of a hamlet, where such order should be made concerning a vill, the hamlet will be presumed to be a vill to support the order. Rex v. Morris, 4 Term R. 550, 552.

VILLAGE.

See "Organized Village."

A village is defined to be a town site platted and unincorporated, and hence the fact that a village is included in a larger corporation does not change the location of a county seat, which was located in the village. Way v. Fox, 80 N. W. 405, 407, 109 Iowa, 340.

A "village" is a subordinate branch of the civil government. Weismer v. Village of Douglas (N. Y.) 6 Thomp. & C. 514, 519.

Any municipal subdivision of a county, less than a city, is included within either of the terms "town" or "village," as is clearly apparent from the legislation of the state from the adoption of Rev. St. 1887 to the present. Our interpretation of these statutes is borne out by Town of Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523; Brown v. Village of Grangeville, 71 Pac. 151, 152, 8 Idaho, 784.

Gen. St. 1878, c. 39, §§ 21, 22, as amended by Laws 1883, c. 38, provides that a seed grain contract, in order to constitute a lien, must be filed in the office of the town clerk of the town, or the clerk or recorder of the city or village, in which the borrower resides, etc. Held that, for the purposes of the action, the village and the balance of the town in which it is situated are as entirely distinct as if they constituted two separate townships, and that where the borrower resides in a village a filing with the town clerk of the town within which the village is situated does not satisfy the requirements of the law. Minnesota Agricultural Co. v. Northwestern Elevator Co., 60 N. W. 671, 672, 53 Minn. 536.

The word "village," employed in the statute allowing one as a homestead a lot in any village, etc., did not include lots which had never been platted as village lots, and were not found upon any reported town plat, but were merely subdivisions of a farm, made for a purpose foreign to that of platting for sale or for village settlement, though within a hamlet of agricultural residence.

Bouchard v. Bourassa, 23 N. W. 452, 453, 57 Mich. 8.

The word "village" imports only a municipal corporation, organized by some special act or under some general law, except when a different definition shall be expressly given to the same. *Rev. St. Wis. 1898, § 4972.*

The word "village" includes every place laid out in lots or blocks, other than cemeteries and incorporated cities. *Cobbeys' Ann. St. Neb. 1903, § 10,407.*

As assemblage of houses.

A "village" is any small assemblage of houses, occupied by artisans, laboring people, and farmers; in French villages, also by farmers. It is a defined locality, with a name, and its inhabitants are called "villagers." The term "inhabitants of the village" has a well-defined and well-understood meaning, and does not include persons who are not, by their own showing, inhabitants of the village. *Hebert v. Lavalie*, 27 Ill. (17 Peck) 448, 454.

The term "village," as used in the Constitution providing for a homestead in a city, town, or village, should be given its ordinary and usual signification. Turning to the lexicons, we find that Webster defines a village to be a small assemblage of houses less than a town or city, and inhabited chiefly by farmers and other laboring people. The definition given by Bouvier is: Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid-out streets and lots or not. *Mikael v. Equitable Securities Co. (Tex.)* 74 S. W. 67, 68.

A "village" is a collection of houses, collocated after something like a regular plan in regard to streets and lanes, without intervening farm lands, with a convenient curtilage allowed to each. In *re West Philadelphia (Pa.)* 5 Watts & S. 281. "It is a small assemblage of houses, less than a town or city, and inhabited chiefly by farmers and other laboring people. In the United States any small collection of houses in the country is called a village." The term is derived from "villa," a country seat. In *re Tullytown Borough*, 1 Pa. Dist. R. 292, 293 (citing *Webst. Dict.*).

A "village" means an assembly of houses less than a city, but nevertheless urban or semiurban in its character, and having a density of population greater than can usually be found in rural districts. A very common definition of a village, found in the books, is as follows: "Any small assemblage of houses for dwelling or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not." *State v. Lammers*, 89 N. W. 501, 502, 113 Wis. 398.

"Villages and towns," as used in Act Wash. T. Feb. 2, 1888, authorizing the incorporation of towns and villages, and not defining the meaning of the term, will be presumed "to be used in their ordinary acceptation as meaning an aggregation of houses and inhabitants more or less compact." *Territory v. Stewart*, 23 Pac. 405, 406, 1 Wash. St. 98, 8 L. R. A. 106.

A village consists of a tract of land, more or less thickly inhabited, forming a nucleus for residence and business purposes. It is an assemblage of houses less than a town or city, but nevertheless urban or semiurban in its character. *State v. Village of Minnetonka*, 59 N. W. 972, 974, 57 Minn. 526, 25 L. R. A. 755.

An assemblage of houses in the country, less than a town or city, and inhabited chiefly by farmers and other laboring people. *Russell v. Detroit Mut. Fire Ins. Co.*, 45 N. W. 356, 357, 80 Mich. 407.

A place where there is a station house, a warehouse, a store, a blacksmith shop, a post office, and five or six dwelling houses, whether they are situated upon regularly laid-out streets and alleys or not, is a "village," for the purpose of excusing a railroad company from fencing its track within the limits hereof. *Toledo, W. & W. Ry. Co. v. Spangler*, 71 Ill. 568, 569.

A small assemblage of houses for dwellings or business, or both, in the country, constitutes a "village," whether they are situated upon regularly laid-out streets and alleys or not. A point at which there is a railroad station, a mill, a blacksmith shop, a store, a grocery, and a number of dwellings, though there is nothing to show that any streets or alleys had been laid off and dedicated to the public, is a village. *Illinois Cent. R. Co. v. Williams*, 27 Ill. (17 Peck) 48, 49.

"Village" is defined to be any small assemblage of houses in the country; a collection of houses collocated after a regular plan in regard to streets and lanes. In *re Incorporation of Village of Edgewood*, 18 Atl. 646, 648, 130 Pa. 348.

A settlement consisting of 14 families, each family on the average containing about 5 persons, all of whom resided along a stream, the distance from one extreme end of the settlement to the other being about 2½ miles, some of the families residing within 40 rods of each other, and others being distant about a mile or more, their chief occupation being farming, and the settlement containing school district and post office, is a "village," within the meaning of *Sess. Laws 1892*, p. 70, c. 62, § 5, prohibiting the keeping of animals along the banks of a stream within 7 miles from any city, town.

or village. *People v. McCune*, 46 Pac. 658, 659, 14 Utah, 152, 35 L. R. A. 396.

A village is an assembly of inhabitants living in the vicinity of each other and not separated by any other intervening civil division of the state. *Town of Enterprise v. State*, 10 South. 740, 744, 29 Fla. 128.

Ballinger's Ann. Codes & St. § 2927, provides that the county commissioners of each county shall appoint at least one suitable person for each "village" or neighborhood where spirituous liquors are sold in less quantities than a gallon, whose duty it shall be to inspect all liquors being sold in such quantities. It was held that the term "village" is more specific than the term "neighborhood," and each aggregation of individuals living in close proximity, as is customary in village life, must be treated as a village for the purposes of the statute; and it is specifically held that, as the statute was passed in 1880, the word "village" should be construed to cover a city which was a village at the time the act was passed. *State v. Meek*, 67 Pac. 76, 77, 26 Wash. 405.

Borough synonymous.

"Borough" and "village," as used in an indictment charging that the money embezzled belonged to an organized borough and village, are duplicates or cumulated names of the same thing, and are synonymous. *Brown v. State*, 18 Ohio St. 496, 507.

Gen. St. 1878, c. 39, § 2, as amended by Gen. Laws 1883, c. 38, requiring chattel mortgages to be filed with the clerks of "villages," did not include the class of municipal corporations styled "boroughs," created and organized under special acts of the Legislature. *Bannon v. Bowler*, 26 N. W. 237, 238, 34 Minn. 416.

As incorporated village.

Code 1880, § 1047, providing that any person who may be injured by the locomotive or cars of a railroad company while such cars are running at a greater rate of speed than six miles an hour through any "city, town, or village," shall have a right of action, etc., refers to an incorporated "city, town, or village," and the statute applies to all violations of its terms within the legal or corporate limits of such "city, town, or village," without regard to the irregular and variable lines of settlement and improvement of such city. *Illinois Cent. R. Co. v. Jordan*, 63 Miss. 458, 461.

Under Laws 1891, c. 467, limiting the speed of railroad trains through cities and villages, the word "village" will not be held to include unincorporated villages, since the word "village," in the original statute, had a definite meaning, including only those which were incorporated. *Nolan v. Milwaukee*

W. Ry. Co., 64 N. W. 319, 320, 91 Wis. 16.

While often used to apply to any small assemblage of houses for dwelling or business, or both, in the country, whether incorporated or unincorporated, yet as used in Laws 1897, c. 94, requiring railroad companies to provide stations at all villages and boroughs, "village" will be held to apply exclusively to incorporated villages, being used in connection with the word "borough," which is never applied to any place except an incorporated municipality. *State v. Minneapolis & St. L. R. Co.*, 79 N. W. 510, 76 Minn. 469.

Unless the context shows that another sense is intended, the word "village" shall mean an incorporated village. *Bates' Ann. St. Ohio 1904*, § 1536—907.

The term "village," whenever used in the acts relating thereto, shall be construed to mean a village incorporated under the act or subject to its provisions. *Comp. Laws Mich. 1897*, § 2935.

The term "village" means an incorporated village. *Laws N. Y. 1892*, c. 877, § 22.

As a municipal corporation.

See "Municipal Corporation."

As requiring a name.

A place without a name cannot have any legal existence as a "village." A name is essential to a corporation or social entity, whether for municipal or other purposes. *Tilford v. Wallace (Pa.)* 8 Watts, 141, 143.

As a precinct.

See "Precinct."

Town synonymous.

The terms "town" and "village" are, within the meaning of the law, synonymous. *Martin v. People*, 87 Ill. 524; *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Town of Enfield v. Jordan*, 119 U. S. 686, 7 Sup. Ct. 358, 30 L. Ed. 523. And hence the fact that in some of the proceedings for the organization of a village it was designated as a "town," and that the village adopted the name of the town of C., does not invalidate the proceedings. *People v. Pike*, 64 N. E. 393, 394, 197 Ill. 449.

"Village," as used in the body of an act relative to municipal corporations, might be deemed a synonym of the word "town" in the title, so as to render the title properly expressive of the purpose of the act. *Chicago, St. L. & N. O. R. Co. v. Town of Kentwood*, 22 South. 192, 49 La. Ann. 931.

The word "village" in its legislative meaning will include a town. The late-

Justice Bradley, in the case of *Town of Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 858, 30 L. Ed. 523, in a discussion of the common use of the words "town" and "village," said: "In New Jersey, Pennsylvania, Ohio, Indiana, Michigan, and Illinois the subdivisions of a county answering to the 'town' of New England and New York are called 'townships,' though the words 'town' and 'village' are indiscriminately applied to large collections of houses less than a city." *Long Branch Police, Sanitary & Improvement Commission v. Dobbins*, 40 Atl. 599, 600. 61 N. J. Law, 659.

A "village" is a small collection of houses, in the country, less than a town. In Delaware the words "town" and "village" are indiscriminately applied to collections of houses. *Town of Enfield v. Jordan*, 7 Sup. Ct. 358, 361, 119 U. S. 680, 30 L. Ed. 523 (citing *Johns. Dict.*; *Webst. Dict.*; *Ogilvie, Dict.*).

A "village" and a "town" are not identical. A village is ordinarily less than a town, and more occupied by agriculturists; yet the two cannot be definitely distinguished by the size of the place or employment of the inhabitants. A statute that the word "town" may include cities, as well as incorporated villages, is a clear implication that it does not include unincorporated villages. *Truax v. Pool*, 46 Iowa, 256, 257.

The terms "villages," "cities," and "townships," in a statute authorizing villages, cities, and townships to issue bonds in aid of railroads, does not include an incorporated town. *Welch v. Post*, 99 Ill. 471, 473.

Laws 1885, p. 60, empowering "cities and villages" to maintain and repair drains, ditches, and plumbing works for drainage purposes by a special assessment on benefited property, does not include incorporated towns. *Gray v. Town of Cicero*, 53 N. E. 91, 92, 177 Ill. 459.

Gen. St. 1878, c. 39, §§ 21, 22, as amended by Laws 1883, c. 38, provide that a seed grain contract, in order to constitute a lien, must be filed in the office of "the town clerk of the town, or the clerk or recorder of the city or village, in which the borrower resides, etc." Held, that for the purposes of the action the village and the balance of the town in which it is situated are as entirely distinct as if they constituted two separate townships, and that where the borrower resides in a village a filing with the town clerk of the town within which the village is situated does not satisfy the requirements of the law. *Minnesota Agricultural Co. v. Northwestern Elevator Co.*, 60 N. W. 671, 672, 58 Minn. 536.

The use of the word "village" instead of "town," in Act March 6, 1868, entitled "An

act to authorize the village of Lake City to aid in the construction of the ——— Railroad," held an inadvertent mistake, and not to render the statute inoperative and void. *State v. Lake City*, 25 Minn. 404, 413.

VILLAINOUS.

A newspaper article concerning the acts of the county supervisors in regard to the bonding of the county to assist in railroad building, and stating that, "instead of the money being in the treasury here, it was never inside of Placer county, for the supervisors swapped it off in Sacramento, and a 'villainous swap' it was," may be construed to mean only that the exchange of the money for the bonds was unwise, improvident, and disadvantageous to the county of Placer; the word "villainous" being used to express the degree of improvidence or injudiciousness of the exchange, and not the motives or inducements that led to it, and no corruption in office may be construed. *Van Vactor v. Walkup*, 46 Cal. 124, 133.

VILLAS.

"Villas" is the name given to villages in the Spanish law. It is distinguished from cities ("ciudades") and towns ("pueblos"). *Hart v. Burnett*, 15 Cal. 530, 537.

VINDICTIVE DAMAGES.

"Punitive," "vindictive," and "exemplary," as to damages, are all synonymous terms. *Louisville & N. R. Co. v. Kelly's Adm'x*, 38 S. W. 852, 854, 100 Ky. 421 (citing *Chiles v. Drake*, 59 Ky. [2 Metc.] 146, 74 Am. Dec. 406).

"Punitive damages" are sometimes spoken of as "vindictive damages" and "exemplary damages." They are sometimes referred to as "smart money" and "blood money." They are called "punitive damages" because of the theory that such damages will act as a sort of punishment of the defendant for such wrongdoing; not only a punishment for past wrongdoing, but to deter the defendant and others in similar business from repeating such wrongdoing in the future. *Oliver v. Columbia, N. & L. R. Co.*, 43 S. E. 307, 320, 65 S. C. 1.

The term "vindictive damages" is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer. It is synonymous with exemplary or punitive damages. *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

"Exemplary, punitive, and vindictive damages" are such damages as are in excess of the actual loss, and are allowed in

theory when a tort is aggravated by evil motive, actual malice, deliberate violence, oppression, or fraud. Such damages are sometimes called "smart money." *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 198 Pa. 156.

In actions in tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct, or criminal indifference to civil obligations affecting the rights of others, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous. *Claiborne v. Chesapeake & O. Ry. Co.*, 33 S. E. 262, 263, 46 W. Va. 363.

Vindictive, punitive, or added damages are damages given in addition to those actually required to compensate the injured party, and intended as smart money or punishment for injuries and sufferings which were intended or occurred through carelessness and negligence, amounting to a wrong so reckless and wanton as to be without palliation or excuse. *Ross v. Leggett*, 23 N. W. 695, 699, 61 Mich. 445, 1 Am. St. Rep. 608.

"Vindictive damages" are such as may be given to punish the defendant for his fraud and actual malice. *Ogg v. Murdock*, 25 W. Va. 139, 146.

"Vindictive damages" operate by way of punishment, and are allowed as compensation for the private injuries complained of. *Smith v. Bagwell*, 19 Fla. 117, 123, 45 Am. Rep. 12.

It is of very little consequence by what name the damages given are called, provided the case is one involving that class of injuries for which plaintiff is entitled to recover. They may be called exemplary, punitive, vindictive, compensatory, or added damages. The important question always is, in every case, was the character of the wrong suffered or injury sustained such as may be lawfully atoned for or compensated in money? *Ross v. Leggett*, 61 Mich. 445, 453, 23 N. W. 695, 1 Am. St. Rep. 608.

"When the term 'vindictive damages' or 'exemplary damages' is employed in a civil action for libel, the words mean the atonement which the law demands shall be made to the libeled party by the offender, and such atonement involves essentially his punishment. It is a condemnation and an infliction for traducing the individual." *Fry v. Bennett* (N. Y.) 1 Abb. Prac. 289, 307.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injuries, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly or op-

pressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required to charge him with exemplary or punitive damages. Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender and as a warning to others, can be awarded only against one who has participated in the offense. *Lake Shore & M. S. Ry. Co. v. Prentice*, 18 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97.

Expenses of litigation do not fall under the head of "vindictive damages" under the Code. *Mosely v. Sanders*, 76 Ga. 293, 294.

VINOUS.

The fermentation which generates alcohol from vegetable juices is called "vinous alcohol." *Eureka Vinegar Co. v. Gazette Printing Co.* (U. S.) 35 Fed. 570, 571.

The term "vinous spirits" does not include alcohol. *State v. Martin*, 34 Ark. 340, 341.

VINOUS LIQUOR.

"Vinous liquors," according to general knowledge, includes all kinds of wine. *Caldwell v. State*, 30 South. 814, 815, 43 Fla. 545 (citing *Hatfield v. Commonwealth*, 14 Atl. 151, 120 Pa. 395).

"Vinous liquors" are those liquors made from the juice of the grape. *Adler v. State*, 55 Ala. 16, 23.

"Vinous liquors" are liquors "which have undergone vinous or alcoholic fermentation." *Eureka Vinegar Co. v. Gazette Printing Co.* (U. S.) 35 Fed. 570, 571.

The term "vinous or alcoholic liquor," in a statute prohibiting the sale of such liquor, includes wine made from grapes and from blackberries, though there is evidence that it is not intoxicating. *Reyfelt v. State*, 18 South. 925, 73 Miss. 415.

Alcohol.

As used in Act Feb. 22, 1842, providing that the sale of "vinous and spirituous liquors" may be licensed, etc., should not be construed to include alcohol. There is a marked distinction between the specific thing known as alcohol and the liquors commonly used as beverages, which contain more or less of alcohol, but are not alcohol, though they may be alcoholic. The words "vinous or spirituous liquors," as used in the statute, refer to alcoholic beverages. *Lemly v. State*, 12 South. 22, 70 Miss. 241, 20 L. R. A. 645.

Bitters.

Under an indictment charging the sale of spirituous and vinous liquors, a defendant

may be convicted for the sale of medicated bitters capable of producing intoxication. *Prinzel v. State*, 33 S. W. 350, 351, 35 Tex. Cr. R. 274.

The words "vinous and intoxicating liquors," as used in the title of a local option act, are sufficient to authorize legislation with respect to wines and intoxicating medicated bitters; the same being included within and classified by such terms. *Hancock v. State*, 40 S. E. 317, 318, 114 Ga. 439.

Cider.

The question whether "vinous liquors," within the meaning of a statute prohibiting the sale thereof without a license, includes cider, is a question of fact for the jury. "Certainly in common acceptance cider is not understood to be either a vinous or a spirituous beverage, yet, when fermented, it doubtless contains a percentage of alcohol sufficient to bring it within the fair meaning of the term 'vinous.' We do not mean to intimate that the unfermented juice of apples is in any circumstances to be regarded as either a vinous or spirituous liquor, but we do not know and cannot say as a matter of law that its character may not be so changed by fermentation as to bring it within the meaning of the term 'vinous.'" *Commonwealth v. Reyburg*, 16 Atl. 351, 352, 122 Pa. 299, 2 L. R. A. 415.

"Vinous liquor," as used in an act of the Legislature declaring that vinous liquors are intoxicating, cannot be construed to include apple cider. The word "vinous" is derived from the Latin "vinum," wine, and so named because made from the fruit of the vine. "Wine" is defined in Worcester's Dictionary, after the statement of its derivation and after reference to the word in the language of many nations, among others to the Latin "vinum," as meaning, first, the fermented juice of certain fruits, resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived, as ginger wine, gooseberry wine, currant wine, etc. The word "vinous" should not be applied to the juice of fruits which grow on trees, and in common parlance cider and beer are never called "vinous liquor" or "wine," although there may be found in works on chemistry general expressions that wine is the expressed juice of ripe fruits containing sugar, which causes it to readily undergo fermentation. *Feldman v. City of Morrison*, 1 Ill. App. (1 Bradw.) 460, 462. See, also, *Allred v. State*, 8 South. 56, 57, 90 Ala. 112.

Fermented juice of blackberries.

The term "vinous liquors," as used in a statute prohibiting the sale of such liquor, included the fermented juice of blackberries, as well as that of grapes, where such juice, after fermentation with sugar, produced in-

toxication when taken as a beverage. *Hirton v. State*, 31 South. 563, 564, 132 Ala. 29.

Intoxicating liquor synonymous.

"Vinous liquors," as used in Code, § 629, requiring a license for engaging in the business of selling vinous liquors, is not synonymous with "intoxicating liquors," and are such as are made from the fermented juice of grapes. Vinous liquor is also a spirituous liquor, in that it contains spirits of alcohol. Vinous liquors may be intoxicating, but they do not include all intoxicating liquors, beverages, or bitters. A given liquor may be in a high degree intoxicating, and yet not be a vinous liquor, in the sense of the statute. Fermented or hard cider is an illustration. Cane beer is another. *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

Spirituous, vinous, and malt liquors are commonly known to contain a considerable portion of alcohol, and alcohol is commonly known to be intoxicating. Hence an allegation, in an indictment for the sale of spirituous, vinous, and malt liquors contrary to law, is equivalent to alleging the sale of intoxicating liquors contrary to law. *State v. Relly*, 52 Atl. 1005, 1006, 66 N. J. Law, 399.

Malt liquor.

Vinous liquor is liquor made from the juice of the grape. It is used in such sense in Act March 19, 1875, prohibiting within certain limits the sale or giving of "vinous liquor," and hence the statute does not prohibit the sale of malt liquors. *Tinker v. State*, 8 South. 855, 90 Ala. 647.

VIOLATE—VIOLATION.

See "Die in Consequence of Violation of Law"; "Die in Known Violation of Law"; "While Violating Law."

"Violate" is synonymous with "ravish." *State v. Montgomery*, 45 N. W. 292, 293, 79 Iowa, 737.

The forty-third section of the third article of the act creating an insurance department, and providing that every "violation" of the act should subject the party to a penalty of \$500, applies to acts of omission, as well as acts of commission. *State v. Case*, 53 Mo. 246, 250.

"Violation," as used in Laws 1893, c. 388, art. 2, § 26, providing that no person shall produce or manufacture any compound in imitation of natural butter, or sell any compound produced in violation of this section, etc., means practical nonconformity as well as punishable transgression, and hence would not be limited to such compounds as are manufactured in the state. *People v. Fox*, 38 N. Y. Supp. 635, 636, 4 App. Div. 38.

A sentence of excommunication read by the pastor of a church, stating that the offender had "violated the seventh commandment," and declaring in the subsequent part of the sentence that "this church does now, as always, bear its solemn testimony against the sin of fornication and uncleanness," did not impute the crime of adultery in its legal and technical sense as an indictable offense, but was merely a charge of unchaste and licentious conduct. *Farnsworth v. Storrs*, 59 Mass. (5 Cush.) 412, 415.

VIOLATION OF TRIAL BY JURY.

By a constitutional prohibition as to "a violation of trial by jury" is to be understood a taking away of that right, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are at least virtually of that character. Such a constitutional provision does not prevent the Legislature from providing for changes of jurisdiction or regulating the exercise of the right. *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 590, 174 U. S. 1, 43 L. Ed. 873.

VIOLENCE.

See "Actual Violence"; "Excessive Violence"; "Irresistible Violence"; "Mob Violence."

"Violence," as used in a statute relating to robbing a person with violence, does not mean any physical act to the person of the complainant which resulted in the taking. "Violence," as used in the statute, generally implies the overcoming or attempting to overcome an actual resistance, or the preventing of such resistance through fear. It may include restraint of the person, and it generally implies that the acts tend to produce terror and alarm in the person on whom the violence is committed. It ought not to be held that every assault and battery, even the most trivial, which results in the taking of property from the assaulted person, constitutes that element of violence which is mentioned in the statute. *People v. McGinty* (N. Y.) 24 Hun, 62, 64.

Under a statute declaring it to be a felony to take or convey by violence a free negro out of that state into another, with intent to sell him as a slave, defendant was convicted on proof that by practicing deception upon a free negro he had induced the negro to go into another state, where he was sold by defendant as a slave. The court held that "violence" is a general term, and includes all sorts of force; that a conviction could not be sustained, in the absence of proof of actual violence; and that the term did not include deception. *State v. Weaver*, 44 N. C. 9, 13.

A death caused by "violence," within the meaning of Rev. St. § 1221, requiring the service of the coroner where a death is supposed to be caused by violence, is a death caused by unlawful means such as usually call for the punishment of those who employ them. *State v. Bellows*, 56 N. E. 1023, 1029, 62 Ohio St. 307.

As force.

The word "violence," is one of the synonyms of the word "force." *State v. Daly*, 18 Pac. 357, 358, 16 Or. 240.

The word "violence," in the common-law definition of robbery as a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting in fear, has the same meaning as the word "force" in the statutory definition of the crime. *Long v. State*, 12 Ga. 293, 320.

"Violence" is defined by Bouvier to be "the abuse of force; that force which is employed against any right, against the laws, and against public liberty." It has reference to human agency, and includes the idea of responsibility for crime. A human life may be violently destroyed, and not feloniously destroyed. Death may result from the kick of a horse, or a man may be mangled or crushed to death by machinery. In *re Burns' Case*, 5 Pa. Co. Ct. R. 549, 552.

As physical force.

The term "violence" is synonymous with physical force, and the two are used interchangeably in relation to assaults. Any language which expressly or by implication charges exertion of physical force on the person assaulted charges assault with actual violence, and hence charging an aggravated battery is sufficient. *State v. Wells*, 31 Conn. 210, 212.

"Violence," according to the Law Dictionaries, is synonymous with "physical force." According to the American & English Encyclopedia of Law, it is a general term, and includes all sorts of force; and in *High v. State*, 26 Tex. App. 545, 573, 10 S. W. 238, 8 Am. St. Rep. 488, it was held that a mere assault was not violence. *Alexander v. State*, 50 S. W. 716, 717, 40 Tex. Cr. R. 395.

"Violence" is defined by Webster to be "physical force; strength of action or motion." Bouv. Law Dict. says it is "the abuse of force; that force which is employed against any rights, against the laws, and against public liberty." *Commonwealth v. Rhoads* (Pa.) 2 Chest. Co. Rep. 146.

VIOLENT.

"In its ordinary acceptation the term 'violent' means not natural or spontaneous;

not intentional, voluntary, expected, or usual. The degree of force is not always material. In this view of the case the bite of a fly or spider or the sting of a bee may be as well characterized as violent as a bite of a rattlesnake or the sting of a scorpion." *Bacon v. United States Mut. Acc. Ass'n* (N. Y.) 44 Hun, 599, 606.

The term "violent," as used in a statute prohibiting riot, is synonymous with "riotous"; and hence the fact that the affidavit alleged the act to have been committed in a riotous, instead of a violent, manner, was immaterial. *State v. Kutter*, 59 Ind. 572, 574.

VIOLENT MEANS.

See "External, Violent, or Accidental Means."

VIOLENT PRESUMPTION.

"We understand by a 'violent presumption' one which is very strong and forcible, although not one which is necessarily conclusive." *Shealy v. Edwards*, 75 Ala. 411, 419.

"A violent presumption in the law of evidence is the presumption arising where the connection between the fact to be inferred and that which is proven is found by experience and observation to be invariably in all instances. It is equal to full proof." *Davis v. Curry*, 5 Ky. (2 Bibb) 238, 239.

VIOLENT TEMPER.

Amiable, peaceable, slow to anger, make up the antithesis to quick or violent temper. In common parlance the two traits, character for violent temper and bad boy, are not one and the same. One may have a hasty or violent temper, and yet in common acceptance not be regarded as a bad boy. *Martin v. State*, 8 South. 858, 861, 90 Ala. 602, 24 Am. St. Rep. 844.

VIOLENTLY.

An allegation that a person committed an injurious act "violently and with great force" is equivalent to charging such person with the proposed wrong in the doing of the act. The word "violently," in this connection, means outrage, unjust force, attack, assault; and the word "force," in this connection, means unlawful violence offered to persons or things. *Summers v. Tarney*, 24 N. E. 678, 679, 123 Ind. 560.

"Violently" means with violence, and as used in an indictment for rape imports that the act was against the consent of the prosecutrix. *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 490, 69 Am. Dec. 264.

As by force or forcibly.

"Violently" signifies "with force," or "forcibly"; and an indictment charging that the defendant "violently and against her will" feloniously ravished a certain female is sufficient, as imputing that the act was done "by force." "Violence" is defined by Webster as "physical force." *State v. Williams*, 32 La. Ann. 335, 337, 36 Am. Rep. 272.

"Violently," as used in an indictment charging a man with assault on a female with intent to violently and against her will ravish and carnally know her, is not equivalent to "by force," as used in Rev. St. c. 154, § 17, defining rape as ravishing and carnally knowing a female by force and against her will. Worcester defines "force" as "strength, vigor, might, energy, power, or violence," and "violently" as "with violence, forcibly, or vehemently." The term "force," when applied to the acts of a man in illicit sexual intercourse with a female, has a peculiar and technical meaning. The definition nearest to its exact meaning is "violence, power exerted against the will or consent." Webster. Dict. One signification of the active verb "to force" is to ravish, to violate by force, as a female, and conveys to the mind ideas similar to those which are imparted by the words "by force." The adverb "violently" has a more general meaning. If used by a man in application to acts of sexual intercourse, without accompanying language indicating compulsion, it would not of necessity import a crime against the person of a female who was the subject of the acts. *State v. Blake*, 39 Me. 322, 324.

"Violently," as used in an indictment charging a person with "violently" and feloniously raping, ravishing, and carnally knowing a female, is equivalent to the word "forcibly," and supplies its place. *Walling v. State*, 7 Tex. App. 625, 628.

As by violence.

An indictment charging the taking of certain articles from the person of the prosecuting witness "violently" held fairly equivalent to an allegation that they were taken "by violence," in the words of the statutory definition. The definition of "violently" is in a violent manner, and "violent" is defined as moving or acting with physical strength, urged or impelled with force. Webster. Int. Dict. The signification of the word "violently," when applied to the forcible and felonious taking of articles of value from the person of another, is not strained when held to be equivalent to the words "by violence." *Craig v. State*, 62 N. E. 5, 6, 157 Ind. 574.

VIOLIN.

A violin is a small instrument, played upon exclusively by the hand. When used by a musician in his business, it is exempt,

under Gen. St. c. 133, § 32, exempting from attachment the implements of a debtor necessary for carrying on his trade or business, etc. *Goddard v. Chaffee*, 84 Mass. (2 Allen) 395, 396, 79 Am. Dec. 796.

VIRTUE.

See "By Virtue of."

VIRTUOUS.

"Virtuous," as used in a statute providing that if any person shall by persuasion and promise of marriage, or other false and fraudulent means, seduce a virtuous unmarried female, etc., means a woman who has never had unlawful sexual intercourse. *O'Neill v. State*, 11 S. E. 856, 857, 85 Ga. 383.

On a prosecution for seduction of a "virtuous unmarried female," the judge charged that "the presumption of law is that the female alleged to have been seduced was virtuous, and that presumption remains until removed by proof. She must have personal chastity. If she at the time of the alleged seduction had never had unlawful intercourse with man, if no man had then carnally known her, had had carnal intercourse with her, she was a virtuous female within the meaning of the law. If man had then carnally known her, had had carnal intercourse with her, she is not a virtuous female within the meaning of the law." In discussing this charge the court said: "Under the definition the judge gave the jury of this word [virtuous] it means simply a woman who has never before been guilty of fornication or adultery. She may be a bad woman at heart; she may be filled with all uncleanness; she may be burning with lust; and yet, if through lack of opportunity, she be yet not an actual violator of the law, she is a virtuous woman in the sense of this law, and one may be guilty of the fiendish crime of seducing her, inducing her to submit to his lustful embraces, and to allow of criminal intercourse. I do not think so. It needs no fraud or vile acts to make an actual criminal of such a woman. She cannot be seduced from virtuous, chaste thoughts to lustful desires and lascivious passions. She is there already." *Wood v. State*, 48 Ga. 192, 288, 15 Am. Rep. 664.

VIRTUTE OFFICII.

See "By Virtue of His Office."

VIS MAJOR.

"Vis major" is translated as "superior force." It is used in the civil law in the same way that the words "act of God" are used in the common law. *Brousseau v. The Hudson*, 11 La. Ann. 427, 428.

A loss is said to have been caused by vis major when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. Story defines "vis major" to be any irresistible natural cause, which cannot be guarded against by the ordinary exertions of human skill and prudence; and this definition is approved by Chief Justice Cockburn, in *Nugent v. Smith*, 1 C. P. Div. 423, 437. Thus a storm of unusual and extraordinary violence, a sudden gust of wind, and a tempest have been held to be examples of vis major. *The George Shiras* (U. S.) 61 Fed. 300, 301, 9 C. C. A. 511.

VISIBLE.

The word "visible" is defined by Webster to mean "noticeable; apparent; open; conspicuous." In the Century Dictionary, as "apparent; open; conspicuous; as a man with no visible means of support; discoverable; in sight; obvious; manifest; clear; distinct; plain; patent; unmistakable." An object that is noticeable, apparent to the touch, may be said to be "visible." *Gale v. Mutual Aid & Accident Ass'n*, 21 N. Y. Supp. 893, 895, 66 Hun, 600.

"Visible" means perceptible by the eye, that may be seen, apparent, open, or obvious, and is so used in reference to visible defects in machinery or appliances. *Kansas City & P. R. Co. v. Ryan*, 35 Pac. 292, 294, 52 Kan. 637.

The words "outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed, not hidden, exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence, denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact; not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive. *Bass v. Pease*, 79 Ill. App. 808, 818.

The word "visible," as used in the collision rules, when applied to lights, shall mean visible on a dark night, with a clear atmosphere. U. S. Comp. St. 1901, pp. 2863, 2876, 2886.

VISIBLE MARK.

An accident insurance policy providing that it should not cover any injury, fatal or otherwise, of which there is no "visible

mark" upon the body, does not necessarily mean a bruise, contusion, laceration, or broken limb, but may be any visible evidence of an internal strain which may appear within a reasonable time after the injury is received. *Thayer v. Standard Life & Accident Ins. Co.*, 41 Atl. 182, 183, 68 N. H. 577 (citing *Pennington v. Pacific Mut. Life Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306; *United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; *Freeman v. Mercantile Ass'n*, 156 Mass. 351, 354, 30 N. E. 1013, 17 L. R. A. 753).

The death of the insured was a "visible mark" of injury upon the body, within the meaning of an accident policy providing that the insurance shall not cover any injury of which there is no visible mark upon the body, and a localized redness of the tissues of the brain, though not revealed until the autopsy, was a visible mark. The terms of the policy do not require that the mark should be upon the surface of the body. In *United States Mut. Acc. Ass'n v. Barry*, 9 Sup. Ct. 755, 759, 131 U. S. 100, 33 L. Ed. 60, the policy provided that it should not extend to any injury of which there was no external visible sign. The court, in charging, said that the visible sign does not necessarily require that the injury should be external. Visible signs of injury are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications which are visible signs of internal injury. Complaint of pain is not a visible sign. Complaint of internal soreness is not such a sign; but if the internal injury produces, for example, a pale and sickly look in the face, or causes vomiting, or sends forth to the observation of the eye any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury. *Union Casualty & Surety Co. v. Mondy*, 71 Pac. 677, 679, 18 Colo. App. 395.

VISIBLE MEANS OF SUPPORT.

In a statute including among disorderly persons those who have no visible means of support, the use of the word "visible" indicates that appearances must to some extent be relied on. "Visible" and "apparent" are words of similar meaning. *People v. Herlick*, 26 N. W. 767, 59 Mich. 503.

VISIBLE POSSESSION.

By "visible possession" is meant that the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible, and notorious as to give notice to the world that the right of the true owner is invaded intentionally and with the purpose to assert a claim adversely to his. *Johnston v. City of Albuquerque* (N. M.) 72 Pac. 9, 11 (citing 1 Cyc. 997).

VISIBLE PROPERTY.

An averment that a person has "no visible property exempt from execution" is not an equivalent to an averment that he is insolvent or unable to respond in damages. *Connery v. Swift*, 9 Nev. 39, 43.

VISIBLE RISK.

An open and visible risk is such as would in an instant appeal to the senses of an intelligent person. It is one so patent that a person familiar with the business would instantly recognize it. *Johnston v. Oregon S. L. & U. N. Ry. Co.*, 31 Pac. 283, 286, 23 Or. 94.

VISIBLE SIGN OF INJURY.

The word "visible" is defined by Webster to mean noticeable, apparent, open, or conspicuous. "An object that is noticeable, apparent to the touch, may be said to be visible." In an action upon an accident policy, providing that benefits should not extend to any injury of which there should be no external or visible signs, it appearing that plaintiff was severely injured in his diaphragm, etc., but that there was no objective evidence of the same visible to the eye upon his person, it being ascertainable only by manipulation of the muscles, he was held entitled to recover. The evidence of the injury need not be necessarily visible to the eye. If it can be ascertained by applying the hand upon the body, it is sufficient. *Gale v. Mutual Aid & Accident Ass'n*, 21 N. Y. Supp. 893, 895, 66 Hun. 600.

Whether the phrase, "visible and external signs of injury," in a clause of an accident policy providing that the benefits shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured, extends to a case where the only marks on the body of the insured are bloody froth at the mouth, and spots upon the face and breast, and red spots upon the body, is a question to be determined by the jury, and such marks cannot be said as a matter of law not to constitute external and visible signs of injury. *United States Mut. Acc. Ass'n v. Newman*, 8 S. E. 805, 809, 84 Va. 52.

A clause in an accident policy that the insurance does not extend to any bodily injury of which there shall be no external and visible sign upon the body of insured does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death, as it would exclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion, means of death leaving no outward mark, and also where the insured has been killed

and his body is missing. *McGlinchey v. Fidelity & Casualty Co.*, 14 Atl. 13, 16, 80 Me. 251, 6 Am. St. Rep. 190.

VISIT.

See "Is Visiting."

Frequent distinguished, see "Frequent."

A rule of court empowering the marshal to regulate the admission of persons to "visit" the prisoners did not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, provided the attendance of the attorney was on the client's business, necessary to and required by him. *Ex parte Matanle*, 4 Barn. & Adol. 365.

"Visits," as used in *Burns' Ann. St.* 1894, § 2080 (*Horner's Ann. St.* 1897, § 2002), providing that whoever, being a male person, frequents or visits a gambling house or houses, shall be fined, is a verb, and as used is singular, and not plural, making a single visit sufficient to constitute an offense. *Roberts v. State*, 58 N. E. 203, 204, 25 Ind. App. 366.

VISITOR.

A "visitor" is one who comes to a locality for pleasure or health, and who engages in no business while there, and remains only for a reasonable time; and if the party engages in any business himself, or employs his slave in any business, except as mere personal attendants upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. *Ex parte Archy*, 9 Cal. 147, 157, 168.

"Visitor" is defined as one who visits or comes or goes to see another, as in civility or friendship, but, as used in a trip railway ticket, providing that the ticket is good for the members of the family of the purchaser or visitors to such family, is used in the sense of "guest"; and as a guest is one who is a visitor sojourning in the house of or entertained at the table of another, and partakes of his hospitality, a neighbor who frequently makes short calls is not a visitor, within the meaning of the ticket. *Odell v. New York Cent. & H. R. R. Co.*, 45 N. Y. Supp. 464, 465, 18 App. Div. 12.

VISITORIAL POWER.

An individual who conveys property in trust for charitable purposes has, unless he should assign it to another, what is called the "visitorial power," in the exercise of which he may prescribe rules for its management and for the administration of the trust; but it is a power which may be assigned, and the incorporation of trustees under a charter which confers on them the full power and management devests such right of the found-

er, and vests it in the corporation. *Trustees of Union Baptist Ass'n v. Huhn*, 26 S. W. 755, 756, 7 Tex. Civ. App. 249.

The "visitorial power" connected with a charitable trust is a mere power to control and arrest abuses and to enforce a due observance of the statutes of a charity. It is not a power to revoke the gift, to change its uses, or to divest the rights of the parties entitled to the bounty. *Allen v. McKean*, 1 Fed. Cas. 489, 498.

VISNE.

The word "visne," from which juries were drawn at common law, is interpreted to mean county. *Ex parte McNeeley*, 36 W. Va. 84, 90, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831.

The word "visne," as employed in stating the fact that at common law a jury was required to be returned from the visne, meant from the neighborhood, or the place where the cause of action was laid or the crime charged to have been committed. *State v. Kemp*, 34 Minn. 61, 63, 24 N. W. 349.

VITIATION.

"Vitiation" of a contract is not avoidance. It is, under circumstances, ground for it. *Richardson v. Horn*, 31 Atl. 896, 897, 8 Houst. 26.

VIVUM VADIUM.

See "Vadium Vivum."

VOCATION.

Laws 1876, c. 122, forbidding the employment of children for any immoral purpose, exhibition, or practice, or in any "business, exhibition, or vocation" injurious to the health or dangerous to life or limb, means an employment either vicious in itself or one partaking of the character of an amusement, and would not include any productive industries or necessary occupations. *Hickey v. Taaffe*, 1 N. E. 685, 686, 99 N. Y. 204, 52 Am. Rep. 19.

VOCIFEROUS.

"Vociferous" means making a loud outcry, clamorous, or noisy, as vociferous heralds. Under Pen. Code, art. 314, punishing the use of "loud and vociferous language" in manner calculated to disturb persons assembled for innocent amusement, a conviction will be set aside where witnesses testified that they heard defendant, but were unable to understand what he said, though they were in the same room. *Anderson v. State* (Tex.) 20 S. W. 358, 359 (citing *Webst. Dict.*).

VOID.

See "Utterly Void"; "Become Void."
See, also, "Null and Void."

"Void" means of illegal form; of no effect whatever. And. Law Dict. Of no legal force or effect. Webst. Dict. Chandler v. Kennedy, 85 N. W. 439, 441, 8 S. D. 56.

The term "void," in its more limited sense, implies an act of no effect at all, being a nullity ab initio. Inskeep v. Lecony, 1 N. J. Law (Coxe) 111, 112.

A void act is one which is entirely null, not binding on either party. Cummings v. Powell, 8 Tex. 80, 81, 85.

A void thing is in legal effect no thing, and it may be doubtful whether a void act is capable of ratification against the wish of the other parties to the transaction. Smith v. Genet (N. Y.) 2 City Ct. R. 88, 91.

Where a statute provides that a particular act shall be void, and fixes a penalty for the perpetration of the act, which is also prohibited, the word "void" should be interpreted as meaning void absolutely, in accordance with the technical accuracy of the word. Land, Log & Lumber Co. v. McIntyre, 75 N. W. 964, 966, 100 Wis. 258, 69 Am. St. Rep. 925.

A void contract is one which has no legal force, and which for that reason cannot be enforced. King v. King, 59 N. E. 111, 112, 63 Ohio St. 363, 52 L. R. A. 157, 81 Am. St. Rep. 635.

A void contract is a mere nullity, of which any one can take advantage, and which is, in legal estimation, incapable of being ratified. Callis v. Day, 88 Wis. 643, 646 (citing Schouler, Dom. Rel. p. 518).

A void contract is one without legal effect. Niagara Fire Ins. Co. v. Scammon, 32 N. E. 914, 915, 144 Ill. 490, 19 L. R. A. 114 (citing Bishop, Cont. § 611).

"Void," when used in a statute, does not always mean absolutely void for every purpose, and, when determining its meaning in a given case, regard must be had to the subject-matter of the statute, and its scope, purpose, and effect. Columbia & P. S. R. Co. v. Brailiard, 40 Pac. 382, 12 Wash. 22.

The term "void" is perhaps seldom, unless in a very clear case, to be regarded as implying a complete nullity; but it is, in a legal sense, subject to large qualifications, in view of all the circumstances calling for its application and the rights and interests to be affected in a given case. Brown v. Brown, 50 N. H. 538, 552.

The word "void," as used in a policy of insurance to the effect that, if the insured shall have or shall hereafter make any other insurance on the property insured, then the

policy shall be void, does not mean voidable or something else than void, although the interpretation works a forfeiture and avoids the instrument. This construction of the word "void" should be given to the second of two policies of insurance on the same property, each containing the condition that, if the insured had or should make other insurance, then the policy should be void. Thus the second policy would not invalidate the first, for it never effected the insurance. Jersey City Ins. Co. v. Nichol, 85 N. J. Eq. (8 Stew.) 291, 299, 40 Am. St. Rep. 625.

Illegal distinguished.

There is a wide distinction between that class of contracts which are unlawful, in the sense that the law will not enforce them, and which we usually term "void contracts," and that other class which are designated as "illegal contracts." Money paid in furtherance of an illegal contract cannot be recovered back; but it is otherwise as to money paid in furtherance of a contract which by statute is void, but not illegal, as in the case of contracts void under the statute of frauds. An illegal contract may be repudiated by either party. City of Los Angeles v. City Bank, 34 Pac. 510, 512, 100 Cal. 18.

Irregular distinguished.

Void proceedings would destroy jurisdiction in a court of inferior powers, but merely irregular proceedings would not. The difference is not readily perceivable. Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundation, and discovers that the proceedings have nothing to stand on, while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law; the other, to matters which are contrary to the practice authorized by law. One relates more to the act, and the other more to the manner of it. Cobbossee Nat. Bank v. Rich, 16 Atl. 506, 508, 81 Me. 164.

Voidable distinguished.

A thing is void which is done against law at the very time of doing it, and when no person is bound by the act. But a thing is voidable which is done by a person who ought not to have done it, but who nevertheless can avoid it himself after it is done. Martin v. Cowles, 18 N. C. 29, 32; Anderson v. Roberts (N. Y.) 18 Johns. 515, 527, 9 Am. Dec. 235; Arnold v. Fuller's Heirs, 1 Ohio 458, 467.

A thing that is void is as if never done to all purposes, so that all persons may take advantage thereof. Again, a thing may be

void to some purposes only, and still further a thing may be so void by operation of law that he that will have the benefit of it will make it good. *Franklin v. Kelley*, 2 Neb. 79, 98.

A thing strictly void in the technical sense of the word is incapable of ratification, while those that are merely voidable may be ratified. *Dayton v. Nell*, 43 Minn. 246, 248, 45 N. W. 231.

A contract is void when it is a nullity, binding on no party, and unsusceptible of ratification. When either party is bound, or it may be confirmed, it is only voidable. *Breckenridge's Heirs v. Ormsby*, 24 Ky. (1 J. J. Marsh.) 236, 240, 19 Am. Dec. 71.

A void act is one which is entirely null, not binding on either party, and not susceptible of ratification, while a voidable act is one which is obligatory on others until disaffirmed by the party with whom it originates. *Cummings v. Powell*, 8 Tex. 80, 85.

The true distinction between void and voidable acts, orders, and judgments is that the former can always be assailed in any proceeding, and the latter only in a direct proceeding. *Alexander v. Nelson*, 42 Ala. 462, 469.

While it is true that the word "void" has been inappropriately used by lawyers and judges, it nevertheless has a determinate meaning in law, when applied as an adjective to statutes, contracts, and other acts intended to effect some purpose or purposes, which meaning is that such contracts and statutes or acts are totally ineffectual for the purposes, or for a part of the purposes, intended. If totally ineffectual for any purpose intended, they are simply void. If totally ineffectual as to only a part of such purposes, they are relatively void. This distinction is not identical with that between void and voidable, since a voidable act or contract takes effect as intended, and continues to be effectual to all intents and purposes, until it is set aside or nullified as to all or some part of the persons or things which were before affected by it. For example: The contracts of infants and contracts procured by fraud, if not otherwise against law or the policy of law, are not void, but only voidable, because they take effect when made, and remain effectual until avoided; whereas, void acts, though in the form of contracts or statutes, never take any effect as such, and acts which are only relatively void are denied any effect, even temporary, against a part or class of the persons or things that they purport or were intended to bind or affect. *Watkins v. Wilhoit* (Cal.) 85 Pac. 646, 648.

Bingham, in his treatise on Infants (page 8), says: "A void act never is or never can be binding, neither on the party in whom it

originates nor on others. A voidable act is binding on others until disaffirmed by the party with whom it originates. So that the contract of an infant is voidable, not void, and infancy is a personal privilege, of which only the infant can avail himself." *Slocum v. Hooker* (N. Y.) 13 Barb. 536, 537.

A deed or instrument utterly void is as one which never existed. It passes nothing, and confers no right or title upon the party named as grantee. But an instrument or deed fraudulent as to creditors and purchasers, and voidable by them, is nevertheless valid as between the parties to it, and the title is deemed to have passed and vested in the grantee or assignee, liable to be divested at the suit of the party aggrieved. A void deed is incapable of confirmation or of being made good by any subsequent act of the party, while one which is merely voidable may be made good by matter *ex post facto*. *Hone v. Woolsey* (N. Y.) 2 Edw. Ch. 289, 291.

In *Terrill v. Auchauer*, 14 Ohio St. 80, it is said that the distinction between the words "void" and "voidable," in their application to contracts, is often of great practical importance, and when entire accuracy is required the term "void" can be properly applied only to those contracts that are of no effect whatever, such as are mere nullities and incapable of confirmation or ratification. The distinction suggested between deeds that are void and those that are voidable only is usually regarded as determining the necessity for the interposition of a court of equity. *Commercial Nat. Bank v. Wheelock*, 40 N. E. 636, 638, 52 Ohio St. 534, 49 Am. St. Rep. 738.

Bacon considers a fraudulent gift void as to some persons only, and says it is good as to the donor and void as to creditors. Wherever the act done takes effect as to some purposes and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore in a legal sense it is not void, but merely voidable. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees: (1) Void, so as if never done, to all purposes, so as all persons may take advantage thereof; (2) void as to some purposes only; (3) so void by operation of law that he that will have the benefit of it, may make it good. *Anderson v. Roberts* (N. Y.) 18 Johns. 515, 527, 9 Am. Dec. 235.

That is absolutely void which the law or the nature of things forbids to be enforced at all, as contracts to do any legal act or omit a legal public duty, or contracts in a form forbidden by law, or made by persons having no legal power or capacity to contract, as bonds of married women. That is relatively void or voidable which the law

condemns as a wrong to individuals and refuses to enforce against them, as contracts tainted with fraud or any other kind of wrong against persons. A contract that is absolutely void cannot be ratified or confirmed, for that would be giving sanction and validity to an agreement which the law declares illegal and refuses to enforce; but a contract relatively void, though it cannot be enforced against the defrauded party, is not so void as to vitiate the title under it as against a bona fide purchaser for value and without notice, or prevent the party intended to be injured by it from renouncing the privilege which the law allows him of rejecting it altogether, or from ratifying it and thus making it his own. *Seylar v. Carson*, 69 Pa. (19 P. F. Smith) 81, 87.

The word "void," as used in the New York statute declaring that a contract for the sale of land not expressing the consideration shall be void, is used in its natural signification, and it cannot be said that a contract declared void by the statute still subsists as a contract, and that the only effect of the statute is to deprive a party of the remedy; but the word "void" is used as a word of substance, and therefore a contract in derogation of the provisions of the statute is utterly void and of no effect. *Marie v. Garrison* (N. Y.) 13 Abb. N. C. 210, 257.

Whatever may be avoided may in good sense be called void, and this use of the term "void" is not uncommon in the language of statutes and of courts; but in regard to the consequences to third persons the distinction is highly important, because nothing can be founded on a deed which is absolutely void, whereas from those which are only voidable fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them. *Somes v. Brewer*, 19 Mass. (2 Pick.) 184, 191, 13 Am. Dec. 408 (cited and approved in *Crocker v. Bellangee*, 6 Wis. 645, 668, 70 Am. Dec. 489; *Bromley v. Goodrich*, 40 Wis. 131, 140, 22 Am. Rep. 685).

The terms "void" and "voidable," as used in our books, seem to stand for absolutely and relatively void. That is absolutely void which the law or the nature of things forbids to be enforced at all, and that is relatively void which the law condemns as a wrong to individuals and refuses to enforce as against them. *Pearsoll v. Chaplin*, 44 Pa. (8 Wright) 9, 15.

Construed as voidable.

The term "void" is equivocal. It may import absolutely null, or merely voidable. *Mailholt v. Metropolitan Life Ins. Co.*, 82 Atl. 989, 991, 87 Me. 374, 47 Am. St. Rep. 836.

"Void" is an indefinite expression, that has no fixed meaning, and what is only void-

able is often called void. *Larkin v. Saffarans* (U. S.) 15 Fed. 147, 152 (quoting Abb. Law Dict.; Bouv. Law Dict.).

The word "void" has been held to mean voidable. *Election Cases*, 65 Pa. (15 P. F. Smith) 20, 34.

The word "void," in one of its recognizable uses, signifies, not a thing which is void in such a sense that it cannot be rendered valid, but merely which is void unless and until it shall be rendered valid by some event or act. *Rheiner v. Union Depot St. R. Co.*, 17 N. W. 623, 625, 31 Minn. 289.

It is a common practice of legislatures and courts to use the words "void" and "voidable" interchangeably, where the distinction between them is not material to the question or case under consideration. *United States v. Winona & St. P. R. Co.* (U. S.) 67 Fed. 948, 954, 15 C. C. A. 96.

Courts often speak of acts and contracts as "void," when they mean no more than that some party concerned has a right to avoid them. *Beecher v. Marquette & P. Rolling Mill Co.*, 7 N. W. 695, 696, 45 Mich. 103.

"Void" has with lexicographers a well-defined meaning as of no legal force or effect whatsoever, or null and incapable of confirmation or ratification. But it is sometimes and not infrequently used in enactments, in opinions, in contracts, and in arguments in the sense of voidable; that is, capable of being avoided. The word "void," when used in any of these instruments, will therefore be construed in the one sense or the other as shall best effectuate the intent in its use, which will be determined from the whole language of the instrument and the manifest purpose it was framed to accomplish. *Van Schaack v. Robbins*, 36 Iowa, 201, 203.

Where the word "void" is used to secure a right or to confer a benefit on the property, it will, as a rule, be held to mean null and incapable of confirmation; but, if used respecting the rights of individuals capable of protecting themselves, it will often be held to mean voidable only. *Van Schaack v. Robbins*, 36 Iowa. 201, 203 (cited in *Denny v. McCown*, 54 Pac. 952, 953, 34 Or. 47).

By the term "void" is not always meant that utter negativeness which is the equivalent of nonexistence, but more often is meant that which, relatively to persons, circumstances, conditions, or forms of action, may be treated as though it were nonexistent. In this latter sense there is little distinction between it and the word "voidable." *Frazier v. Jeakins*, 68 Pac. 24, 23, 64 Kan. 615, 57 L. R. A. 575.

There is in our books great looseness and no little confusion in the use of the terms "void" and "voidable," growing, per-

haps, in some degree out of the imperfection of our language. There are at least four kinds of defects which are included under these expressions, while we have but those two terms to express them all. 2 Kent, Comm. 234; 7 Bac. Abr. 64, "Void and Voidable"; 22 Vin. Abr. 12, "Void and Voidable"; Jac. Law Dict. "Void." (1) Proceedings may be wholly void, without force or effect as to all persons and for all purposes, and incapable of being or being made otherwise. This is the broadest sense of the word, but the cases which fall within this signification are probably not numerous. (2) Things may be void as to some persons and for some purposes, and as to them incapable of being otherwise, which are yet valid as to other persons and effectual for other purposes; as a deed executed by an idiot, and by others capable of contracting, may be void as to the idiot, and yet binding as to the others. An instrument in form of a deed, but without a seal, may be void as a conveyance, and yet be binding for some other purposes. (3) Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, though not so as to others, until they are confirmed; but, though said to be void, they are not so in the broadest sense of that term, because they have a capacity of being confirmed, and after such confirmation they are binding. For this kind of defect our language affords no distinctive term. They are strictly neither void—that is, mere nullities—nor voidable, because they do not require to be avoided, but until confirmed they are without validity. They are usually spoken of as void; and, as usage is the only law of language, they are so called correctly. It is, therefore, always to be considered an open question, to be decided by the connection and otherwise, whether the term "void" is used in a given instance in one or the other of these in some respects dissimilar senses. (4) Contracts and proceedings are properly called voidable which are valid and effectual until they are avoided by some act. *Prima facie* they are valid, but they are subject to defects, of which some person has a right to take advantage, who may by proper proceedings for that purpose entirely defeat and destroy them. Voidable contracts are in general, perhaps always, like the last class referred to, capable of confirmation by the party who has the right to avoid them. 1 Bouv. Inst. § 1321. Matters which are properly voidable are very commonly spoken of as void. *Smith v. Saxton*, 23 Mass. (6 Pick.) 483, 487. Technically and legally speaking, they are improperly so called. But the word "void" is so often used by good writers, and even by legal writers, in the sense of invalid, ineffectual, or not binding, that it can hardly be said that this is not a correct and legitimate use of the term. Our books are full of examples of the loose and inaccurate use

of these words, and many difficult questions have grown out of this circumstance. They are so common that we think no strong inference can be justly drawn from the unqualified use of these words as to the particular kind or degree of invalidity meant, where the attention of the court is not clearly directed to that point. *State v. Richmond*, 26 N. H. (6 Fost.) 232, 237.

The courts sometimes call contracts in general restraint of trade "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense merely of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon a contract a sufficient protection to the public. *Bohn Mfg. Co. v. Hollis*, 55 N. W. 1119, 1121, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319.

Same—Conveyances and deeds.

While the word "void" is of broader technical signification, it is often used in the sense of "voidable." An instance is found in *Gardner v. Early*, 69 Iowa, 42, 28 N. W. 427, where a deed, because of failure to carry forward the tax to the tax lists of other years, as required by law, is said to be invalid and void; but the language immediately following and other language of the opinion clearly indicates that nothing more was intended than that it was a voidable instrument. *Lawrence v. Hornick*, 46 N. W. 987, 988, 81 Iowa, 193.

A voidable indenture is valid, subsisting, and operating, until it be avoided by those who have power over it. *Overseers of Bloomfield Tp. v. Overseers of Acquackanonck Tp.*, 8 N. J. Law (3 Halst.) 257, 260.

In considering the question whether a deed of one who was insane at the time of the execution thereof is void absolutely, or merely voidable, the court said: "The term 'void,' as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its primary and limited sense, as contradistinguished from 'voidable'; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid and not binding in law. But the distinction between the terms 'void' and 'voidable' in their application to contracts is often one of great practical importance, and whenever an entire technical accuracy is required the term 'void' can only be properly applied to those contracts that are of no effect whatever, such as are a mere nullity and incapable of confirmation or ratification." And it was held that the deed of one insane was voidable merely, and could be ratified by the grantor when he was lucid. *Allis v. Billings*, 47 Mass. (6 Metc.) 415, 417, 39 Am. Dec 744.

Same—Conveyance of pre-empted land.

"Void," as used in Act Cong. Sept. 4, 1841, declaring that a conveyance by a party who has entered land under the pre-emption laws before a patent shall have been issued shall be void, means voidable. *Franklin v. Kelley*, 2 Neb. 79, 98.

Same—Franchises.

The word "void," as used in an unlimited sense, implies an act of no effect, a nullity ab initio, but as used in the provision for forfeiture in Laws 1867, c. 895, incorporating a bridge company, and providing that in certain contingencies all rights and privileges created should be null and void, clearly means voidable. *New York & L. I. Bridge Co. v. Smith*, 42 N. E. 1088, 1089, 148 N. Y. 540.

Same—Fraudulent conveyance.

The term "void" is often used in the statutes and decisions in a way to mislead. A law which declares an instrument valid between parties, but void as to creditors, means that it is voidable by creditors who choose to attack it. Being valid as between the parties, it is good as to all the world except those who assail it upon the ground permitted by the law. In *re Antigo Screen Door Co.* (U. S.) 123 Fed. 249, 256, 59 C. C. A. 248.

The term "void," in Sand. & H. Dig. § 3472, providing that conveyances of property in fraud of creditors shall be void, means voidable. *Doster v. Manistee Nat. Bank*, 55 S. W. 137, 138, 67 Ark. 325, 43 L. R. A. 334, 77 Am. St. Rep. 116.

The word "void," as used in Rev. St. § 2320, providing that every conveyance of the land made with intent to defraud creditors shall be void, does not mean absolutely void, but voidable. That it has been held to mean absolutely void in many and most jurisdictions, and is so laid down by many and perhaps most of the elementary writers, cannot be denied. But that the law in Wisconsin is to the contrary, as was declared by this court as early as *Hyde v. Chapman*, 33 Wis. 391, decided in 1873, cannot be gainsaid. The doctrine of that case has been fully considered and approved since that time. *French Lumbering Co. v. Theriault*, 83 N. W. 927, 928, 107 Wis. 627, 51 L. R. A. 910, 81 Am. St. Rep. 856.

While the statute pronounces transfers for the purpose of hindering and defrauding creditors void, the word "void" is construed by all the courts to mean voidable. Such transfers are valid between the parties and operate to transfer the title to the grantee, subject to being impeached at the suit of creditors. *Brasie v. Minneapolis Brewing Co.*, 92 N. W. 340, 341, 87 Minn. 456, 94 Am. St. Rep. 709 (citing *Spooner v. Travelers'*

Ins. Co., 76 Minn. 317, 79 N. W. 305, 77 Am. St. Rep. 651; *Hathaway v. Brown*, 22 Minn. 214).

"Void" is a word more often used to point out what may be avoided by those interested in doing so than to indicate an absolute nullity—a proceeding or act to be disregarded on all occasions. Many things are called void, not absolutely so, which can only be called relatively void; for instance, conveyances in fraud of creditors are declared by statute to be void, yet they are good unless attacked by such creditors, and if they fail to attack them for the period of limitations they become absolutely valid. So in a contract for the sale of land, or for a lease, it is common to insert a clause that the instrument shall be void in certain contingencies, yet it remains perfectly valid unless the provision is taken advantage of by the vendor or the vendee. *Kearney v. Vaughan*, 50 Mo. 284, 287.

The word "void" is not always used in an absolute sense. It has from the earliest times been applied to fraudulent gifts of goods, which, though good against the donor, are said to be void as to his creditors. The transaction falls within the class described as void as to some persons only. *Colt v. Sears Commercial Co.*, 37 Atl. 311, 314, 20 R. I. 64.

When it is said that a voluntary deed is void as against the creditors of a grantor, or will be set aside, the terms "void" or "set aside" are to be understood as meaning only that the conveyance, while good as against all others, shall not operate to defeat the equity of the creditors of the grantor. Hence an insurance policy requiring sole and unconditional ownership is not void when taken out by the grantee of realty by deed of gift, though the deed has been adjudged void as against the grantor's creditors. *Steinmeyer v. Steinmeyer*, 42 S. E. 184, 185, 64 S. C. 413, 59 L. R. A. 319, 92 Am. St. Rep. 809.

The word "void," as used in the statute of frauds relating to the creation or transfer of an estate, will generally be understood as meaning voidable, and therefore capable of being made unavoidable by ratification, as part performance of a parol contract for the sale of lands, or performance to an extent that renders it impossible to restore the original position of the parties, will take the case out of the statutes. In *re Muller's Estate* (Pa.) 16 Phila. 321.

A conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property. The word "void," as used in the statement of the principal that a fraudu-

lent conveyance of property is void as to the creditors of the vendor, means that the rights of the creditor as such are not, with respect to the property, affected by the conveyance, but that he may, notwithstanding the conveyance, avail himself of all the remedies for collecting the debt out of the property or its avails which the law has provided in favor of creditors, and in pursuing those remedies he may treat the property as though the conveyance had not been made. *Webb v. Brown*, 3 Ohio St. 246, 254.

Under the statute declaring that sales made by a debtor, with intent on the part of the debtor and the purchaser to defraud the debtor's creditors, shall be deemed utterly void and of no effect as between the parties to the sales, the sales are not void; nor is it true, without qualification, that they are void as against creditors. Such sales are void against such creditors only as are able, by means of some kind of legal process, to fasten on the property or its proceeds while in the hands of the fraudulent vendee; but, however fraudulent the original purchase may have been, if the vendee, before the rights of the creditor are in any way fixed by legal process or proceeding, honestly restores it to the vendor, the vendee is exonerated from further liability. *Hallowell v. Bayliss*, 10 Ohio St. 536, 542.

Same—Insurance policy.

In the construction of an insurance policy, the word "void" may be used in a variety of senses, and is not in such cases used in its extreme sense. *Ohio Farmers' Ins. Co. v. Burget*, 61 N. E. 712, 714, 65 Ohio St. 119, 55 L. R. A. 826, 87 Am. St. Rep. 596.

Though a policy usually stipulates that a breach of its conditions on the part of the insured would render the policy void, this word is always employed in the sense of voidable. *Georgia Home Ins. Co. v. Allen*, 24 South. 399, 403, 119 Ala. 436.

Where a policy of insurance provides that it should become void while the note remains overdue and unpaid, the effect of the default was merely to defeat the right to recover for any loss occurring during its continuance. *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 463, 2 Am. Rep. 95.

The word "void" in a contract has often been held to mean voidable only, and at the election of the party wronged. Although a condition be attached to an insurance policy declaring it shall be void on failure to pay an assessment within a specified time, yet the policy does not thereby become ipso facto void. The company may at its option declare the policy canceled and notify the delinquent, or may waive its right of avoidance and continue to assess the premium

note. *Columbia Ins. Co. v. Buckley*, 83 Pa. 293, 296, 24 Am. Rep. 172.

The word "void," as used in a fire insurance policy, providing that, if the insured shall have any other insurance on the property insured without the consent of the company, the policy shall be void, is to be regarded as meaning that the company may at its exclusive option treat it so, and not that the policy becomes an absolute nullity as to either party. *Phoenix Ins. Co. v. Spliers*, 87 Ky. 285, 293, 8 S. W. 453.

The term "void," as used in *How. Ann. St. § 4349*, declaring void all insurance policies containing other or different terms than those expressed in the Michigan standard policy, means voidable. *Armstrong v. Western Mfrs.' Mut. Ins. Co.*, 54 N. W. 637, 638, 95 Mich. 140.

Same—Judicial sale.

In *Allis v. Billings*, 47 Mass. (6 Metc.) 415, 417, 39 Am. Dec. 744, the court says the term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to the particular and limited sense, as contradistinguished from voidable; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid and not binding in law. The distinction between the terms "void" and "voidable" in their application to contracts is often one of great practical importance, and whenever entire technical accuracy is desired the term "void" can only be properly applied to those contracts that are of no effect whatsoever, such as are mere nullities and incapable of confirmation or ratification. In *Rex v. Inhabitants of Hipswell*, 8 Barn. & C. 471, it is said that "void" is sometimes construed "voidable"; and, where the provision is introduced for the benefit of the parties only, such a construction may be right, but when it is introduced for public purposes, and to protect those who are incapable of protecting themselves, it should receive its full force and effect. It is so used in *Code, § 441*, providing that a judicial sale of real estate shall be void when the purchaser was one of the appraisers thereof. *Terrill v. Auchauer*, 14 Ohio St. 80, 85.

Same—Lease.

Where a lease provided that the leased premises should be used only as a dwelling and boarding and lodging house, and should not be sublet, and also contained a provision that the lease should be void if the tenant failed to perform on his part, the word "void" meant voidable at the option of the lessor. *Smith v. Sinclair*, 84 Atl. 943, 59 N. J. Law, 84.

"Void," as used in a lease providing that it shall become "void" on the failure of the tenant to pay the stipulated rent, means "voidable at the landlord's election." *Bowman v. Foot*, 29 Conn. 331, 338 (citing *Jones v. Carter*, 15 Mees. & W. 718).

The provisions of St. 1850, c. 54, § 3, that an illegal use of premises rented shall make void the lease under which the tenant holds, makes it void only at the option of the lessor; the conditions being intended for his benefit. *Almy v. Greene*, 13 R. I. 350. In *Trask v. Wheeler*, 89 Mass. (7 Allen) 109, the court says: "If it were to be held that the lease is made void against the will of the landlord, any tenant, desiring to get rid of his lease, might do so by violating the statute. Though the lease is declared void, yet it belongs to that class of things which are said to be void only as to some persons." *Small v. Clark*, 54 Atl. 758, 760, 97 Me. 304.

Same—Mortgage.

The term "void," as used in the statute requiring mortgages without delivery of possession to be absolutely void as to classes of persons referred to, bears the sense of voidable, or subject to be avoided. *Tolbert v. Horton*, 18 N. W. 647, 648, 31 Minn. 518.

Same—Municipal ordinance.

The term "void" has been used indiscriminately in some cases, as applied to ordinances which are nullities and those which may be avoided as an unreasonable or improper exercise of authority. An ordinance may be unreasonable in its provisions, though dealing with a subject on which municipal authorities have power to legislate, and such ordinances have been termed void, but yet are only so in the sense that their unreasonableness is a good defense against their enforcement. *Hewes v. Glos*, 48 N. E. 922, 923, 170 Ill. 436.

Same—Note or check given for money won on wager.

Much confusion has grown out of the ill-advised and inaccurate use of the words "void" and "voidable." Where the purpose of a statute is to protect a person presumably unable to protect himself, the word "void" may with good reason be construed under certain circumstances to mean voidable only; but we know of no reason for applying this rule to a statute whose purpose is to subserve a public policy, and as used in a statute providing that all notes or contracts given for money won on any wager shall be void, the word is used in its exact meaning. In this state the word "void," used in certain statutes, has been construed to mean voidable only, as in *Burns' Ann. St. 1894*, § 2724, providing that conveyances by persons of unsound mind

shall be held void; and a contract of suretyship by a married woman, declared void under *Burns' Ann. St. 1894*, § 6964, is construed to be voidable only, coverture being a personal defense. *Irwin v. Marquett*, 59 N. E. 38, 39, 26 Ind. App. 383, 84 Am. St. Rep. 297.

Notwithstanding the general tendency of courts to construe the word "void" as "voidable" only, when used in statutes that affect contracts made in disregard of their provisions, yet, where a public policy is to be subserved, as the suppression of usury or gaming, the settled rule is to give to the language employed its full force and effect. In *Maxw. Interp. St. (2d Ed.)* 256, it is said: "In general, however, it would seem that, where the enactment has relation only to the benefit of the particular person, the word 'void' would be understood as voidable only at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves, but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect." Under *Rev. St. § 4269*, providing that "all promises, agreements, notes, bills, bonds or other contracts, * * * when the whole or any part of the consideration of such promise * * * is for money won or lost * * * upon any game whatever, * * * shall be absolutely void and of no effect," a check given for money lost at a game of cards is void and of no effect, and the indorsee although a bona fide holder of such check without notice cannot recover upon it against the drawer. *Lagonda Nat. Bank v. Portner*, 46 Ohio St. 381, 384, 21 N. E. 634.

Same—Pardon obtained by fraud.

The word "void" is used in different senses, and frequently used to mean voidable. Where the term is used in reference to solemn judgments and acts of the superior courts, it may mean no more than voidable. The judgment or proceedings may be avoided, but until this is done, in the direct and regular course of revision, they stand. A record of a judgment may be avoided for fraud, but not between the parties or privies in a court of law. *Hartshorn v. Day*, 60 U. S. (19 How.) 211, 223, 15 L. Ed. 605. The use of the term "void" is not uncommon in the language of statutes and courts. In that sense it was employed in the opinion in *Work v. Corrington*, 34 Ohio St. 64, 75, 32 Am. Rep. 345, in the remark that pardons obtained by fraud are held to be void. It means simply that a pardon obtained by fraud is void, when in a proceeding before a court having jurisdiction for the purpose, with ample opportunity to the per-

son holding the pardon to defend, such pardon is declared to be void. *Knapp v. Thomas*, 39 Ohio St. 377, 388, 48 Am. Rep. 462.

Same—Preference by insolvent.

The word "void" is not always used in an absolute sense. It has from the earliest times been applied to fraudulent gifts of goods, which, though good against the donor, are said to be void as to its creditors. Such transactions fall within the class of acts described as void as to some persons only, and which are made good by subsequent matter. The Legislature, in its provision that preferences by an insolvent shall be void, has used the customary word; yet, as creditors may affirm such a conveyance or waive their right to treat it as void, it is also properly called voidable. *Colt v. Sears Commercial Co.*, 37 Atl. 311, 315, 20 R. I. 64.

The word "void," in the insolvent law, providing that a preferential transfer or conveyance by an insolvent, or one in contemplation of insolvency, within four months of the filing of a petition, etc., shall be void, and the assignee may recover the property or the value thereof as assets of the insolvent debtor, is always construed as voidable, meaning simply that such conveyances are voidable only in favor of proceedings under and in aid of the law. *Smith v. Brainerd*, 35 N. W. 271, 272, 37 Minn. 479.

Same—Purchase of corporation stocks, etc., by director.

Rev. St. Ohio, § 3313, provides that all stocks, bonds, or securities of a railroad company, purchased of the company by a director thereof, either directly or indirectly, for less than their par value, shall be null and void. Held, that the word "void" should be interpreted as used in the sense of voidable; such statute being for the protection of the corporation. *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* (U. S.) 95 Fed. 497, 525, 36 C. C. A. 155.

Same—Sale by administrator or executor.

The words "void" and "voidable" are not always used in statutes and reports with entire legal accuracy, and the word "void" is often construed as meaning only voidable, and is so used in Rev. St. § 3914, providing that sales of real estate by an administrator, where he becomes interested in the purchase, should be void. If the statute should be construed so as to avoid sales by executors, administrators, and guardians on the ground stated, or for secret frauds, as against innocent purchasers for value, titles founded upon them would be so doubtful and uncertain that few would care to purchase or pay a fair price for them. *Melms v. Pabst Brewing Co.*, 66 N. W. 518, 521, 93

Wis. 153, 57 Am. St. Rep. 899; *Gibson v. Gibson*, 78 N. W. 917, 918, 102 Wis. 501; *Veeder v. McKinley-Lanning Loan & Trust Co.*, 86 N. W. 982, 986, 61 Neb. 892.

The word "void," in Gen. St. 1878, c. 57, § 41, providing that "no executor, administrator, or guardian making the sale shall directly or indirectly purchase . . . any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void," was used in the sense of voidable, and the sales prohibited are void; that is, at the election, timely exercised, of those interested in the land sold. It is difficult to lay down when courts may construe the term "void," occurring in a statute, to mean "voidable." We think generally it is to be understood that the Legislature employ the term in its strict and precise meaning, and that, when it says a thing shall be void, it means that the thing shall be null and of no effect whatever. *White v. Iselin*, 5 N. W. 359, 360, 362, 364, 26 Minn. 487.

Same—Sale of infant's real estate.

The word "void," as used in the statute authorizing the sale of infant's real estate, and providing that, unless bonds shall be given, the sale shall be void, should be construed to mean voidable. The common law pronounces a certain class of deeds by infants void, but still it is admitted that no such deed could be treated as void under all circumstances by the infant, and especially by the other and the adult party. In that class of cases, and many others, the words "void" and "voidable" are used indiscriminately by legislators and jurists, without regard to their true import. To make them void as to both parties, in a true sense of the word, might frustrate the object of their protection, and pervert an intended blessing into a curse to them, by depriving them of the profit of beneficial contracts. *Thornton v. McGrath*, 62 Ky. (1 Duv.) 349, 352.

In *Thornton v. McGrath*, 62 Ky. (1 Duv.) 349, the court held that, where the word "void" is used in the statutes and decisions of Kentucky in reference to sales of the lands of infants, it should be considered as meaning "voidable," for the reason that infants ought not to be deprived of the benefit of sales which were beneficial to them. The New York courts construe the statute in the same way, and hold that sales made in proceedings which are not in strict conformity with the statute are void. *Ammons v. Ammons*, 50 W. Va. 390, 403, 40 S. E. 490, 495 (citing *Battell v. Torrey*, 65 N. Y. 294).

VOID AND OF NO EFFECT.

The words "void and of no effect," as used in a fire policy providing that it shall become void and of no effect by the failure

or neglect of the insured to comply with the terms, conditions, and covenants, are to be construed as equivalent to "voidable" or "to be treated as void by the insurer at his own exclusive option." *Brumfield v. Union Ins. Co.*, 7 S. W. 893, 894, 87 Ky. 122.

The phrase "void and of no effect," when used in statutes declaring certain instruments to be void and of no effect, is sometimes used in the sense of voidable, merely—that is, capable of being avoided; as, for instance, where statutes provide that certain transactions are void as to creditors, they mean that the creditors may avoid them, and not others. *Ewell v. Daggs*, 2 Sup. Ct. 408, 412, 108 U. S. 143, 27 L. Ed. 682.

Rev. St. § 2756, declares that in case of garnishment the garnishee process shall not only be served on the garnishee, but on the defendant in the main action, and that unless the garnishee summons be so served, or proof is made that after due diligence such service cannot be made within the state, the service on the garnishee shall become void and of no effect from the beginning. Held, that the phrase "shall become void and of no effect from the beginning" cannot be construed to mean simply that the proceedings shall become voidable at the election of the defendant, since there was no reason why the Legislature might not provide that a failure to perform a certain act after jurisdiction of the res had been obtained shall divest the court of jurisdiction ab initio; and that the provision that a default in the performance of such service shall render the service on the garnishee void and of no effect must be construed according to its terms, which would clearly have the effect of divesting the court of the jurisdiction provisionally obtained by the service on the garnishee. *Globe Milling Co. v. Boynton*, 59 N. W. 132, 136, 87 Wis. 619.

The Ohio statutes declaring that every gift, grant, or conveyance of lands, etc., made or obtained to defraud creditors, etc., or to defraud or deceive the person or persons who shall purchase such lands, tenements, etc., shall be deemed utterly "void and of no effect," means void only as against such creditors or subsequent purchasers. *Burgett's Lessee v. Burgett*, 1 Ohio (1 Ham.) 469, 480, 13 Am. Dec. 634.

VOID AS AGAINST CREDITORS.

The expression that a fraudulent transfer is "void as against creditors" simply means that the rights of creditors as such are not, with respect to the property, affected by such transfer, but that they may, notwithstanding the transfer, avail themselves of all the remedies for collecting their debts out of the property or its avails which the law provides in favor of creditors, and that

in pursuing these remedies they may treat the property as though the transfer had not been made—that is, as the property of the debtor. *Allen v. Steiger*, 31 Pac. 226, 228, 17 Colo. 552 (citing *Bump, Fraud. Conv.* [2d Ed.] p. 453).

VOID DEVISE.

There is a distinction between a lapsed and a void devise. In the former case the devisee dies in the intermediate time between the making of the will and the death of the testator, but in the latter case the devise is void from the beginning, as, if the devisee be dead when the will was made. *Murphy v. McKeon*, 32 Atl. 374, 53 N. J. Eq. (8 Dick.) 406.

VOID JUDGMENT.

"Void," as applied to judgments, means that they are an absolute nullity. *Cochrane v. Parker*, 54 Pac. 1027, 1029, 12 Colo. App. 169.

A void judgment is in legal effect no judgment. By it no rights are devised. From it no rights can be obtained, it being worthless in itself. All proceedings founded upon it are equally worthless. It neither binds nor bars any one. *Bennett v. Wilson*, 55 Pac. 390, 391, 122 Cal. 509, 68 Am. St. Rep. 61 (citing *Freem. Judgm.* § 117); *Adams v. Agnew*, 15 S. C. 36, 43; *American Acc. Co. v. Reigart*, 92 Ky. 142, 144, 17 S. W. 280, 281; *Stafford v. Gallops*, 31 S. E. 265, 266, 123 N. C. 19, 68 Am. St. Rep. 815.

A void judgment is one which has only the semblance of a judgment, as if rendered by a court having no jurisdiction. *McKee v. Angel*, 90 N. C. 60, 62.

A judgment, if actually rendered in favor of or against a party not before the court, is void, and no execution can legally issue thereon. When a judgment is void, it is a nullity whenever invoked, and it may be collaterally attacked in any court. *Moore v. Perry* (Tex.) 56 S. W. 120, 121.

A void judgment is that which is a judgment in name and form only. On collateral attack it matters not that a court erred in determining any question of law or fact. The judgment is not thereby made void. *Burke v. Interstate Savings & Loan Ass'n*, 64 Pac. 879, 881, 25 Mont. 315, 87 Am. St. Rep. 416.

The word "void" can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. If a judgment rendered without in fact bringing the defendants into court cannot be attacked collaterally on this ground, unless the want

of authority over them appears in the record, it is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. *Peyton v. Peyton*, 68 Pac. 757, 763, 28 Wash. 278.

Mr. Freeman, in his work on Judgments (4th Ed.) 116, in speaking of void judgments, says "that they must be so from one or more of the following causes: (1) Want of jurisdiction over the subject-matter; (2) want of jurisdiction over the parties or some of them; (3) want of power to grant the relief contained in the judgment." *Pitkin v. Burnham*, 87 N. W. 160, 162, 62 Neb. 385, 55 L. R. A. 280, 89 Am. St. Rep. 763.

A void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded one. *McCormick Harvesting Mach. Co. v. Stires* (Neb.) 94 N. W. 629, 631 (citing *Black*, Judgm. § 170); *Pitkin v. Burnham*, 87 N. W. 160, 162, 62 Neb. 385, 55 L. R. A. 280, 89 Am. St. Rep. 763; *State v. Bates*, 61 Pac. 905, 906, 22 Utah, 65, 83 Am. St. Rep. 768. It can neither affect nor create rights as to the person against whom it professes to be rendered. It binds him in no degree whatever. It has no effect as a lien on his property. It does not raise an estoppel against him. It is not necessary to take any steps to have it reversed, vacated, or set aside. *Black*, Judgm. § 170. A void judgment is really no judgment. It leaves the parties litigant in the same position they were in before the trial. It leaves them in exactly the same position as if no trial had taken place. Such a judgment confers authority upon no one to enforce it. *State v. Bates*, 61 Pac. 905, 906, 22 Utah, 65, 83 Am. St. Rep. 768. A party against whom it is given may escape its effect as a bar, but only by application to have it vacated or reversed. Until that is done it is efficacious. *Pitkin v. Burnham*, 87 N. W. 160, 162, 62 Neb. 385, 55 L. R. A. 280, 89 Am. St. Rep. 763.

Judgments are frequently spoken of as "void" because they may be so declared in a proper proceeding. The general and correct rule, as established by authority, is that a judgment by a court of competent jurisdiction is not void unless the thing lacking or making it so is apparent on the face of the record. If the inaccuracy do not so appear, the judgment is not void, but voidable. One is a nullity, a mere brutum fulmen, and may be so treated by all persons in collateral as well as in direct attacks. The other, except in cases of fraud, is binding upon third parties and upon the parties to it as against a strictly collateral attack. *Gall v. Fryberger*, 75 Ind. 96; *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Cain v. Goda*, 84 Ind. 209 (cited in *Earle v. Earle*, 91 Ind. 27, 42).

Erroneous judgment distinguished.

A judgment rendered by a court which had no power so to do is void; it is as though there had been no judgment or process; it is *coram non jndice*. But if the court had jurisdiction and gave a wrong judgment, such judgment is merely erroneous. *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211.

A "void judgment" is undoubtedly, in a broad sense of the term, an erroneous one. But a judgment may be manifestly erroneous, and yet not a void one. *State v. Sheriff of Middlesex*, 12 N. J. Law (3 J. S. Green) 68, 70 (citing *Kempe v. Kennedy*, 9 U. S. [5 Cranch] 173, 3 L. Ed. 70).

There is a distinction between "void" and "erroneous," as used with reference to acts from a judicial body, the general rule being that, where the body has jurisdiction of the subject-matter and of the person affected, its judgment in the case will not be void, though it may be erroneous. If the judgment is merely erroneous, it can be attacked, and the error corrected only by appeal or by a direct proceeding to set it aside, while if it be absolutely void it is a nullity from the beginning, and may be treated as such without further proceedings to have such nullity judicially declared. *Kelly v. People*, 4 N. E. 644, 645, 115 Ill. 583, 590, 56 Am. Rep. 184.

VOID ON ITS FACE.

A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. The mere absence from the roll of a paper—as, for example, the return of the officer showing a service of the summons—cannot invalidate the judgment when the judgment itself recites the fact that the defendant was duly served with process. *People v. Harrison*, 24 Pac. 311, 312, 84 Cal. 607.

The phrase "void on its face," as applied to patents, means that a patent is seen to be invalid either when read in the light of existing law or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale or is otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain. *Poire v. Wells*, 6 Colo. 406, 410.

VOID PROCESS.

"Void process" is defined to be such as was issued without power in the court to award it, or which a court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal pro-

cess. *Bryan v. Congdon* (U. S.) 86 Fed. 221, 223, 29 C. C. A. 670.

VOID TAX.

A void tax is no tax. It is as if there never had been any attempt at assessment. The owner is under no duty, either at law or in equity, to pay it. Hence there is no equitable reason for requiring the owner to pay such a tax before a cloud upon his title made by a tax sale shall be removed. *Morrill v. Lovett*, 49 Atl. 666, 668, 95 Me. 165, 58 L. R. A. 634.

VOIDABLE.

Void distinguished, see "Void."

A voidable contract is a contract which has some effect, but is liable to be made void by one of the parties or by a third party. *Niagara Fire Ins. Co. v. Scammon*, 32 N. E. 914, 915, 144 Ill. 490, 19 L. R. A. 114.

A voidable contract is one which is void as to the wrongdoer, but not void as to the wronged party unless he elect so to treat it. *Inlow v. Christy*, 40 Atl. 823, 824, 187 Pa. 186.

A voidable act is binding on others until disaffirmed by the party with whom it originates. *Slocum v. Hooker* (N. Y.) 13 Barb. 536, 537.

"Voidable" means subject to be avoided by judicial action of a court of adequate jurisdiction. The terms "voidable" and "null and void" are not the same. *Pearse v. Morrice*, 2 Adol. & El. 84.

VOIDABLE WILL.

There is no such thing known as a voidable will. *McGee v. Porter*, 14 Mo. 611, 612, 55 Am. Dec. 129.

VOIDS.

The word "voids" means the space between broken stones. *United States v. Venable Const. Co.* (U. S.) 124 Fed. 267, 269.

VOLITION.

"Volition" is the opposite of "accident." *Ætna Life Ins. Co. v. Vandecar* (U. S.) 86 Fed. 282, 285, 30 C. C. A. 48.

VOLUNTARY.

See "Suicide, Voluntary or Involuntary."

"Voluntary" is defined to mean "done by design or intention; purposely; intentional; not accidental." *Williams v. United States Mut. Acc. Ass'n*, 31 N. Y. Supp. 343, 346, 82

Hun, 268; *Travelers' Ins. Co. v. Randolph* (U. S.) 78 Fed. 754, 762, 24 C. C. A. 305; *Campbell v. Fidelity & Casualty Co. of New York*, 60 S. W. 492, 495, 109 Ky. 661.

"Voluntary" implies acts of commission. *Willey v. Laraway*, 25 Atl. 436, 437, 64 Vt. 559.

Willful synonymous.

In speaking of the word "willful," as employed in statutory murder, the court says in *McManus v. State*, 36 Ala. 285: "'Willful' is not the synonym of 'voluntary.' In truth they express no idea which is common to both. The former is a word of much greater strength than the latter. Therefore, in this connection, it denotes governed by the will without yielding to reason; obstinate; stubborn; perverse; inflexible. 'Voluntary,' in this connection, means willing; acting with willingness. It is the antithesis of 'involuntary.'" *State v. Preston*, 34 Wis. 675, 684.

VOLUNTARY ABSENCE.

Rev. St. 1838, c. 34, § 2, subd. 7, providing that every settlement, when once legally acquired, shall continue until it shall be lost or defeated by acquiring a new one in the state, or by "voluntary or uninterrupted absence" from the town in which such legal settlement should have been gained for one whole year or upwards, means an absence, especially if the party resides within the state, during which the party is not a pauper needing and receiving support; and it does not mean an absence during which the town in which he has a legal settlement supports the absentee as a pauper in some other town in the state. *Town of Scott v. Town of Clayton*, 8 N. W. 171, 174, 51 Wis. 185.

VOLUNTARY ADMISSION.

See "Voluntary Confession."

VOLUNTARY ANNUITY.

17 Geo. III, c. 26, requiring grants of annuity to be registered, except that the act shall not apply to any "voluntary annuity granted without regard to pecuniary consideration," meant that any annuity granted for any other than a pecuniary consideration should, for the purpose of the act, be considered a voluntary annuity. An annuity granted in consideration of the grantee's giving up his business to the grantor was within the exception, and did not require registration. *Crespigny v. Wittenoom*, 4 Term R. 790, 793.

VOLUNTARY APPEARANCE.

A voluntary appearance of a defendant is equivalent to service of summons on him per-

sonally. Comp. Laws, § 9404; *Ayers, Weatherwax & Reid Co. v. Sundback*, 58 N. W. 4, 5, 5 S. D. 31.

A voluntary appearance of a party to a suit is a waiver of formal notice. *Belt v. Blackburn*, 28 Md. 242. Where defendant was notified by an officer that the latter had a summons for him, and he and his wife referred the officer to his attorney, who indorsed the summons, over his signature, "Enter my appearance for defendants," there was a voluntary appearance, constituting a waiver of formal service. *Harrison v. Morton*, 40 Atl. 897, 898, 87 Md. 671.

VOLUNTARY ASSIGNEE.

A voluntary assignee is a mere representative of the debtor, enjoying his rights only, and no others, and is bound where he would be bound. He is not the representative of the creditors, and is not clothed with their power. He is but a volunteer, and not a bona fide purchaser for value. He is, in short, but the hand of the assignor in the distribution of his estate among his creditors. *Mills v. Ritter*, 47 Atl. 194, 197 Pa. 353.

VOLUNTARY ASSIGNMENT.

A voluntary assignment "is a transfer, without compulsion of the law, by a debtor of his property to an assignee in trust to apply the same, or the proceeds thereof, to the payment of his debts, and to return the surplus, if any, to the debtor." *Farwell v. Nilsson*, 24 N. E. 74, 75, 183 Ill. 45 (cited in *Same v. Cohen*, 28 N. E. 35, 37, 138 Ill. 216, 18 L. R. A. 281); *Ingram v. Osburn*, 70 Wis. 184, 195 (citing *Burrill*, Assignm.).

A voluntary assignment is a transfer voluntarily made, without any compulsion of law, by a debtor of all or a part of his property to an assignee, as trustee to apply the property, or its proceeds, to the payment of a part or all of the assignor's debts, and to return the surplus, if there be any, to the debtor. *Willcox v. Jackson*, 4 Pac. 966, 973, 7 Colo. 521; *Weber v. Mick*, 23 N. E. 646, 649, 131 Ill. 520.

Voluntary assignments "have always been understood to be instruments voluntarily executed by a failing debtor, by which he assigns to some third person, as assignee or trustee, the whole, or sometimes the bulk, of his property, to be by said trustee distributed among the assignor's creditors in satisfaction of their demands." *Weber v. Mick*, 23 N. E. 646, 649, 131 Ill. 520.

A voluntary assignment is one which is made by the assignor of his own will, without legal compulsion, as distinguished from an assignment made in obedience to a law which compelled the assignor to make it.

Weider v. Maddox, 1 S. W. 168, 170, 66 Tex. 372, 59 Am. Rep. 617.

The term "voluntary," as applied to voluntary assignments, means voluntary as opposed to compulsory. It is applied to assignments to distinguish them from such as are made by the compulsion of the law, as under statutes of bankruptcy and insolvency, or by order of some competent court. *Manny v. Logan*, 27 Mo. 528, 530; *Weber v. Mick*, 23 N. E. 646, 649, 131 Ill. 520.

By the term "voluntary assignment" is meant a conveyance of some or all of a debtor's property in trust for the purpose of being disposed of by the trustee to raise a fund to pay debts, as distinguished from a sale to a creditor in payment of his claim, or from a pledge or hypothecation as a security in the nature of a mortgage. *Wood v. Adler-Goldman Commission Co.*, 59 Ark. 270, 275, 27 S. W. 490, 491.

A voluntary assignment and conveyance of property by a debtor for the benefit of all his creditors, to an assignee, is not a judicial sale, and will not entitle the wife of the debtor to have partition. *Willson v. Miller*, 66 N. E. 757, 759, 30 Ind. App. 586 (citing *Hall v. Harrell*, 92 Ind. 408).

"A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors." *Weber v. Mick*, 23 N. E. 646, 649, 131 Ill. 520 (quoting *Burrill*, Assignm. §§ 2, 3).

"Voluntary assignment," as used in Act March, 1797, § 65, regulating the collection of duties on imports and tonnage, means an assignment, in trust, of all the debtor's property to pay debts, as distinguished from a mere sale of the property to a creditor in payment of his debts, or the mere pledge or hypothecation of property to a particular creditor, as a mere security in the nature of a mortgage. *Dias v. Bouchaud* (N. Y.) 10 Paige, 445, 461.

An assignment under a decree of court, or the passing of the legal title by such decree, is not a voluntary assignment. *Burke v. Davis* (U. S.) 63 Fed. 456, 459.

A provision in a lease that "the lessee shall not assign this lease, or let or underlet said premises, or any part thereof, without the consent of the lessor," is violated by a voluntary assignment by the lessee for the benefit of creditors. *Medinah Temple Co. v. Currey*, 44 N. E. 839, 840, 162 Ill. 441, 53 Am. St. Rep. 320.

A voluntary assignment is a general disposition by an insolvent debtor of all his property and effects to all or a part of his creditors, whereby he abandons his business,

or puts himself in such a position that it is impossible for him to continue it. *Sandwich Mfg. Co. v. Max*, 58 N. W. 14, 16, 5 S. D. 125, 24 L. R. A. 524.

Act Cong. March 2, 1799, § 65, provided that in all cases of insolvency the debt due to the United States should first be satisfied, and that the cases of insolvency should extend to cases in which a debtor, not having sufficient property to pay all his or her debts, should make a voluntary assignment thereof for the benefit of his creditors. Held, that where an assignment of part of the property was made to one person, and in 31 days the balance of the property was assigned to another, the claims of the United States were entitled to preference as to all the property, the two assignments being considered as one voluntary assignment for the benefit of his creditors. *Downing v. Kintzing* (Pa.) 2 Serg. & R. 326, 336.

VOLUNTARY BANKRUPTCY.

The Supreme Court, in *Metsker v. Bonebrake*, 108 U. S. 66, 71, 2 Sup. Ct. 351, 353, 27 L. Ed. 654, said: "It is not a voluntary bankruptcy if the man is forced into it as against his will by his partner, any more than by any one else. A proceeding brought by a part of the members of a firm is, in its initiation, a voluntary one, and will remain so in its entirety, if upon notice the other member or members of a firm actively join with the petitioners, or by acquiescence consent to the adjudication of the partnership; but if the nonpetitioning member refuses to join the proceedings, and contests the adjudication, then the proceeding becomes, as to him, an involuntary one." *In re Murray* (U. S.) 96 Fed. 600, 602.

VOLUNTARY CONFESSION.

A voluntary confession is one which springs from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. *State v. Clifford*, 53 N. W. 299, 300, 86 Iowa, 550, 41 Am. St. Rep. 518 (citing *People v. McMahon*, 15 N. Y. 384, 385); *Phillips v. People* (N. Y.) 57 Barb. 353, 363; *People v. Chapleau*, 121 N. Y. 268, 273, 24 N. E. 469, 471.

A confession, especially an affirmative one, appearing to have been made with no expectation of its bringing good or averting evil, is termed "voluntary"; the real question being in every case whether or not the confessing mind was influenced in a way to create doubt of the truth of the confession. *Gallaher v. State*, 50 S. W. 388, 395, 40 Tex. Cr. R. 296; *Grimsinger v. State*, 69 S. W. 583, 593, 44 Tex. Cr. R. 1.

A "voluntary confession" means one not extorted by threats or violence, nor obtained

by any direct or implied promise. *Roesel v. State*, 41 Atl. 408, 412, 62 N. J. Law, 216.

A confession is deemed to be voluntary if it is shown to have been made after the complete removal of the impression produced by an inducement, threat, or promise which would otherwise render it involuntary. *People v. Kurtz* (N. Y.) 42 Hun, 835, 843 (citing *Steph. Dig. Ev. art. 22*).

A confession is not voluntary if caused by an inducement or threat or promise, proceeding from any person in authority, having reference to the charge against accused. *State v. Alexander*, 33 South. 600, 601, 109 La. 557 (citing *Regina v. Boswell*, Car. & M. 584; *Beckham v. State*, 14 South. 859, 100 Ala. 15; *Commonwealth v. Myera*, 160 Mass. 530, 36 N. E. 481).

A voluntary confession is one made by a person accused of crime, of his own free will, not influenced by fear or promises. Prima facie all confessions are voluntary, and it is for the party objecting to their admission as evidence to show that they were uttered under such pressure of hope or fear as to raise a doubt of their accuracy. It is undoubtedly the duty of a court to guard carefully the rights of a defendant in this respect, and more especially so when the person is in the custody of the law, and the hopes or fears are supposed to be raised by an officer of the law. The fact that a defendant may think that it will be better for him if he confesses, or worse for him if he does not confess, is immaterial if that condition is brought about by his own independent reasoning. It is when that state of mind is induced by promises or threats or other inducement from without, that the confession is to be rejected. *Commonwealth v. Sego*, 125 Mass. 210, 213.

A voluntary confession is one not induced or obtained under the influence of hope or fear. *Bush v. State*, 33 South. 878, 879, 136 Ala. 85.

A voluntary confession is one not extorted by threats, or obtained by any direct or implied promise relating to some benefit to be derived by the prisoner in the criminal prosecution. *Bullock v. State*, 47 Atl. 62, 64, 65 N. J. Law, 557, 86 Am. St. Rep. 668.

A voluntary confession is one made without the influence of hope or fear, or for the purpose of gaining any benefit or avoiding any harm connected with the criminal charge. It is the hope of escape from temporal punishment which excludes, and the hope must be derived from the inducements. The evidence is rejected because the inducements may have led to a false statement, and the confession is not entitled to credit, and not because the public faith is pledged by means of the promise. *Colburn v. Town of*

Groton, 28 Atl. 95, 66 N. H. 151, 22 L. R. A. 763.

The word "voluntary," in regard to an admission of one accused of crime, as contrasted with "compulsory," is used with a technical meaning indicating certain surrounding circumstances. The question is, shall the evidence be excluded because the conditions make the admission too unreliable to go to the jury? And so where the admission was made in the presence of the sheriff after the accused had been duly warned, but it was contended that the admission was induced by promises of a detective who had before had the prisoner in charge, it did not follow, as a matter of law, that the subsequent admission was caused by the prior inducement. It was a question of fact, and, there not appearing a clear and manifest error in the judge's determination that the admission was voluntary, it was held to be properly admitted. *State v. Willis*, 41 Atl. 820, 824, 71 Conn. 293.

VOLUNTARY CONTRIBUTION.

Contributions made by the fellows or members of a society under an obligation to pay the amount, which obligation continues so long as they remain fellows or members, are nevertheless voluntary where the engagements were originally entered into voluntarily. *Linnean Soc. of London v. Church Wardens of St. Anne*, 26 Eng. Law & Eq. 212, 217; *Church Wardens, etc., of St. Anne v. Linnean Soc.*, 3 El. & Bl. 793, 885.

A society organized for the promotion of literature and the arts was supported by voluntary contributions, so as to entitle it to the benefit of St. 6 & 7 Vict., c. 36, § 1, though strangers were admitted to the exhibition of paintings only on paying a small fee at the door; the money thus received being applied to the purposes of the society. *Regina v. Overseers of Manchester*, 16 Adol. & El. 450, 460.

VOLUNTARY CONVEYANCE.

"A voluntary conveyance is a conveyance without any valuable consideration. The adequacy of the consideration does not enter into the question. The character of purchase as voluntary is determined by the fact whether anything valuable passes between the grantor and grantee as a consideration for the transfer. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary." *Gentry v. Field*, 45 S. W. 286, 287, 143 Mo. 399 (quoting *Bump. Fraud. Conv.* [3d Ed.] 267); *Martin v. White*, 42 S. E. 279, 280, 115 Ga. 866.

A voluntary conveyance is one made without any substantial consideration. *Trumbull v. Hewitt*, 62 Conn. 448, 451, 26 Atl. 350.

The Supreme Court of Errors of Connecticut defines a voluntary conveyance to be one that is wholly without a valuable consideration. *Washband v. Washband*, 27 Conn. 424. Hence a conveyance which expresses as a consideration love and affection and a small sum of money is not, upon its face, voluntary. It depends upon the intention of the parties, and thus is to be ascertained by an inquiry into all the facts and circumstances which will throw light upon a question as to whether the deed was executed as the consummation of a sale or as the evidence of a gift. *Martin v. White*, 42 S. E. 279, 280, 115 Ga. 866.

To bring a conveyance within the category of a voluntary conveyance there must be a total want of any substantial consideration. Nevertheless a conveyance made on a good consideration only is a voluntary conveyance. *Knight v. Kidder (Me.)* 1 Atl. 142, 150 (citing 3 Washb. Real Prop. [3d Ed.] 320).

VOLUNTARY DEED.

A voluntary deed is one made without any consideration, and such a deed is presumed to be fraudulent as against existing creditors. *Kimball v. Fenner*, 12 N. H. 248, 250.

VOLUNTARY DEPOSIT.

A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the "depositor," and the person receiving, the "depository." *Rev. St. Okl. 1903*, § 2825; *Rev. Codes N. D. 1899*, § 4001; *Civ. Code S. D. 1903*, § 1353.

The voluntary deposit takes place by the mutual consent of the person making the deposit and the person receiving it. *Civ. Code La. 1900*, art. 2932.

VOLUNTARY DESTRUCTION.

In an action on a life insurance policy which provided that the company should not be liable in case of "self-destruction of the person, whether voluntary or involuntary," the insured having come to his death by reason of an overdose of laudanum, taken ostensibly to relieve pain, the court said: "The words 'voluntary' and 'involuntary' must be regarded as being used in the policy in a sense somewhat analogous to that in which they are employed in the criminal law. They do not include cases of death by accident or misadventure, but they must be held to include all cases where death results immediately and proximately from the culpable negligence of the insured. Doubtless, also, if this should ensue by the performance of the insured of an unlawful or criminal act,

it would be a case of voluntary self-destruction, within the meaning of the policy." The trial court having limited the effect of this condition of the policy to cases of gross negligence instead of culpable negligence, such limitation was held to be erroneous. *Mutual Life Ins. Co. v. Laurence*, 8 Ill. App. (8 Bradw.) 488, 492.

VOLUNTARY DISCONTINUANCE.

"A discontinuance is voluntary when the plaintiff withdraws his suit." *Hunt v. Griffin*, 49 Miss. 742, 748.

VOLUNTARY ESCAPE.

A voluntary escape is where an officer having the custody of a prisoner, charged with or guilty of an offense, knowingly gives him his liberty with intent to save him from his trial or execution of his sentence. *Porter v. State*, 30 S. W. 791, 792, 34 Tex. Cr. R. 364 (citing 4 Bl. Comm.).

A "voluntary escape" is defined to be when a person, having a felon lawfully in his custody, voluntarily permits him to escape from it, or to go at large. This is felony in case the prisoner be imprisoned for felony, and treason in case the person be imprisoned for treason, etc. But a person voluntarily permitting such escape is not to be tried until the principal offender escaping is convicted. *Martin v. State*, 32 Ark. 124, 126 (citing 1 Hale, P. C., 590, 599).

In an action under a statute which gives debt against a sheriff who shall willfully or negligently suffer a debtor taken in execution to escape, the court said: "There are, at the common law, two kinds of escape—the one, willful, or voluntary, as it is oftener called; the other, negligent. Whether before or after the judgment, the common law gave an action on the case for an escape of either kind. The difference, and the only difference, between the consequences of voluntary and negligent escapes of a debtor in execution, was that in the former case the sheriff could not retake the party, whereas in the latter he might; and if he did so upon fresh pursuit, and subsequently kept the party in safe custody, the recaption formed a defense to an action afterwards brought. The same rule applies under the statute. Nothing could purge a voluntary escape, when prosecuted in either the common law or under the statute, and, in both, recaption before action brought for a negligent escape was a bar. An escape is voluntary when it is by the consent or default of the officer. All other escapes are negligent." *Adams v. Turrentine*, 30 N. C. 147, 151, 152.

If a jailer allows a prisoner committed on final process to go at large, or if he takes him from the jail into a part of the same

building occupied by the jailer and his family, and allows him to take his meals there, it will be a voluntary escape, after which the jailer has no right to retake or recapture him. *Riley v. Whittiker*, 49 N. H. 145, 149, 6 Am. Rep. 474.

An escape is not voluntary unless it be with the consent or by the default of the sheriff. Therefore, where by statute a sheriff was obliged to give the prisoner the liberties of the prison on sufficient bail being furnished, and had no right to restrain the prisoner should he see him at large, the fact that the prisoner went beyond the liberties of the prison, and was seen by the sheriff, who made no effort to restrain him, would not constitute a voluntary escape. *Tillman v. Lansing* (N. Y.) 4 Johns. 45, 48.

VOLUNTARY EXPOSURE.

The word "voluntary," as used in an accident policy providing that the insurer shall not be liable for injuries occasioned by voluntary exposure to unnecessary danger, would, if literally interpreted, embrace every exposure of the insured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part; but the word should properly be construed as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and conscientiously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the insured, and hence within the usual rule that an insurance policy should be construed so as to favor the insured, while at the same time such interpretation does no violence to the words used, one of the accepted meanings of voluntary being "done by design or intention"; "proposed"; "intended." *Campbell v. Fidelity & Casualty Co. of New York*, 60 S. W. 492, 495, 109 Ky. 661; *Travelers' Ins. Co. v. Randolph* (U. S.) 78 Fed. 754, 762, 24 C. C. A. 305; *United States Mut. Acc. Ass'n v. Hubbell*, 47 N. E. 544, 546, 56 Ohio St. 516, 40 L. R. A. 453; *Lehman v. Great Eastern Casualty & Indemnity Co.*, 39 N. Y. Supp. 912, 915, 7 App. Div. 424 (citing *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. [8 Pickle] 167, 21 S. W. 39, 20 L. R. A. 765; *Keene v. New England Mut. Acc. Ass'n*, 161 Mass. 149, 36 N. E. 891; *Williams v. United States Mut. Acc. Ass'n*, 82 Hun. 260, 31 N. Y. Supp. 343; *Id.*, 133 N. Y. 367, 31 N. E. 222).

A "voluntary exposure to unnecessary danger," within the meaning of an accident policy avoiding the policy if the insured should be guilty of a voluntary exposure of unnecessary danger, implies a conscious, un-

intentional exposure; something which one is consciously willing to take the risk of. *Commercial Travelers' Mut. Acc. Ass'n v. Springsteen*, 55 N. E. 973, 978, 23 Ind. App. 657; *Fidelity & Casualty Co. v. Chambers*, 24 S. E. 896, 898, 93 Va. 138, 40 L. R. A. 432; *Keene v. New England Mut. Acc. Ass'n*, 86 N. E. 891, 892, 161 Mass. 149.

"Voluntary exposure," as used in an accident insurance policy conditioned that voluntary exposure to unnecessary danger should relieve the insurer from liability, means an intentional exposure; and, unless the insured intentionally did the act exposing him to danger, it cannot be said that he exposed himself to danger, within the terms of the policy. *De Loy v. Travelers' Ins. Co. of Hartford*, 32 Atl. 1108, 1109, 171 Pa. 1, 50 Am. St. Rep. 787.

The expression "voluntary exposure to unnecessary danger," in an accident policy providing that it does not cover voluntary exposure to unnecessary danger, is equivalent to exempting the insurer from liability where the accident results from an intentional exposure of one's self to unnecessary danger. If the danger be concealed and unknown to the party who suffers from it, then it cannot be said he has voluntarily exposed himself to it. To constitute such exposure one must intentionally have done some act which reasonable or ordinary prudence would pronounce dangerous. *Union Casualty & Surety Co. v. Harroll*, 40 S. W. 1080, 98 Tenn. 591, 60 Am. St. Rep. 873.

Where an insurance policy provides that it does not cover death occasioned by "exposure to unnecessary danger," such phrase means an unnecessary risk taken of some known danger, which must itself be the actual cause of death. *Employers' Liability Assur. Corp. v. Anderson*, 47 Pac. 331, 334, 5 Kan. App. 18.

The term "voluntary exposure to unnecessary danger," in a clause of an accident policy, indicates a consciousness of danger by the insured to which he voluntarily exposes himself, or where the danger is so obvious that one of ordinary intelligence would necessarily have apprehended it. *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359.

Under an accident policy excepting from risks "voluntary exposure to unnecessary danger," an accident is not within the exception unless the insured was aware of the danger he incurred, and purposely assumed the risk thereof. *Ashenfelter v. Employers' Liability Assur. Corp. (U. S.)* 87 Fed. 682, 683, 81 C. C. A. 193.

An accident insurance policy providing that it should not extend to a case of death or injury caused by "voluntary exposure to unnecessary danger" means the intentional doing of some act which reasonable and ordi-

nary prudence would pronounce dangerous. There is a clear distinction between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to any unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. *Burkhard v. Travellers' Ins. Co.*, 102 Pa. 262, 263, 48 Am. Rep. 205; *Equitable Acc. Ins. Co. v. Osborn*, 9 South. 869, 870, 90 Ala. 201, 13 L. R. A. 267.

An act is not "voluntary," within the terms of an accident insurance policy excepting loss from voluntary exposure to unnecessary danger, if it is such as a man of ordinary prudence would be induced to do by the circumstances. *Duncan v. Preferred Mut. Acc. Ass'n*, 13 N. Y. Supp. 620, 621, 59 N. Y. Super. Ct. (27 Jones & S.) 145.

The term "voluntary exposure to unnecessary danger," as used in a clause of a policy of accident insurance, means a consciousness of the danger by insured, to which he voluntarily exposes himself, or that the danger is so apparent that a man of ordinary intelligence would, in the circumstances, necessarily have known it. *Fidelity & Casualty Co. v. Sittig*, 54 N. E. 903, 181 Ill. 111, 48 L. R. A. 359.

"Voluntary exposure to unnecessary danger and hazardous or perilous adventure," as used in an accident insurance policy exempting the insurer from liability for death produced from such exposure, means wanton or grossly imprudent exposure. *Manufacturers' Acc. Indemnity Co. v. Dorgan (U. S.)* 58 Fed. 945, 952, 7 C. C. A. 581, 22 L. R. A. 620.

To show a voluntary exposure on the part of deceased, the evidence must have disclosed a design or intention on his part to expose his life or a high degree of negligence; something more than mere ordinary negligence. *Williams v. United States Mut. Acc. Ass'n*, 31 N. Y. Supp. 343, 346, 82 Hun, 268.

Where an accident policy provided for exemption from liability where the injury arose from voluntary exposure to unnecessary danger, the unnecessary danger must be known or obvious, such as prudent men should know; and, where an insured had been kicked by a mule, the company was liable unless insured knew of the dangerous kicking qualities of the mule, or had reasonable grounds for apprehending such qualities. *Carpenter v. American Acc. Co.*, 24 S. E. 500, 502, 46 S. C. 541.

Where an accident policy exempts the insurer from liability in case of accident arising from voluntary exposure to unnecessary

danger, the insured is not to be held to have voluntarily exposed himself to unnecessary danger unless he acted with gross or wanton negligence. And hence, where the insured was injured by being tossed by a bull which he was driving out of a pasture, the insurer was not exempt from liability unless he believed, or had good reason to believe, that there was danger in the attempt. *Johnson v. London Guarantee & Accident Co.*, 72 N. W. 1115, 1116, 115 Mich. 86, 40 L. R. A. 440, 69 Am. St. Rep. 549.

Where an accident policy contained a clause exempting the company from liability from accident caused by voluntary exposure to unnecessary danger, and in an action on the policy there was evidence that deceased brought on the difficulty which resulted fatally, but there was also evidence that he did not bring on the trouble, though there was an exposure to danger, it was not a voluntary exposure. *Collins v. Fidelity & Casualty Co.*, 63 Mo. App. 253, 256.

Insured, who was cashier in a bank, called at a sawmill to have some lumber cut for a cabinet to be used in the bank. While standing near a saw he stepped on a block which was concealed in the sawdust on the floor, and instinctively threw out his arm to recover himself. His hand came in contact with the saw and was cut off. Held, that the insured, in entering the sawmill, was acting within the scope of his employment, and it would not be held, as a matter of law, that he voluntarily exposed himself to unnecessary danger, though shortly before the accident he had been operating the saw himself. *Hess v. Van Auker*, 32 N. Y. Supp. 126, 127, 11 Misc. Rep. 422.

"Voluntary exposure to unnecessary danger," within the meaning of such a condition in an accident insurance policy, must be an act done designedly, and not accidentally, and must have been done in obedience to and regulated by the will of the person who does it, and who must have intentionally and consciously assumed the risk of the obvious danger. Where the insured, while asleep on the top of the boilers of a steamboat, was injured by steam escaping from the safety valve, there was no voluntary exposure to unnecessary danger, within the meaning of an exception of the policy, unless the insured was conscious of the danger from escaping steam; it not being sufficient to preclude him from recovery that he had been warned that it was dangerous to be on top of the boilers. *Travelers' Ins. Co. v. Clark*, 59 S. W. 7, 9, 109 Ky. 350, 95 Am. St. Rep. 374.

Where a locomotive engineer thought it necessary to put on the brakes of an attached car in order to check the speed on a descending grade, and there was no brakeman there to do it, his attempting to pass

from the tender of the engine to the car for that purpose, while the train was moving at the slow rate of eight miles per hour, was not a "willful exposure to unnecessary danger or peril," within the meaning of the term as used in an accident insurance policy. *Providence Life Ins. & Inv. Co. v. Martin*, 32 Md. 310, 314.

Boarding moving train.

An attempt to board a train of cars running eight or ten miles an hour, by a young, strong, and active man, with experience as a travelling man in boarding and alighting from moving cars, is an exposure to "obvious risk of injury," within the meaning of an accident insurance policy which excepts the insurer from liability for injuries received as a result of voluntary or unnecessary exposure to danger or to obvious risk of injury, and, when made merely for the purpose of avoiding the delay incident to missing the train, will prevent a recovery against the insurer for injuries received in consequence of such attempt. *Small v. Travelers' Protective Ass'n of America*, 45 S. E. 706, 118 Ga. 900, 63 L. R. A. 510.

Cleaning gun.

"Voluntary exposure to unnecessary danger," as used in a policy of insurance exempting the company from liability if the assured was injured by voluntary exposure to unnecessary danger, was not equivalent to ordinary negligence, but would require a degree of consciousness of danger before the exposure would be voluntary. The cleaning of a loaded gun without knowing that it was loaded would not constitute such voluntary exposure. *Miller v. American Mut. Acc. Ins. Co.*, 21 S. W. 39, 43, 92 Tenn. (8 Pickle) 167, 20 L. R. A. 765.

Crossing track.

It is "voluntary exposure to unnecessary danger," within the prohibition of an accident policy, for one to attempt to cross a railroad track between the cars of a third train standing on it, when he saw that its crew were in their places, merely on his own assumption that he would have time enough before it was started. *Wells v. Putnam*, 47 N. E. 1005, 1006, 169 Mass. 226.

Insured, after waiting at a street crossing 10 or 15 minutes for a freight train to move, undertook to cross by climbing upon the drawheads of the cars, and cross through the train, and, while in the act, the train started, catching and crushing his foot. In holding that such act constituted "voluntary and unnecessary danger," within the meaning of that clause in his accident policy, which exempted the company from liability for any injury occasioned by voluntary exposure to unnecessary danger, the court said: "These facts manifestly establish voluntary

exposure to unnecessary danger. Indeed, it would be difficult to state a case more clearly within these terms. It is said to be undoubted law that the act of climbing over or between stationary cars without looking to see whether they are attached to an engine or not is the grossest kind of negligence, and such as will in ordinary actions preclude recovery for injuries received while making the attempt. Climbing over these drawheads and freight car couplings was not a case of the plaintiff going into concealed danger, as in some of the cases cited by plaintiff's counsel, but was that of taking a position obviously and necessarily dangerous." *Bean v. Employers' Liability Assur. Corp.*, 50 Mo. App. 459, 462, 463.

Crossing trestle.

Where a person was insured under an accident insurance policy which exempted the insurer from liability for accidents resulting from the insured's voluntary exposure to unnecessary danger, the fact that the insured crossed a railroad trestle bridge having a plank walk and fence railing on one side, much used by the public, did not show, as a matter of law, that he exposed himself to unnecessary danger. Where, on a dark night, the insured, in his right mind, attempted to walk across a railroad trestle where there was no railing, and nothing to walk on but ties 10 inches apart, he voluntarily exposed himself to unnecessary danger. *Follis v. United States Mut. Acc. Ass'n*, 62 N. W. 807, 809, 94 Iowa, 435, 28 L. R. A. 78, 58 Am. St. Rep. 408.

An accident policy contained a stipulation exempting the company from liability for injuries occasioned by voluntary exposure to unnecessary danger, hazard, or perilous adventure. During a dark and rainy night the insured, with two packages in his hands or arms, attempted by choice to pass over a trestle which he knew to be dangerous, other ways being open to him. Held, that there was in such conduct a voluntary exposure, etc., notwithstanding that it was his usual way of travel, and that he had been going, as had many others, that way for 10 years. *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270.

Discharging regular duty as switchman.

Where an insurance policy contains a clause exempting insurer from liability in case of death from voluntary exposure to unnecessary danger, such provision does not include a case where one is killed in the discharge of his regular duty as a railroad switchman while handling broken cars. *National Ben. Ass'n v. Jackson*, 2 N. E. 414, 416, 114 Ill. 533.

Escaping from officer.

Where the insured, in order to escape a police officer at the door of the room where

he was, lowered himself from the window by a strip of bedticking, which broke, and let him fall, causing his death, it was caused by his own "voluntary exposure to unnecessary danger," within the meaning of an accident policy which did not cover death or disability resulting from voluntary exposure to unnecessary danger. *Shaffer v. Travelers' Ins. Co. (Ill.)* 22 N. E. 589.

Fishing.

Where deceased, who could not swim, at the time of his death was seining in a river in which there were sink holes, and stepped into one of such holes, and was caught in the eddy, he not knowing of such danger, his death does not come within a clause in an accident policy exempting the company from liability from injuries resulting from voluntary exposure to unnecessary danger or perilous venture. *Conboy v. Railway Officials' Employés' Acc. Ass'n*, 46 N. E. 363, 365, 17 Ind. App. 62, 60 Am. St. Rep. 154.

Going out on water in a boat to fish on a dark night, without knowledge that snags are there, is not an exposure to unnecessary danger, within a provision of an accident policy exempting the insurer from liability for injuries from voluntary exposure to unnecessary danger. *Collins v. Bankers' Acc. Ins. Co.*, 64 N. W. 778, 779, 96 Iowa, 216, 59 Am. St. Rep. 367.

Going into house of ill fame.

In an action to recover under an accident policy conditioned not to extend to death resulting from voluntary exposure to unnecessary danger, deceased having been shot just after coming out of a bawdyhouse, in an altercation arising between his companion and a hack driver over payment of fare, the court said: "It cannot be said that the shooting followed as a natural consequence of, or that it was the result of, or that it might reasonably have been expected to follow, going into the house of ill fame or passing therefrom out upon the sidewalk on the street. A degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary." *Jones v. United States Mut. Acc. Ass'n*, 61 N. W. 485, 490, 92 Iowa, 652.

Going on platform of train.

It cannot be said that a passenger on a railroad train, who goes out on the platform while the train is in motion because he is overcome by the heat of the car or suffering from nausea, voluntarily exposes himself to unnecessary danger, within the meaning of a policy of accident insurance providing that

the insurer should not be liable for accidents resulting from voluntary exposure to unnecessary danger. *Marx v. Travelers' Ins. Co.* (U. S.) 39 Fed. 321.

Going on roof to get pigeons.

One injured while attempting to get pigeons in the cupola of his barn was not guilty of voluntary or unnecessary exposure to danger, within the meaning of an accident insurance policy providing that the policy should not cover disability when caused by voluntary or unnecessary exposure to danger, where the pigeons were to serve as food for himself and family. *Matthes v. Imperial Acc. Ass'n*, 81 N. W. 484, 485, 110 Iowa, 222.

Hunting.

One who hunts for game with a loaded gun, cannot be said to have voluntarily exposed himself to unnecessary danger, within the meaning of the provision of an accident insurance policy declaring that for injuries sustained by reason of a voluntary exposure to unnecessary danger there can be no recovery. *Cornwell v. Fraternal Acc. Ass'n*, 69 N. W. 191, 192, 6 N. D. 201, 40 L. R. A. 437, 66 Am. St. Rep. 601.

Jumping from moving train.

Under an insurance policy providing that it should be void if the accident occurred from voluntary or unnecessary exposure to danger, no recovery can be had for the death of the assured, caused by his jumping from a moving train after it had passed a station. *Smith v. Preferred Mut. Acc. Ass'n*, 104 Mich. 634, 62 N. W. 990.

Sitting down on track.

An accident insurance policy stipulated that its benefits should not extend to death or disability happening, directly or indirectly, in consequence of voluntary exposure to unnecessary danger. The insured sat down on a track of a railroad in active operation, and was run over and killed. Held a voluntary exposure to unnecessary danger. *Metropolitan Acc. Ass'n v. Taylor*, 71 Ill. App. 132, 135.

The death of a man who stepped on a railroad track when an engine running at the rate of 4 miles an hour was about 25 feet from him, and who sat down upon the track, so that he was struck by the engine and killed, resulted from voluntary exposure to unnecessary danger, within a clause of an insurance policy precluding a recovery in such a case. *Williams v. United States Mut. Acc. Ass'n*, 31 N. E. 222, 223, 133 N. Y. 366.

VOLUNTARY LICENSE.

See "Simple License."

VOLUNTARY MANSLAUGHTER.

Voluntary manslaughter is the unlawful and intentional killing of a human being without malice. *Dowdy v. State*, 23 S. E. 827, 828, 96 Ga. 653.

Voluntary manslaughter is the unlawful killing of another without malice, on sudden quarrel or in heat of passion. *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 555; *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 198, 201; *United States v. Lewis* (U. S.) 111 Fed. 630, 633; *Territory v. Catton*, 16 Pac. 902, 906, 5 Utah, 451; *State v. Lockwood*, 24 S. W. 1015, 1016, 119 Mo. 463.

Voluntary manslaughter is defined by common law writers as an intentional killing in hot blood without malice. *United States v. Meagher* (U. S.) 37 Fed. 875, 881.

Voluntary manslaughter is the intentional taking of life without malice, without premeditation, without deliberation. *State v. Prater*, 43 S. E. 230, 232, 52 W. Va. 132.

Judge Gillett, in his work on Criminal Law, p. 404, in treating of "voluntary manslaughter," defines it as an unlawful intentional killing of a human being without malice and without premeditation. Although the statute adds "upon a sudden heat," it is only in the application of the definition to a given case that this element must be made use of. *Hasenfuss v. State*, 59 N. E. 463, 465, 156 Ind. 246.

Voluntary manslaughter is where one kills another in the heat of blood; and this usually arises from fighting or from provocation. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564; *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542; *State v. Trusty* (Del.) 40 Atl. 766, 768, 1 Pennewill, 319; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573.

Voluntary manslaughter is the unlawful killing of another without malice, on sudden quarrel or in heat of passion. When, upon sudden quarrel, two persons fight, and one of them kills the other, that is voluntary manslaughter. *McCann v. People* (N. Y.) 6 Parker, Cr. R. 629, 631 (citing Whart. Homicide, p. 45).

"Voluntary manslaughter is the unlawful killing of another, without malice, in a sudden quarrel or in heat of blood. But it is not every killing in the heat of blood or upon sudden quarrel which is voluntary manslaughter. In order to be so it must be done without malice. * * * Involuntary manslaughter is when one, in the performance of an unlawful act, kills another by accident." *Whitehurst v. Commonwealth*, 79 Va. 556, 559.

Voluntary manslaughter is where one kills another in the heat of blood; and this usually arises from fighting or other provocation. In the former case, in order to reduce

the crime from murder to manslaughter, it must be shown that the fighting was not preconcerted, and that there was not sufficient time for the passion to subside. *State v. Wilson*, 11 S. W. 985, 988, 98 Mo. 440.

Voluntary manslaughter is the killing of a human being by another person upon a sudden heat or passion caused by provocation apparently sufficient to make the passion uncontrollable in a reasonable person. *Territory v. Manton*, 19 Pac. 387, 388, 8 Mont. 95.

Voluntary manslaughter is properly defined in an instruction as the unlawful killing of a human being without malice, express or implied; voluntary, as done in a sudden heat, as upon adequate provocation the passion has been aroused, and the fatal act is unlawfully and voluntarily committed before sufficient time has elapsed to allow the passion to cool and for reason to resume its sway. *Stout v. State*, 90 Ind. 1, 11.

Voluntary manslaughter is defined to be the unlawful killing of a human creature without malice, either express or implied, and without any mixture of deliberation whatever; and in all cases of voluntary manslaughter there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstance to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. *Huff v. State*, 11 S. E. 618, 619, 85 Ga. 285.

Manslaughter is the unlawful killing of another without malice aforethought, either express or implied, which may be either voluntary, in the heat of passion, and upon sudden provocation, or involuntary, in the commission of some unlawful act. *State v. Conley*, 39 Me. 78, 87.

As requiring intention to kill.

In order that there may be a conviction of voluntary manslaughter, there must be an intention to kill. *Daly v. Stoddard*, 66 Ga. 145, 146.

Voluntary manslaughter, at common law, was an intention of killing in the heat of sudden passion, caused by sufficient provocation. *Olds v. State* (Fla.) 33 South. 296, 299.

Voluntary manslaughter is manslaughter "when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which, in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offense." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 304, 52 Am. Dec. 711.

Voluntary manslaughter is the causing of the death of another by some unlawful act not accompanied by any intention to take life. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 304, 52 Am. Dec. 711.

Voluntary manslaughter includes all felonious homicides less heinous than murder, which results directly from any unlawful force aimed at or applied to the party slain. It is not necessary that the perpetrator shall have willed the death of the slain, but, if unlawful and intentional violence be directed against the deceased, the law pronounces the consummated act of manslaughter to be voluntary. *Harrington v. State*, 3 South. 425, 427, 83 Ala. 9.

Murder distinguished.

Voluntary manslaughter often so nearly approaches murder that it is necessary to distinguish it clearly. The difference is this: manslaughter is never attended by legal malice or depravity of heart, being sometimes a willful act, as the term "voluntary" denotes. It is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton killing. Therefore, to reduce an intentional blow, stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. *Commonwealth v. Drum*, 58 Pa. (8 P. F. Smith) 9, 17.

Voluntary manslaughter is an intentional killing in hot blood, and differs from murder in this: That though the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice aforethought which is the essence of murder is presumed to be wanting, and, the act being imputed to the infirmities of human nature, the punishment is proportionately lenient. The provocation in the case of a killing in hot blood must be such as to account for the act by reason of the infirmities of human passions in men in general, and without attributing to the prisoner a cruel and relentless disposition. *United States v. King* (U. S.) 34 Fed. 302, 309.

VOLUNTARY NONSUIT.

A nonsuit is voluntary when the plaintiff throws up his case and consents to a judgment for the defendant for costs. *Sandoval v. Rosser*, 26 S. W. 933, 934, 86 Tex. 682.

A voluntary nonsuit is when a suit is terminated by a voluntary action and free will of the plaintiff, while an involuntary nonsuit is when the plaintiff, by some ruling of the court which precludes his recovery, is compelled to take a nonsuit. It is only

proper to take a nonsuit where, at the trial, the ruling of the court is such as to preclude plaintiff from recovery. *Williams v. Finks*, 57 S. W. 732, 735, 156 Mo. 597.

Voluntary nonsuit is where a party submits to the court, and says, "I have not made out a case," and asks that it be dismissed. Such a judgment is not a judgment on the merits. *Hammergen v. Schurmeier* (U. S.) 8 Fed. 77, 78.

A voluntary nonsuit is allowed by the court on the plaintiff's own motion. The plaintiff submits to the court that he has not made or cannot make out a case, and asks, in effect, that it be dismissed. A motion by a plaintiff for a nonsuit, under our Code, is a dismissal. *Wabash R. Co. v. McCormick*, 55 N. E. 251, 252, 23 Ind. App. 258 (citing *Burns v. Reigelsberger*, 70 Ind. 522).

A voluntary nonsuit is an abandonment of his cause by the plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. A "nonsuit" is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of the cause after it has been put at issue without determining such issue. *Deeley v. Heintz*, 62 N. E. 158, 159, 169 N. Y. 129.

A voluntary nonsuit is an abandonment of a cause by the plaintiff, and an agreement that a judgment for costs be entered against him, but an involuntary nonsuit is where a plaintiff, on being called when the case is before the court for trial, neglects to appear, or when he has given no evidence upon which the jury could find a verdict. *Boyce v. Snow*, 88 Ill. App. 402, 405.

A nonsuit taken after instructions have been given which preclude recovery by the plaintiff is not a voluntary nonsuit. *Martin v. Fewell*, 79 Mo. 401, 409.

Nonsuits may be classed under two divisions: (1) Involuntary, as when awarded by the court against the plaintiff's objection; (2) voluntary, when allowed by the court on plaintiff's own motion. *Washburn v. Allen*, 77 Me. 344, 346.

VOLUNTARY PAYMENT.

A voluntary payment means one made without compulsion. *Amsden v. Danielson*, 35 Atl. 70, 19 R. I. 533.

Voluntary payments are when one knowingly pays, and intends to pay, an illegal or unfounded claim, with full knowledge of its illegality or groundlessness. See *New York Life Ins. & Trust Co. v. Manning* (N. Y.) 3 Sandf. Ch. 58; *Redmond v. City of New York*, 125 N. Y. 632, 26 N. E. 727. These authorities show that a voluntary payment

is one made with a full knowledge of the facts; a voluntary payment of an unfounded or illegal claim. *Davis v. Kling*, 28 N. Y. Supp. 1026, 1029, 77 Hun. 598.

"To constitute a voluntary payment," says the court, in the case of *Scholey v. Mumford*, 60 N. Y. 501, "the party paying must have had the freedom of exercising his will. When he acts under species of compulsion, the payment is not voluntary." *Edward O. Jones Co. v. Board of Education of City of Mt. Vernon*, 51 N. Y. Supp. 950, 953, 30 App. Div. 429.

Payment under protest upon a threat of suit, the parties knowing all the circumstances, is not a payment under such compulsion as protects it from the infirmity of a voluntary payment. *Burnham v. Town of Strafford*, 53 Vt. 610, 613.

Where a party is induced to pay money which he is under no legal duty to pay, through legal proceedings commenced or threatened, he cannot recover it back if the proceedings are bona fide and no undue advantage is taken; and the fact that it was made under protest does not make the payment voluntary. *Meacham v. Town of Newport*, 89 Atl. 631, 632, 70 Vt. 67 (citing *Taggart v. Rice*, 87 Vt. 47).

Cooley, Tax'n, 811, says: "When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense; and many payments are held to be voluntary which are made unwillingly, and only as a choice of evils or of risks." *Maxwell v. San Luis Obispo County*, 12 Pac. 484, 485, 71 Cal. 466.

What constitutes a voluntary payment has been many times discussed and variously decided, and it is impossible to reconcile all these decisions. There is a long line of cases in New York where, in order to carry out a contract for the sale of property, assessments which subsequently were decided to have been illegal have been paid; and it has been held that a payment so made was voluntary, and could not have been recovered. Of this class, *Tripler v. City of New York*, 125 N. Y. 617, 26 N. E. 721, is an instance. There the plaintiff paid an illegal assessment to clear the premises therefrom, in compliance with the terms of a sale from plaintiff to the purchaser. The court held that the payment was voluntary. So, also, in *Wood v. City of New York*, 25 App. Div. 579, 49 N. Y. Supp. 622. These cases, however, are distinguishable from those where money has been paid under a mistake of fact. In 7 Wait, Act. & Def. p. 402, the rule is thus stated: "If a party, with full knowledge of all the facts, voluntarily pays money in satisfaction of a demand made upon him, he cannot afterwards allege such a payment to have been unjustly demanded, and recover back such money." And in *Waite v. Leggett* (N. Y.) 8

Cow. 195, 18 Am. Dec. 441, it was said: "To constitute a voluntary payment it must appear that the money was paid with a knowledge of the facts which showed no liability to pay, and even with knowledge that it ought not to be paid." *Lesster v. City of New York*, 53 N. Y. Supp. 934, 937, 33 App. Div. 350.

No payment is a voluntary payment, so as to become an acknowledgment by the debtor of his liability on the whole demand, and an implied new promise to pay the residue of the debt, which was enforced by means of a proceeding in rem, without any act on the part of the debtor. *Thomas v. Brewer*, 7 N. W. 571, 572, 55 Iowa, 227.

A voluntary payment implies that the man who makes it intends to waive any right which he may have to resist it. When he gives notice by his protest that he does not waive his right, but intends to insist upon it, such implication is negatived. Chief Justice Tindall, in *Valpy v. Manley*, 1 Man. G. & S. 603, after quoting the dictum of Lord Kenyon, adds: "I am not aware that there is any difficulty or impropriety in laying it down that where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold." *Rumford Chemical Works v. Ray*, 34 Atl. 814, 815, 19 R. L. 456.

Where one receives money as a wrongdoer, it may in general be recovered from him in the equitable action for money had and received. The defendant in such case cannot complain that the plaintiff waives that form of action in which he might recover more than the value of the goods, and adopts a form in which he can only recover the money which the defendant has received, with interest. *Wisner v. Bulkley* (N. Y.) 15 Wend. 321, 323.

Of claim to release mechanic's lien.

The term "voluntary payment," in the rule that there cannot be a recovery of money voluntarily paid, cannot be construed to apply to a payment under protest by a property owner to procure a release of a mechanic's lien based on an unfounded claim, in order to clear the title of record, so that he may consummate a loan upon the property in order to raise money to pay an overdue mortgage and other pressing debts; the owner having no other means of raising the money. *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581.

Of costs of libels.

Where a vessel was libeled, together with her cargo, under Act Cong. March 2, 1811, and the seizure was withdrawn, and the vessel and cargo liberated so far as the customhouse was concerned, but they were detained by the marshal, who refused to deliver them without an order from the district court or until the costs of the libels were paid, and the owners paid the costs of the district attorney, and the fees of the clerk of the court, who refused to give an order for delivery of the property until his fees were paid, the payment of the costs was not a voluntary act, having been exacted by the officer under color of his office, and the costs, having been illegally exacted, might be recovered back by an action of indebitatus assumpsit at common law. *Clinton v. Strong* (N. Y.) 9 Johns. 370, 376.

Of duty on import.

Where a revenue collector insisted upon either having the goods appraised at the value at the time of shipment, the consequence of which would have been an addition of so much to the invoice price as to subject the importer to a penalty, or to allow the importer voluntarily to make the addition of the invoice price, and so escape the penalty, and the importer chose the latter course, the duties were not voluntarily paid by him, so as to debar him from bringing an action against the collector for the recovery of the excess thus exacted. To make a payment involuntary, it need not be by actual violence or any physical duress. It suffices if the payment is caused, on the one part, by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of the property, except by submitting to the payment. *Maxwell v. Griswold*, 51 U. S. (10 How.) 242, 255, 13 L. Ed. 405.

Of execution.

A voluntary payment is one made by a debtor on his own motion without any compulsory process. A payment on execution does not fall within the rule. *Nichols v. Knowles* (U. S.) 17 Fed. 494.

Of fees.

Where one has a clear legal right to inspect public records, and the official having possession and control thereof makes use of his official authority, and, under cover thereof, exacts fees to which he has no legal claim, the payment of such fees is not a voluntary payment. *Townshend v. Dyckman* (N. Y.) 2 E. D. Smith, 224, 233.

Of freight rates.

Where a shipper pays the rates established in violation of law by a common carrier, rather than forego his services, such

payment is not "voluntary," in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge, for the corporation and the shipper are in no sense on equal terms. *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559, 595.

Of judgment.

A payment of a judgment is not a voluntary payment. If such a payment is voluntary, every payment is voluntary, unless the property be sold by the sheriff. *Brown v. Williams* (N. Y.) 4 Wend. 360, 363.

Payment by the judgment debtor to prevent the issuance of an execution or the enforcement of an order of sale is not a voluntary or an officious payment. *Wright v. Knoxville Livery & Stock Co.* (Tenn.) 59 S. W. 677, 689.

Of license.

The term "voluntary payment" applies to the payment of money to procure a license to transact business as required by municipal ordinance, and the money cannot be recovered as being paid under compulsion, even if the ordinance requiring a license is void. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 277.

When it appears that there was no liability to anything beyond civil and criminal prosecutions in case of refusal to pay certain license taxes, and in such prosecutions the invalidity of the law which authorizes the collection of the taxes would have been a perfect defense, a party making payment is not under such duress or compulsion that he can recover back the money so paid in an action brought for that purpose, but such payment must be deemed to have been voluntarily made. *Maxwell v. San Luis Obispo County*, 12 Pac. 484, 485, 71 Cal. 466.

Of tax.

Where the interest on stock representing a debt of the city of Baltimore was payable at certain banks in such city, and for six years the banks deducted, by direction of the city register, from the July installments of interest, the annual tax levied by the state of Maryland for state purposes, and remitted the balance to the owner of the stock in New York, such owner knowing that the tax was so collected, the receipt, without objection, of the interest, less the tax deducted, constituted a voluntary payment of the tax by such owner, so that she could not recover it back, though the stock was not properly taxable by the state. *City of Baltimore v. Hussey*, 9 Atl. 19, 21, 67 Md. 112.

A voluntary payment of a tax is a payment made under a claim from the tax authorities that the law compelled payment.

People v. Wemple, 36 N. E. 506, 507, 141 N. Y. 471.

To constitute a voluntary payment of taxes, the payment must be made under circumstances not tantamount to legal compulsion—either to release a seizure already made under a tax warrant, or to prevent one which is immediately apprehended. If a demand is made by the collecting officer, accompanied by a threat to levy for sale in case of refusal, or any equivalent expression of intention, and a payment is made under protest, with notice that suit will be instituted to recover back the taxes thus paid, it is sufficient to show that the payment was involuntary, as being under compulsion. It is not necessary to await an actual seizure. *Erskine v. Van Arsdale*, 82 U. S. (15 Wall.) 75, 21 L. Ed. 63; *Gachet v. McCall*, 50 Ala. 307. Any payment made by the taxpayer before demand made by the collector, or before any threat or step on his part indicating an intention to levy under the warrant, is voluntary. *Raisler v. City of Athens*, 66 Ala. 194, 198 (citing *Cooley, Tax'n*, 569, note 3; 2 Dill. Mun. Cor. 751; *Union Bank v. City of New York* [N. Y.] 51 Barb. 159).

VOLUNTARY RETURN.

Pasch. Dig. art. 2397, providing that, if stolen property be voluntarily returned before any prosecution, the punishment shall be reduced, means that the return must not be induced by threats and fear of prosecution; and where the thief makes no effort to return it until he is found in possession, and then hastens to return it to secure immunity from punishment, it is not a voluntary return. *Stephenson v. State*, 4 Tex. App. 591, 592.

Where a cow was driven 30 miles from its ranch, and the person in whose possession it was found promises, when overtaken, to drive it back, and did drive it back the greater part of the way, where it was turned loose, the property will not be deemed to have been voluntarily returned, within the Code. *Brill v. State*, 1 Tex. App. 572.

The return of stolen property may be voluntary, notwithstanding it was superinduced by the fear of detection and punishment, as well as the spirit of repentance and restitution, within Code, art. 738, providing that, if property taken under such circumstances as to constitute theft "be voluntarily returned within a reasonable time," the punishment shall be by fine not exceeding \$1,000. *Allen v. State*, 12 Tex. App. 190.

VOLUNTARY SACRIFICE.

Where property has been displaced by a storm, though valuable and capable of being saved if the storm abates, is from its po-

sition an especial source of danger to the vessel, its sacrifice in order to save the vessel is a voluntary sacrifice, and its loss the subject of general average. *Arn. Ins. (2d Ed.)* 906, says: "If the will of a man was in any way, even the least degree, contributory to the loss, that is all that is required to make it a voluntary sacrifice." It makes no difference that the pressure of circumstances was such as to prevent that will from being exerted, except in one way. *The Margarethe Blanca (U. S.)* 12 Fed. 728, 780.

VOLUNTARY SEPARATION.

In construing a statute of Alabama which authorizes the court, if a voluntary separation occur between husband and wife, to permit either of the parties to have the custody and control of the children, the court said: "It is urged that in the present case the separation was not voluntary; that the appellant did not assent to it, but the appellee, without cause, willfully abandoned him. The statute is in terms limited to a voluntary separation, but we do not suppose each party should, in words, express assent to it. The assent may be implied, as it is often implied in reference to contracts and agreements. A husband may pursue towards the wife, or the wife towards the husband, a course of conduct compelling a separation; and it would be idle to say such was not the result anticipated or intended. Continuous accusations against the virtue of the wife may be made, wounding her pride, chilling her affections, blighting her hopes, embittering every hour of her life, until, if all self-respect is not crushed, she must abandon the society of her husband, and seek relief from the tortures he inflicts. It would be vain for him to say that his wife's abandonment was voluntary on her part, and involuntary as to himself. When such a case occurs, it will be a voluntary separation, within the meaning of this statute. The wife chooses separation as her only hope of peace, and the only mode of maintaining her self-respect and reputation, and the husband must intend and assent to the natural consequences of his misconduct." *Anonymous*, 55 Ala. 428, 431.

VOLUNTARY SERVICE.

"Voluntary service," as used in 1 Rev. St. 1876, p. 63, § 7, providing that the board of commissioners may make allowances at their discretion, but declaring it to be their duty to avoid, as much as possible, the necessity for making any allowances for voluntary service, means services rendered without any contract therefor. *Carroll County v. Richardson*, 54 Ind. 153, 156.

VOLUNTARY SETTLEMENT.

A deed will not be regarded as a voluntary settlement if there are other circum-

stances besides the retention of the deed by the grantor showing that he did not intend it to operate immediately, or that he had an intention contrary to that appearing on the face of the deed. *Rodemeler v. Brown*, 48 N. E. 468, 471, 169 Ill. 347, 61 Am. St. Rep. 176 (citing *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. 792).

VOLUNTARY STRANDING.

Where a ship and cargo are exposed at a particular place to a common peril of sinking and becoming submerged in deep water, and the expense of raising and saving them in that place would be greater than if stranded in shoal water, and the master, to save them from such increased expenses, runs the ship on flats near by and strands her in shoal water, and thereby increases the peril to the ship and diminishes the damages and expenses of saving her and her cargo, then there is a "voluntary stranding," within the meaning of the law entitling the owners of the vessel to recover, as general average, their just proportion of such damages and expenses. *Fowler v. Rathbone*, 79 U. S. (12 Wall.) 102, 118, 20 L. Ed. 281.

VOLUNTARY SUICIDE.

The term "voluntary suicide" in a life policy excepting the insurer from liability for suicide, voluntary or involuntary, does not characterize death resulting from the taking of poison, unless it is taken with knowledge that it is poison. *Edwards v. Travelers' Life Ins. Co. (U. S.)* 20 Fed. 661, 662.

VOLUNTARY TRANSFER.

The words "voluntary transfer," as used in speaking of a transfer by a debtor of all, or substantially all, of his property, subject to the payment of his debts, are expressive of the true character of the transfer—that it is the act, and proceeds from the volition, of the debtor. And the expression "voluntary transfer" is not employed in the sense in which it is frequently used—that of not being supported by a valuable consideration. *Bell v. Goetter*, 17 South. 709, 711, 106 Ala. 462.

VOLUNTARY TRUST.

Gift distinguished, see "Gift."

A "voluntary trust" is an equitable gift, and, like a gift *inter vivos*, must be complete. *Bath Sav. Inst. v. Hathorn*, 33 Atl. 836, 837, 88 Me. 122, 32 L. R. A. 377, 51 Am. St. Rep. 382.

Code, § 2956, declares that a voluntary trust is created by any words or acts of the trustor indicating with reasonable certainty an intention on the part of the trustor to

create a trust. *McDonald v. American Nat. Bank*, 65 Pac. 896, 911, 25 Mont. 456.

A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another. Civ. Code Cal. 1903, § 2216; Rev. Codes N. D. 1899, § 4255; Civ. Code S. D. 1903, § 1607; Civ. Code Mont. 1895, § 2951.

VOLUNTARY UNINCORPORATED ASSOCIATION.

As partnership, see "Partnership."

VOLUNTARY VALIDITY.

By the "voluntary validity" of a treaty is meant that validity which a treaty, become voidable because of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. It is called "voluntary" because it entirely depends on the will of the nation either to let it continue to operate or to annul and extinguish it. To this head such questions as these relate; that is: Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals? Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone this risk until we can be better prepared for it? Shall we at this moment take measures, or would it be more prudent to remain silent, and let the treaty go on and continue to operate as if nothing had happened? *Jones v. Walker* (U. S.) 18 Fed. Cas. 1059, 1062.

VOLUNTARY WASTE.

See "Commissive Waste."

VOLUNTARY WITHDRAWAL.

"Voluntary withdrawal," as used in a law chartering a corporation, which provides that membership may be terminated by death, voluntary withdrawal, or expulsion, means a withdrawal entirely by the member's own free and voluntary act. *New York Protective Ass'n v. McGrath*, 5 N. Y. Supp. 8, 10.

VOLUNTARILY.

"Voluntarily," as used in a certificate of a wife's separate acknowledgment of a mortgage, reciting that she executed such mortgage voluntarily, is of equivalent import and meaning with the expression "of her own free will and accord," as used in Code 1876, § 2822, providing that a wife shall acknowledge that she signed any conveyance of land

of her own free will and accord. A voluntary act proceeds from one's own free will; done by choice or by one's own accord; unconstrained by external interference, force, or influence; not prompted or suggested by another. "Voluntarily" expresses, by the use of one word, all the force and meaning of the phrase "of her own free will and accord." *Gates v. Hester*, 1 South. 848, 850, 81 Ala. 357.

"Voluntarily," as used in an instruction in an action by a wife against a person for selling intoxicating liquors to her husband, stating that if the husband was in the habit of getting intoxicated, and the wife, knowing this habit, voluntarily drank intoxicating liquors with him at the bar of the defendant, this would not only be encouraging the husband in his intemperate habits; but would be an apparent sanctioning on her part of the sales of liquor to him, means spontaneously, of one's own will, without being moved, influenced, or impelled by others. *Kearney v. Fitzgerald*, 43 Iowa, 580, 585.

"Voluntarily leave," as used in a statute authorizing the granting of a divorce if a wife "voluntarily leave" her husband's house, means a leaving of her own free choice. *Hardin v. Hardin*, 17 Ala. 250, 253, 52 Am. Dec. 170.

"Voluntarily and unnecessarily," as used in an instruction, in an action for personal injuries, that if plaintiff voluntarily and unnecessarily placed himself in a certain position, whereby his injury was made possible, then he could not recover, characterizes the act to which they are applied as needless, not required by the circumstances of the case, and one which, if it involved danger to life or limb, was unreasonable, and, in the nature of things, negligent. *Tanner v. Buffalo Ry. Co.*, 25 N. Y. Supp. 242, 243, 72 Hun, 465.

Where there is a parol exchange of coal lands, one of the parties, who proceeds to mine the land received by him, does not voluntarily abandon possession by temporarily stopping the extension of his operations on a notice from the other disputing his rights. *Jermyn v. Elliott*, 45 Atl. 938, 951, 195 Pa. 245.

The word "voluntarily," in the Indiana statute providing that if any person shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat of passion, or involuntarily and in the commission of some unlawful act, such person shall be deemed guilty of manslaughter, means by the free exercise of the will; done by design; purposely. *Murphy v. State*, 31 Ind. 511, 513.

Where a person, of his own motion, goes upon a railroad track to walk there, he is voluntarily there, if he is run over by a

train, though just before the accident he may have fallen down and have been unable to move on account of causes beyond his control. *Weinschenk v. Aetna Life Ins. Co.*, 67 N. E. 242, 243, 183 Mass. 312.

As without contract.

"Voluntarily," as used in 1 Rev. St. 1876, p. 63, § 7, providing that the board of commissioners may make allowances at their discretion, but declaring it to be their duty to avoid, as much as possible, the necessity for making any allowances for things voluntarily furnished, means things furnished without any contract therefor. *Carroll County v. Richardson*, 54 Ind. 153, 156.

As without fear or coercion.

A certificate of acknowledgment of a deed by a married woman, that she did so freely and voluntarily, shows that she must necessarily have been without fear. It is possible that fear may exist without threats, but it is not very easy to suppose there can be fear if there be no compulsion. *Hadley v. Geiger*, 9 N. J. Law (4 Halst.) 225, 233.

"Voluntarily," as used in acknowledgment of a deed by a married woman that she executed it voluntarily, implies the absence of fear or coercion. *Brown v. Faran*, 8 Ohio (3 Ham.) 140, 155.

As knowingly.

"Voluntarily," as used in an instruction, in an action for personal injuries, that to prevent recovery plaintiff must have gone into the danger voluntarily, assuming the risk by stepping into the danger there apparent, should be construed to mean "knowingly." *Munger v. City of Marshalltown*, 9 N. W. 192, 56 Iowa, 216.

Act Cong. May 10, 1800, prohibiting the carrying on of the slave trade from the United States to any foreign place or country, and making it an offense for any seaman to serve "voluntarily" on any vessel engaged in the trade, meant serve with knowledge of the business in which she was employed. *United States v. Morris*, 39 U. S. (14 Pet.) 464, 476, 10 L. Ed. 543.

As willfully.

The cases and text-writers seem to use interchangeably the words "willfully," "intentionally," and "voluntarily" as synonymous terms in discussing the question of the making of declarations or performing acts from which it is alleged an estoppel arises. *Gillett v. Willey*, 19 N. E. 287, 290, 126 Ill. 310, 9 Am. St. Rep. 587.

As unlawfully.

In an indictment charging that the defendant "feloniously, voluntarily, and maliciously" committed the offense, was not equivalent to stating that it was "unlaw-

fully" committed. *Rex v. Reader*, 4 Car. & P. 245.

VOLUNTEER.

A volunteer is one who has no interest in the work, but nevertheless undertakes to assist therein. *Welch v. Maine Cent. R. Co.*, 30 Atl. 116, 117, 86 Me. 552, 25 L. R. A. 658.

A volunteer, within the rule that no one officiously paying the debts of another can maintain an action to recover from the debtor the money so paid, is one who has paid the debts of another without request, when he was not legally or morally bound so to do, and when he had no interest to protect in making such payment. One who pays the debt of another under such circumstances officiously intrudes himself into business which does not concern him, and his right to compel reimbursement is not recognized by law, in the absence of a subsequent promise on the part of the debtor to repay. *Irvine v. Angus* (U. S.) 93 Fed. 629, 633, 35 C. C. A. 501.

In *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1, it is said that the terms "stranger" and "volunteer," as used with reference to the subject of subrogation, mean one who in no event, resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged for the payment thereof and cannot be sold therefor. The payment by one who is liable to be compelled to make it or lose his property will not be regarded as made by a stranger. When the person paying has an interest to protect, he is not a stranger. *Durante v. Eannaco*, 72 N. Y. Supp. 1043, 1051, 65 App. Div. 435.

In reference to the rule of subrogation, a stranger has been said to be not necessarily one who has nothing to do with the transaction out of which the debt grew. Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer; so that, where agents employed to invest money for a mortgagee, on failure of the mortgagor to pay the interest, remitted the amount of the interest coupons without the knowledge of the mortgagor or mortgagee, they were mere volunteers. *Bennett v. Chandler*, 64 N. E. 1052, 1055, 199 Ill. 97.

A person who may be compelled to pay a debt, or the protection of whose interest requires that he pay it, is not a mere volunteer. *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373. Nor is he who pays a debt or advances money for the purpose at the request of the debtor a mere volunteer. *Warford v. Hankins*, 50 N. E. 468, 470, 150 Ind. 489 (citing *Shattuck v. Cox*, 128 Ind. 293, 27 N. E. 609; *Trible v. Nichols*, 53 Ark. 271, 13 S. W. 796, 22 Am. St. Rep. 190).

The term "volunteer," when used in the sense of a person doing a thing which he is not legally bound to do, includes the purchaser of real estate at a tax sale, he not being under obligations to pay the taxes, or to purchase at the sale; and in general he buys without warrant or covenant, at a price which he considers the venture worth, and, where there is no fraud or misrepresentation and no mistake of the facts, he is without remedy in case of a failure of title. *Pennock v. Douglas County*, 58 N. W. 117, 121, 39 Neb. 293, 27 L. R. A. 121, 42 Am. St. Rep. 579.

In an action by a donor to reform the deed to the donee, in which the donor claimed that by a mistake in the lines he had unintentionally included the dwelling house and the grounds surrounding it, the court said, "Volunteers in contracts are defined to be persons who receive a voluntary conveyance" (2 Bouv. Law Dict. 636), and held that, though a court of equity could not relieve the donees, who are volunteers, if they were applying for a reformation of the contract, such relief would be granted to the donor if a proper case was made by him. *Mitchell v. Mitchell*, 40 Ga. 11, 16.

In military law.

"Volunteer," as used in Sess. Laws 1864, p. 25, c. 8, § 22, authorizing the board of county supervisors to provide for raising money upon the credit of the county for the use of the county for the purpose of paying volunteers in the military or naval service of the United States during the war, should be construed to include one who freely enlists in the place of another who has been drafted, and becomes his substitute of his own free will and accord. *Magee v. Cutler* (N. Y.) 43 Barb. 239, 249.

"Volunteers," as used in Sess. Laws 1863, p. 60, Laws 1864, p. 53, and Laws 1865, p. 29, providing for the payment of bounties to volunteers, applies only to volunteers as the people ordinarily understand the term, and not to one who enters the service in the place of another as a substitute for hire. *People v. Quartermaster General*, 25 Mich. 340, 343.

The act of volunteering or enlisting contemplated by the provision of Gen. St. c. 63, § 20, includes the whole transaction by which a person not before in the military service would get into it, and would embrace the muster of a troop as well as the signing of the contract and enlistment by him. *Wood v. Town of Springfield*, 43 Vt. 617, 624.

VOTE.

See "By Vote"; "Casting Vote"; "Legal Votes"; "True Vote."
Written votes, see "Written Ballots."

"Vote" is defined by Worcester to be "suffrage, voice, or opinion of a person in some matter which is commonly to be determined by a majority of voices or opinions of persons who are empowered to give them; the wish of an individual in regard to any question, measure, or choice, expressed by word of mouth, by ballot or otherwise; that by which the will, preference, or opinion of a person is expressed; a ballot." *Maynard v. Board of Canvassers*, 47 N. W. 756, 759, 84 Mich. 228, 11 L. R. A. 332.

A "vote" is an expression of the choice of the voter for or against any measure, any law, or the election of any person to office. It is but the expression of the will of a voter; and, whether the formula to give expression to such will be a ballot or viva voce, the result is the same; either is a vote. *Gillespie v. Palmer*, 20 Wis. 544, 546; *State v. Green*, 37 Ohio St. 227, 230; *People v. Pease*, 27 N. Y. 45, 57, 84 Am. Dec. 242; *State v. Roper*, 68 N. W. 539, 540, 47 Neb. 417; *State v. Barden*, 46 N. W. 899, 900, 77 Wis. 601, 10 L. R. A. 155.

"Vote," as used in the Constitution of Vermont and the Acts of the General Assembly, is sometimes used to signify the opinion of the individual as expressed by ballot, sometimes as expressed viva voce, and sometimes for the collective opinion of a body of men; and no technical definition of the term can be given. *Temple v. Mead*, 4 Vt. 535, 541.

A party rule provided that the city executive committee, by a vote of two-thirds of its members, might suspend the rules temporarily only in so far as they relate to the time of holding elections and conventions, and that the city executive committee might suspend the rules by changing the time of holding the primary elections for delegates without a vote of two-thirds of the 39 possible members of the committee. Held, that the term "a vote of two-thirds of its members" means members present doing business, providing there shall be a quorum. *Doyle's Nomination*, 24 Pa. Co. Ct. R. 27, 32.

As appropriate.

In Pub. St. c. 40, § 4, providing that towns may vote such sums as they judge necessary to light streets, "vote" and "appropriate" have the same meaning. *Childs v. Hillsborough Electric Light & Power Co.*, 47 Atl. 271, 272, 70 N. H. 318.

Ballot distinguished.

While the terms "ballot" and "vote" are sometimes confused, and while they sometimes may be used as synonymous, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between two candidates or propositions, and his vote is his choice or election

between the two, as expressed by his ballot; and when his ballot makes no choice between two candidates, or on any question, then he casts no vote for either of these candidates or on the question. *Davis v. Brown*, 34 S. E. 839, 841, 46 W. Va. 716.

In Laws 1849, c. 137, § 1, providing that the act was to become a law only upon condition that the majority of all the votes cast in such election should be in favor thereof, the word "votes" is not synonymous with the word "ballots." "And although these words are sometimes used one for the other, they are not, strictly speaking, synonymous words. They certainly do not mean the same thing. The word 'vote' means suffrage, expression of the will, while the word 'ballot' signifies that by which the right of suffrage is exercised; it is the means by which the will is expressed. One elector can exercise the right of suffrage or vote but once at a general election, although in doing so he may be allowed to deposit several ballots." *Gillespie v. Palmer*, 20 Wis. 544, 546.

As majority vote.

The word "vote," as used in Sp. Laws 1869, c. 92, providing for the support and better regulation of common schools in the town of Sauk Centre, and authorizing the issuance of bonds in pursuance of a vote of electors at any annual or duly called meeting, means a majority vote. *Town of Sauk Centre v. Moore*, 17 Minn. 412, 418 (Gil. 391, 396).

Comp. St. 1895, p. 208, c. 13a, art. 1, § 67, subd. 21, authorizing a city to issue bonds for funding indebtedness when the same shall have been authorized by a vote of the people, means authorized by a majority of the votes. *Bryan v. City of Lincoln*, 70 N. W. 252, 50 Neb. 620, 35 L. R. A. 752.

The word "voted" in a town clerk's record of the doings at a town meeting, which, after mentioning the state of the vote upon the proposition to aid in the construction of a railroad to the amount indicated, declares that it was voted that such sum be hired and appropriated to pay for a specified number of shares, without saying by what majority the vote was carried, raises no implication of law that the proportion of legal voters present and voting upon the proposition necessary for its adoption by the meeting were in its favor. *Portland & O. R. Co. v. Inhabitants of Standish*, 65 Me. 63, 68.

VOTE OF THE MAJORITY.

See "Majority."

VOTE OF THE PEOPLE.

The phrase "vote of the people," in an order issued in proceedings under St. 1883,

p. 311, § 37, requiring the question of a county bond issue to be submitted to the qualified electors, which order recites that the question is to be submitted to the "vote of the people of this county," means the vote only of those people who are qualified voters or electors. *People v. Counts*, 26 Pac. 612, 614, 89 Cal. 15.

Comp. St. c. 26, § 70, provides that the district courts of the respective counties shall try and determine contests of the election of county judges, etc., and in regard to any other subject which may by law be submitted to the vote of the people of the county. In construing this statute the court say: "The people of a municipal corporation within the territorial limits of the county cannot be called the 'people of the county' in the sense of a political body or organization, and yet I think that the Legislature used the words 'the vote by the people of the county' as the equivalent of the words 'a popular election of the county.'" *Foxworthy v. Lincoln & F. R. Co.*, 14 N. W. 394, 395, 13 Neb. 308.

VOTE TO PAY MONEY.

A vote by the inhabitants of Boston accepting the provision of St. 1894, c. 548, which provides for the construction of a subway for railroad tracks, after the act is accepted by a majority of the voters, is a "vote to pay money," within Pub. St. c. 27, § 129, directing that a town which shall vote to pay money from its treasury for an illegal purpose may be restrained. *Prince v. Crocker*, 44 N. E. 446, 166 Masa. 347, 32 L. R. A. 610.

VOTER.

See "Legal Voter"; "Loyal Voters"; "Qualified Voters."

The word "voters" has two meanings—persons who perform the act of voting, and persons who have the qualifications entitling them to vote. In *re Denny*, 59 N. E. 359, 361, 156 Ind. 104, 51 L. R. A. 722.

In *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, the Supreme Court of the United States overruled the case of *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735, and held, in construing a clause of the Constitution of Mississippi prohibiting the Legislature from authorizing any county to aid any railroad company unless two-thirds of the qualified voters at a special or regular election of such county should assent thereto, that the term "voter," in such connection, means one who votes, not one who, though qualified to vote, does not vote. This decision of the Supreme Court but follows its earlier decision in similar cases, viz., *St. Joseph Tp. v. Rogers*, 83 U. S. (16 Wall.) 644, 21 L. Ed. 328, and *Cass County*

v. Johnston, 95 U. S. 360, 24 L. Ed. 416. Thus, the term in Const. art. 8, § 6, fixing the limit of municipal indebtedness, but giving permission to increase indebtedness to a certain amount on the assent of three-fifths of the qualified voters therein, voting at an election to be held for that purpose, is to be construed as only requiring a three-fifths majority of the electors actually voting, and not three-fifths of all persons entitled to vote at such election. *Metcalf v. City of Seattle*, 25 Pac. 1010, 1013, 1 Wash. St. 297.

The phrase "if three-fifths of the voters shall vote," as used in an ordinance authorizing the construction of a water and sewerage system if three-fifths of the voters of said city shall, at such election, vote in its favor, should be construed as equivalent to the phrase "if three-fifths of the qualified voters voting vote"; and hence such improvements are authorized if three-fifths of the voters who vote at such election vote in favor thereof. *Yesler v. City of Seattle*, 25 Pac. 1014, 1016, 1 Wash. St. 303.

The word "voters" does not mean the same thing as the word "votes," in Const. art. 3, § 1, providing that the Legislature may at any time extend by law the right of suffrage to persons not enumerated therein, and no such law will be enforced until it shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election. These are two words which mean very different things—are never used as synonyms even in the loosest conversation; but although these words are not synonyms, yet, by a figure of speech, the thing done is sometimes put for the doer. This is, however, seldom or never done in such instruments as state constitutions, which are formed with deliberation and care, and in which language is used literally, and with great precision. A vote is an expression of the choice of the people for or against any measure, any law, or the election of any person to office. The expression of the choice of the voter in favor of any candidate for office by depositing a ballot for him is a vote for such candidate. The same voter, at an election where the extension of the right of suffrage was voted on, might cast one vote in favor of that measure, and if there were ten candidates for as many different offices, state and county, voted for at such election, cast a vote for each of such candidates. *Gillespie v. Palmer*, 20 Wis. 544, 553.

"A majority of the adult residents and voters" of a township, as used in a petition for the revocation of an order prohibiting the sale of liquor, means the body of persons residing in the township who have the elective franchise; hence such petition is of no power under a statute authorizing such order by a petition of the adult residents, which in-

cludes females as well as males. Concurring opinion in *Wilson v. State*, 35 Ark. 414, 421.

In statutes relative to elections, the term "voter" shall mean a registered male voter. Rev. Laws Mass. 1902, p. 105, c. 11, § 1.

Elector distinguished.

In the case of *Sanford v. Prentice*, 28 Wis. 358, 362, it is said: "There is a difference between an 'elector,' or person legally qualified to vote, and a 'voter.' In common parlance they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote." *Bergevin v. Curtz*, 59 Pac. 312, 313, 127 Cal. 86.

VOTERS PRESENT AND VOTING.

See "Qualified Voters Voting."

Const. art. 14, § 1, requiring an amendment to the Constitution to be ratified by a majority of the voters present and voting, requires a majority of the voters who are present and voting upon the proposition for the amendment, without respect to those who are present and voting for other purposes at such election, since the persons so voting are not to be regarded as present and voting as far as respects the proposed amendment. *Dayton v. City of St. Paul*, 22 Minn. 400, 402.

VOTES CAST.

Act March 22, 1849, § 2, providing that the act should become a law only on condition that it should be approved by a majority of all the votes cast at the election in 1849, does not mean that it must be approved by a majority of all the votes cast at such election, but only by a majority of all the votes cast on that subject at such election. *Gillespie v. Palmer*, 20 Wis. 544, 554.

"Votes cast," within the meaning of Comp. St. c. 18, art. 1, § 30, requiring two-thirds of the votes cast to be in favor of a proposition for selling public grounds in order to authorize such sale, means the votes cast at the polls of the general election at which the question was submitted to the electors, and cannot be limited to mean only the votes cast upon the proposition in question. *State v. Anderson*, 42 N. W. 421, 422, 26 Neb. 517.

In Comp. St. 1893, art. 3, § 1, relating to elections for the purpose of relocating county seats, which provides that any place receiving three-fifths of all the votes cast shall become and remain the county seat

of such county, "votes cast" means the names registered on the pollbook, and not the ballots accounted for, as it will be presumed that every elector whose name appears on the pollbooks was present and voted at the election. *State v. Roper*, 61 N. W. 753, 754, 46 Neb. 724.

The term "votes cast," in the statute relating to the change of county seats at a special election held for such purpose, and requiring that the proposition for a change should receive 55 per cent. of the votes cast, was held in *Smith v. Renville County Com'rs*, 64 Minn. 16, 65 N. W. 956, to have been used as an equivalent of "ballots cast." *Hopkins v. City of Duluth*, 83 N. W. 536, 538, 81 Minn. 189.

VOTES POLLED.

"Votes polled," as used in Comp. Laws, § 565, relating to elections of county seats, providing that, if any place has two-thirds of the votes polled, such place shall be the county seat, means the votes polled on the particular question, and not the votes cast at the election. *State v. Langlie*, 67 N. W. 958, 959, 5 N. D. 594, 32 L. R. A. 723.

VOTING.

"Voting" and "giving a vote" are precisely synonymous terms. Giving the vote is voting, not offering to vote. *State v. Moore*, 27 N. J. Law (8 Dutch.) 105, 107.

The words "electors voting," in Const. art. 15, § 1, providing for the submission of amendments to the Constitution to the electors for approval or rejection, and providing that, if a majority of the electors voting at such election adopt such amendments, the same shall become a part of the Constitution, have been considered and construed in *State v. Babcock*, 17 Neb. 188, 22 N. W. 372, where the court held that, the number of votes for the amendment being less than a majority of the votes for Senators and Representatives, the proposed amendment failed of adoption. *State v. Anderson*, 42 N. W. 421, 422, 26 Neb. 517.

As actually voting.

Const. art. 8, § 6, providing that no municipal corporation shall become indebted beyond $1\frac{1}{2}$ per cent. of its taxable property "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," means three-fifths of the voters actually exercising their right to vote, and not three-fifths of those entitled to vote. *Metcalf v. City of Seattle*, 25 Pac. 1010, 1012, 1 Wash. St. 297.

As legally voting.

The term "electors voting thereon," in a constitutional provision requiring a consti-

tutional amendment to be approved and ratified by a majority of the electors qualified to vote for members of the Legislature voting thereon, means the electors who exercise the right of suffrage in such a manner that their votes shall, under the law, be counted for or against the proposition submitted. And although the number of names on the poll lists may represent the number of qualified electors who attempted to vote, and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted, in the constitutional sense, and that the rejected ballots were not votes. *Bott v. Wurts*, 43 Atl. 744, 748, 63 N. J. Law, 289, 45 L. R. A. 251.

"Voting is not the mere physical act of depositing a piece of paper in the box. The physical act must be performed under certain conditions and with certain concomitants to render it voting. There must be an election held under some authority of law. The time and place must in some way be legally designated. Election officers acting under a legal warrant must be present to receive the votes and decide upon the qualifications of the voters. The question to be decided or the offices to be filled must be named by law." *Atchison, T. & S. F. R. Co. v. Jefferson County*, 17 Kan. 29, 39.

VOTING BY BALLOT.

A "vote by ballot" *ex vi termini* implies a secret ballot. *Pearson v. Brunswick County Sup'rs*, 91 Va. 322, 334, 21 S. E. 483.

Voting by ballot is depositing in a box provided for that purpose a paper on which is the name of the person intended for the office. The principal object of this mode of voting is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill will or prosecution on account of his vote. The method of voting by tablets in Rome was an example of this manner of voting. *Temple v. Mead*, 4 Vt. 535, 541.

"As applied to elections of public officers, 'voting by ballot' signifies a mode of designating an elector's choice of a person for office by the deposit of a ticket bearing the name of such person in a receptacle provided for that purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for. This privilege of secrecy may probably be regarded as the distinguishing feature of ballot voting as compared with open voting; as, for instance, voting viva voce. The object of the privilege is the independence of a voter." And hence a statute (Laws 1878, c. 84, § 8) providing for the numbering of tickets to correspond with the number of the voters upon the poll lists was held in violation of Const. art. 7, § 6,

declaring that all elections shall be by ballot. *Brisbin v. Cleary*, 1 N. W. 825, 826, 28 Minn. 107.

VOTING PRECINCT.

As used in the supplement of the act to regulate elections, approved March 28, 1890 (P. L. p. 361) § 52, providing that whenever, within 20 days next succeeding any election in any election district or voting precinct in any county of the state, a petition should be presented, signed by at least 25 voters resident in such election district or voting precinct, and, certain matters being made to appear, directing the justice to set aside such election, "election district" is synonymous with "voting precinct," and cannot be construed to embrace a city comprising many voting precincts. In re *Swain*, 23 Atl. 421, 54 N. J. Law (25 Vroom) 82.

VOTING THEREAT.

St. Louis City Charter, § 22, provides that the charter may be amended by proposals therefor, submitted by the lawmaking authorities of the city to the qualified voters thereof at a general or special election held at least 60 days after the publication of such proposal, and "accepted by at least three-fifths of the qualified voters voting thereat." Such provision is free from ambiguity, giving to the words employed their natural and usual signification. It is clear that, before any amendment can be adopted or made, such amendment must be accepted; that is, voted for by three-fifths of the qualified voters voting, be there a general or special election. If the framers of the Constitution intended that an acceptance by three-fifths of the qualified voters voting at such election on the proposed amendment would be sufficient to adopt it, they would have used the word "thereon" instead of "thereat." *State ex rel. Allen v. City of St. Louis*, 73 Mo. 435, 437.

VOUCH.

A statute requiring that notes shall be "vouched" by two witnesses, in order to give the county court jurisdiction of actions thereon, means testified to by witnesses called into court. "A note subscribed by two witnesses as and for witnesses cannot be said to be vouched by two witnesses until those persons are vouched and called and do testify before the court respecting it." *Barker v. Colt* (Conn.) 1 Root, 224, 225.

VOUCHER.

Laws 1870, c. 190, provided that all moneys drawn from the treasury of New York for county expenditures should be upon vouchers examined and allowed by the

auditor, and approved by the comptroller. It was held that the auditor and comptroller were not authorized to examine and pass upon the claims themselves, but upon the vouchers only. "The word 'vouchers,'" said the court, "would seem to mean the evidence, written or otherwise, of the truth of the fact that the service had been performed or the expense paid or incurred, not evidence of the legal conclusion on the question whether the services or expenses, assuming the services or expenses have been in fact performed, paid, or incurred, are properly county charges, or are properly allowable, when the account for them is presented for allowance. The vouchers to be presented, examined, and allowed by the auditor are accounts in proper form, verified, the resolution of the board of supervisors allowing it, and the acquittance or discharge to be signed on payment being made." *People v. Green* (N. Y.) 2 Thomp. & C. 18, 20, 5 Daly, 194, 199; *People v. Haws* (N. Y.) 12 Abb. Prac. 192, 202, 21 How. Prac. 117, 128.

The word "voucher," as used in *Hill's Ann. Laws*, § 1172, providing that, if the estate of a decedent is fully settled, it shall be the duty of the executor or administrator to file his final account, which shall contain a detailed statement of the amount of money received and expended by him, from whom received, and to whom paid, and refer to the vouchers of such payment, a receipt from a party to whom money is paid, showing for what the payment was made, would undoubtedly constitute a proper voucher, when applied to the ordinary expenses incurred in the settlement of an estate; but the receipt alone could not be said to be a sufficient voucher for money paid out of a claim arising out of an action with the decedent, as the court might not approve the payment on the receipt alone, while it could and would ordinarily if accompanied by a verified claim; so that it would seem that a verified claim and receipt showing the payment, whether in whole or in part, would constitute a proper voucher in such a case. *Willis v. Marks*, 45 Pac. 298, 296, 29 Or. 493.

In considering an indictment charging the theft of "one voucher of the value of \$50.00, the property of Robert Lake, in the words, letters, and figures following, viz.: 'Davis Wharf, April 18, 1825. Captain Robert Lake landed 22½ cords of oak wood, and ¼ cord of pine wood, all left for sale. To cash paid Robert Lake on account \$25.00. Samuel Davis'"—the court said: "The instrument is correctly styled a 'voucher.' It attests, warrants, maintains, bears witness." *State v. Hickman*, 8 N. J. Law (3 Halst.) 299, 301.

"Voucher," as used in Rev. St. c. 96, § 25, which provides that when a cause is at issue, and it appears that the trial will

require investigation of accounts or an examination of vouchers by the jury, the court may appoint one or more auditors, etc., is construed to mean "an account book in which charges and acquittances are entered; and it signifies also any acquittance or receipt charging a person or being evidence of payment." *Whitwell v. Willard*, 42 Mass. (1 Metc.) 216, 218 (citing Jacob, Law Dict.).

The term "voucher," when used in connection with the disbursement of moneys, implies some written or printed instrument in the nature of a receipt, note, account, bill of particulars, or something of that character, which shows on what account or by what authority a particular payment has been made, and which may be kept or filed away by the party receiving it for his own convenience or protection or that of the public. *People v. Swigert*, 107 Ill. 494, 504 (cited and approved in *State v. Moore*, 36 Neb. 579, 54 N. W. 866; *Moore v. Graneau*, 39 Neb. 511, 58 N. W. 179, 180).

VOWEL

A vowel is a letter of the alphabet which is vocals or sonans, and can be uttered by itself, without the addition of other letters, and the same may be a Christian name. *Kinnersley v. Knott*, 7 Man., G. & S. 980, 987.

VOYAGE

See "Foreign Voyage"; "Trading Voyage"; "Whaling Voyage."

See "During the Voyage"; "On a Voyage."

A "voyage" is the sailing of a vessel from one port or place to another port or place. *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 77, 30 Am. Rep. 654.

The word "voyage," as used in Act Cong. July, 1790, c. 29, providing that every vessel of 150 tons burden or more, bound on a voyage across the Atlantic, shall, on leaving her last port, have on board a specified number of pounds of meat and a designated quantity of other provisions, is used in its ordinary sense—that is, a transit from one place or port to another—and the object of the Legislature in requiring a proportionate amount of provisions was to prevent a famine at sea. *The John L. Dummick* (U. S.) 13 Fed. Cas. 690, 691, 692.

"A voyage is the passage of a ship over and upon the seas from one port to another or to several ports." *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620, 622 (quoting Bouv. Law Dict. 793).

"Voyage," as used in a marine insurance policy, providing that no vessel should

sail from the harbor of Gloucester on any voyage east of Cape Sable after a certain date, nor should any vessel sail upon any voyage whatever after a certain date at the risk of the insurer, means the enterprise entered upon, and not merely the route. *Friend v. Gloucester Mut. Fishing Ins. Co.*, 118 Mass. 326, 332.

Insurance on a ship for the voyage does not include detentions, and the underwriters are not liable while the ship is not proceeding. *Brough v. Whitmore*, 4 Term R. 206, 209.

Where the United States chartered a vessel for a "voyage or voyages" at a stipulated price per diem for every day when so employed, the words of the contract only embrace the employment of the vessel when on such voyage or voyages, and do not extend to demurrage. *Mitchell v. United States*, 96 U. S. 162, 24 L. Ed. 702.

A "voyage" is not limited to the passage of a vessel from one port to another, but it may include several ports. In *re Moncan* (U. S.) 14 Fed. 44, 46 (citing Bouv. Law Dict.; 1 Pars. Shipp. & Adm. 307).

As imparting definite commencement and termination.

"Voyage" is a technical phrase, and always imports a definite commencement and end. *Brown v. Jones* (U. S.) 4 Fed. Cas. 404, 405.

"The term 'voyage' is frequently applied to the passage of a ship from one defined port to another; but it is also sometimes used with a more obscure reference to the place, and with a direct limitation of time. Its boundaries may be defined by local limits, or by artificial time, or by both combined. It imports a definite place of commencement and termination, unless that construction be repelled by the context." *The Brutus* (U. S.) 4 Fed. Cas. 490, 494.

As commencing from sailing.

"Voyage," as used in a policy of insurance covering the cargo of a ship while on a whaling voyage, means the whole voyage from its commencement—that is, from the sailing of the ship, and not from the date of the policy; and where a policy was on a cargo lost or not lost on board of a ship now on a whaling voyage, it relates back to the commencement of the voyage so as to cover a loss which happened at a time anterior to the date of the policy. *Paddock v. Franklin Ins. Co.*, 28 Mass. (11 Pick.) 227, 230.

"Voyage" has received a construction in cases of insurance, where it has been held to be reckoned from the time the vessel breaks ground. Such construction is applicable to a charter party by which it was agreed that a ship then lying at Genoa should

sail on or before July 30th to Monte Video, and then to Callao; and further providing that, should the vessel be unnecessarily detained at any other period of the "voyage," such detention to be paid for by the party delinquent, at a named rate of demurrage, therefore the detention of the vessel at Genoa until the 8th of September was not a detention of the vessel during the "voyage," within the meaning of the penalty clause. *Valente v. Gibbs*, 6 O. B. (N. S.) 270, 284.

When a vessel quits her moorings in complete readiness for sea, and it is the actual and real intention of the master to proceed on the voyage, and she is afterwards stopped by head winds, and comes to anchor still intending to proceed as soon as wind and weather will permit, this is a sailing on the voyage, within the meaning of a policy of insurance. *Bowen v. Hope Ins. Co.*, 37 Mass. (20 Pick.) 275, 278, 32 Am. Dec. 213 (citing *Bond v. Nutt*, Cowp. 601; *Lang v. Anderson*, 3 Barn. & C. 495; *Pettigrew v. Pringle*, 3 Barn. & Adol. 523).

As ending on reaching port of discharge.

A "voyage" is the transit of a vessel, and ends when the vessel is safely moored at her last port of discharge. *The Martha* (U. S.) 16 Fed. Cas. 860, 861.

A "voyage" is a transit at sea from one terminus to another. *Cohen*, Adm. Law, p. 235. In the *Standard Dictionary* the word is defined as "the outward and homeward passages of a vessel taken together; the whole course of a vessel before reaching her home port." In *The Martha*, 16 Fed. Cas. 860, 861, it was said that a "voyage" denotes the transit to be performed by the seamen, and that it is in this sense that the term is used in the law maritime. A voyage is ended when the vessel is safely moored at her last port of discharge, after a circuitous voyage. *The Mary Adelaide Randall* (U. S.) 93 Fed. 222, 225.

"Voyage," as used in a charter party for as many voyages between given points as can be made between the date of the charter and a future date, and containing stipulations for lay days in loading and discharging, for customary dispatch, and for the payment of wharfage by the charterer, is not used in a strict sense, signifying the actual transit of the vessel from port to port, but denotes that the voyages are those in which receiving and discharging cargo and lying at the wharf are incidents. *The Mary Adelaide Randall* (U. S.) 93 Fed. 895, 896, 39 O. C. A. 335.

The phrase "end of voyage," when construed literally, means the arrival of the ves-

sel; but as used in the following order, "Please pay William Bradford or his order \$24.90 at the 'end of my voyage' in the Schooner Columbus on a fish voyage, if I make enough to pay, after taking out \$10 I now owe you," it refers to the time when the fish caught on such voyage are sold and converted into money. *Bradford v. Drew*, 46 Mass. (5 Metc.) 188, 190.

As applicable to trip of tug.

The term "voyage," as applied to vessels engaged in foreign and interstate commerce, within the meaning of the maritime law, is not applicable to a tug making short trips, not from port to port, but from one body of water to another, merely furnishing the motive power to other vessels. It would be a misnomer to apply the term "voyage," in the sense of the maritime law, to such trips. *The John Martin* (U. S.) 18 Fed. Cas. 694, 697.

A trip of a steam tug while towing a ship from port to sea is a "voyage," within the meaning of the statute prohibiting the district court of New York City from taking cognizance of an action brought by any seaman against the owner of a ship for breach of contract for services on board ship during any voyage performed by such ship. *Roche v. McOaldin*, 20 N. Y. Supp. 688, 689, 1 Misc. Rep. 165.

VOYAGE POLICY.

A "voyage policy" is a policy insuring a vessel for a voyage "from a terminus a quo to the terminus ad quem in a prescribed course, which, though seldom set out in the policy, forms part of it, and is as binding on the insured as though mutually detailed." *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 339, 27 Am. Rep. 455.

VS.

See "V.—Vs."

VUG.

"Vug" is defined by Webster to be "a cavity in a lode or vein," which would imply that such cavities were in veins. *Cheesman v. Sheeve* (U. S.) 40 Fed. 787, 794.

VULGAR LANGUAGE.

"Vulgar and obscene language," within the meaning of a statute forbidding such language in the presence of a female, includes the language of a man in asking a female to go to bed with him. *Dillard v. State*, 41 Ga. 278, 282.

W

W.

In a notice to the "Chicago W. Div. R. R. Co.," the letter "W." will be understood as an abbreviation of the word West, where the name of the railroad was the Chicago West Division Railway Company. *West Chicago St. R. Co. v. People*, 40 N. E. 599, 600, 155 Ill. 299.

W. D.

In an application for insurance the property was described as a dwelling house, and in answer to the question whether the title was a warranty deed or bond the answer was "W. D.," and to the question, "Is your property incumbered?" the answer was "None." These were the only expressions in the application in reference to title, and the court fails to find by the application of the meaning attached to the words that insured represented herself as holding any particular kind of title. The words dwelling house did not import title of any kind. The letters "W. D." have no such meaning, nor does the question, "Is your property incumbered?" If the letters "W. D." mean a warranty deed, it must appear from extrinsic evidence, if such could be received. They have no such fixed and definite meaning in the law, nor in common use, nor even in the connection in which they are employed. That may be their meaning, but it is not apparent. But if it was considered that they mean her title was a warranty deed, still that is not an assertion that such a title is a fee. No member of the profession, we presume, would say that it was. All know that a warranty deed may pass a term of years, a life estate, a fee or less estate, or it may pass no estate whatever. It conveys, as all know, only the estate of the grantor, whatever it may be. If he has none, it can pass none to the grantee. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 419.

WAGE-EARNER.

A "wage-earner," within the bankruptcy act, is an individual who works for wages, salary or hire, at a rate of compensation not exceeding \$1,500 per year. *U. S. Comp. St. 1901, p. 3420; In re Pilger* (U. S.) 118 Fed. 206.

WAGER—WAGERING CONTRACT.

See, also, "Bet."

Bouvier defines a "wager" as follows: "Wager. A bet; a contract by which two persons or more agree that a certain sum of

money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." *Dunn v. Bell*, 4 S. W. 41, 43, 85 Tenn. (1 Pickle) 581; *Mitchell v. Orr*, 64 S. W. 476, 107 Tenn. 534; *McGrew v. City Produce Exchange*, 4 S. W. 38, 40, 85 Tenn. (1 Pickle) 572, 4 Am. St. Rep. 771; *Comly v. Hillegass*, 94 Pa. 132, 133, 39 Am. Rep. 774; *In re Chandler* (U. S.) 5 Fed. Cas. 443, 447; *Ex parte Young* (U. S.) 30 Fed. Cas. 823, 831; *Merchants' Savings Loan & Trust Co. v. Goodrich*, 75 Ill. 554, 560; *Jacobus v. Hazlett*, 78 Ill. App. 239; *Thornhill v. O'Rear*, 19 South. 882, 883, 108 Ala. 299, 31 L. R. A. 792; *Treacy v. Chinn*, 79 Mo. App. 648, 651. This definition implies that to every wager there must be two or more contracting parties, having mutual or reciprocal rights in respect to the money or other things that are wagered, and usually called the stakes of the bet or wager, and that each of the parties shall jeopardize something, and have the chance to make something or to recover the stakes or thing bet or wagered upon the determining of the contingent or uncertain event in his favor. *Jordan v. Kent* (N. Y.) 44 How. Prac. 206, 207; *Treacy v. Chinn*, 79 Mo. App. 648, 651.

A "wager" is defined as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest, except that arising from the possibility of such gain or loss. *Fareira v. Gabell*, 89 Pa. 89, 90; *Kitchen v. Loudonback*, 26 N. E. 979, 980, 48 Ohio St. 177, 29 Am. St. Rep. 540.

A "bet" or "wager" is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or some of them on the happening in the future of an event at the present uncertain, or upon the ascertainment of a fact in dispute. This definition, though not exhaustive, sufficiently expresses what is meant by a wager. The essential elements of an ordinary wagering contract are (1) an agreement by one party to pay another a sum of money, or give something of value, if a certain event happens; (2) a reciprocal agreement by the second party to pay the first a sum of money, or give something of value, if a contrary event happens; and (3) that the event contemplated in the agreement shall be something other than the passing of a consideration between the parties. *Winward v. Lincoln*, 51 Atl. 103, 112, 23 R. I. 476, 64 L. R. A. 160.

A "wager" is something hazarded on the issue of some uncertain event. *Cassard v. Hilmnan*, 14 N. Y. Super. Ct. (1 Bosw.) 207, 213.

A "wager," in ordinary acceptation, is the placing of something valuable belonging in part to each of two individuals in such a position that it is to become the sole property of one upon the result of some unsettled question. Each of the parties risks something which he may lose, and each may gain something beyond what he risks. If he merely hazards the loss of something without any expectation in any event of having more in return than he ventures, it would not seem to be a wager; and where a physician treats a pauper patient under an agreement with the town that he shall receive compensation if the town is able to recover the same from the town in which the pauper has a settlement, it is not a wager contract. *Edson v. Town of Pawlet*, 22 Vt. 291, 293.

Any contract or agreement for the purchase, sale, loan, payment, or use of any property, real or personal, the terms of which are made to depend upon or are to be varied and affected by any uncertain event in which the parties have no interest, except that created by such contract or agreement, shall be deemed a bet or a wager. Pub. St. N. H. 1901, p. 818, c. 270, § 18.

All wagers are not void at common law. It is only those that are contrary to public policy. *Merchants' Sav. Loan & Trust Co. v. Goodrich*, 75 Ill. 554, 560.

As a bet.

A "wager" is nothing more than a bet. *Thornhill v. O'Rear*, 19 South. 382, 383, 108 Ala. 299, 31 L. R. A. 792.

"A wager is the bet or stake laid upon the result of a game, or upon acts to be done, events to happen, or facts existing or to exist. 'Bet' and 'wager' are synonymous terms, and are applied both to the contract of betting and wagering and to the thing or sum bet or wagered. For example, one bets or wagers or lays a bet or wager of so much upon a certain result. But these terms cannot properly be applied to the act to be done or event to happen upon which the bet or wager is laid. The bets or wagers may be illegal, and the acts, events, or facts upon which they are laid may not be. Everything upon which a bet or wager may be laid is not a game." *Woodcock v. McQueen*, 11 Ind. 14, 15.

A "bet" is a "wager," and the betting is complete when the offer to bet is accepted. The placing of the money or its representative on the gambling table is such an offer, and where no objection is made by the player or the owner of the table or bank it is an acceptance of the offer, and the offense of betting against the statute is complete. *State v. Welch* (Ala.) 7 Port. 463, 465.

The words "wagering," "playing," "gambling," and "betting," though each have a meaning more or less different from the other,

are often used one for the other. *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

As the subject of a bet.

A wager is the contract by which a bet is made, and it is applied also to the thing or amount bet. *Woodcock v. McQueen*, 11 Ind. 14; *Bouv. Law Dict. tit. "Wager"*; also the same in *Tomlin*, *Burrill*, and *Wharton*. We have no law authority that makes it mean the subject on which a bet is laid. It seems that it was used in such a sense by *Sidney*. See *Webster* and *Worcester*. But a bet or wager may be the subject of another bet or wager. One may bet that the bet of another person may be won or lost by such person. *Smoot v. State*, 18 Ind. 18, 19.

Dealing in futures.

A "wager" is a contract by which two or more parties agree that a certain sum of money or other valuable thing shall be paid or delivered to one of them on the happening of a certain event. A contract between parties that one would reimburse the other for any losses they might sustain in optional or gambling contracts made on the board of trade, in consideration that if any gains should be made in such dealing such party would pay the sum to the other, and would receive a commission for his services, is a wager. *Pearce v. Foote*, 113 Ill. 228, 239, 55 Am. Rep. 414.

Where there is no real transaction—no real contract for purchase or sale—but only a bet upon the rise or fall of the price of a stock or article of merchandise in the exchange or market, one party agreeing to pay if there is a rise and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is bought or sold or contracted for; there is only a bet. *Dillaway v. Alden*, 33 Atl. 981, 982, 88 Me. 230.

A person may contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personalty which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding, for an actual transfer of property is contemplated. If, however, at the time of entering into a contract for the sale of personal property for future delivery, it is contemplated by both parties that at the time fixed for delivering the purchaser shall merely receive or pay the difference between the contract and the purchase price, the contract is a "wager," and nothing more, and it makes no difference that a bet or wager is made to assume the form of a contract. *Irwin v. Williar*, 4 Sup. Ct. 160, 165, 119 U. S. 499, 23 L. Ed. 225.

It was said by Judge Gresham in *Williar v. Irwin* (U. S.) 20 Fed. Cas. 38, that a transaction which on its face is legitimate cannot

be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further, and show that this understanding was mutual, and that both parties so understood the transaction. *Ward v. Vosburgh* (U. S.) 31 Fed. 12, 13.

In a wagering contract on the price of stock both parties assume the risk of either gaining or losing. In a legitimate transaction through an agent or broker the agent or broker assumes no risk, except that the principal may not be able to carry out his agreement. In *Wagner v. Hildebrand*, 41 Atl. 34, 36, 187 Pa. 136, the court says: "A purchase of stock on margin for speculation is not necessarily a gambling transaction. If it is the intention of the parties that a real purchase shall be made by the broker, although the delivery may be postponed or made to depend upon future conditions, the transaction is legal." *Winward v. Lincoln*, 51 Atl. 106, 112, 23 R. I. 476, 64 L. R. A. 160.

"Contracts of wager" are contracts depending upon a chance or casualty. "All contracts for speculation in stocks upon margins, when the broker and customer do not contemplate or intend that the stock purchased or sold shall become or be treated as the stock of the customer, but the real transaction is the mere dealing in differences between prices—that is, in payment of future profits or losses, as the event may be—are contracts of wager." In *re Hunt* (U. S.) 26 Fed. 739, 740; *Waugh v. Beck*, 6 Atl. 922, 924, 114 Pa. 422, 60 Am. Rep. 354; *Tantum v. Arnold*, 6 Atl. 316, 318, 42 N. J. Eq. 60.

The term "wagers" includes an option contract by which one party purports to sell commodities to another, to be delivered at a future date, the understanding being that the rise or decrease in price is to be settled between the parties by the losing party paying the difference. *Waterman v. Buckland*, 1 Mo. App. 45, 47; *McGrew v. City Produce Exchange*, 4 S. W. 38, 40, 85 Tenn. (1 Pickle) 572, 4 Am. St. Rep. 771; *People v. Wade*, 59 N. Y. Supp. 846, 848; *Ex parte Young* (U. S.) 30 Fed. Cas. 828, 831; *Ward v. Vosburgh* (U. S.) 31 Fed. 12, 13; *Williar v. Irwin* (U. S.) 30 Fed. Cas. 38, 39.

A speculative option, where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences commonly called a "put," is a wagering contract. In *re Chandler* (U. S.) 5 Fed. Cas. 443, 444.

An agreement by which it is understood by the parties at the time that there shall be no delivery of the commodity sold, but instead thereof a settlement of differences according to the market fluctuations, is a wager and void. *Kent v. Miltenberger*, 13 Mo. App. 503, 504.

All bargains for the purchase and sale of things where it is the understanding of the parties, whether expressed or not, that the things are not to be delivered, but at the agreed time the differences between the market values at the two periods are to be adjusted, constitute wagers or gambling contracts. *Lester v. Buel*, 49 Ohio St. 240, 255, 30 N. E. 821, 34 Am. St. Rep. 556.

If two men agree that if coffee rises in price one of them shall pay a sum of money to the other, it is a "wager," if they have no other interest in the coffee than that growing out of the contingency about which they stipulate. *Fareira v. Gabell*, 89 Pa. 89, 90.

Where a person sold certain seed wheat at a fixed sum per bushel, and further agreed to sell the wheat to be grown by the purchaser from the wheat sold at the same price, although there were elements of uncertainty in the transaction it did not constitute a "wager" in the contract. *Kitchen v. Loudenback*, 26 N. E. 979, 980, 48 Ohio St. 177, 29 Am. St. Rep. 540.

Election bet.

The term "wager" is a comprehensive one, and includes every description of betting. A bet on an election is embraced by it. *Lyons v. Hodgen & Miller*, 10 Ky. Law Rep. 271, 273 (citing *Conner v. Ragland*, 54 Ky. [15 B. Mon.] 634, 635).

A wager may be based upon something not instituted, created, or brought about for wagering purposes—upon something made necessary by law, the result of which is doubtful. So it is held that the hazard of money on the result of a primary election was a wager within *Shannon's Code*, § 8161, declaring that any one who has lost money on any wager may recover the same by action. *Mitchell v. Orr*, 64 S. W. 476, 107 Tenn. 534.

Within the meaning of the statute declaring all bets and wagers to be illegal, an agreement during the pendency of the election of President, by which one of the parties sold and delivered to the other certain property, the purchaser agreeing to pay therefor double the then market price when a certain named candidate for the presidency was elected, was a wagering contract, and invalid. *Lucas v. Harper*, 24 Ohio St. 328. See, also, *Somers v. State*, 37 Tenn. (5 Sneed) 438, 439.

The term "game" or "wager" in Gen. St. c. 47, art. 1, § 11, providing a penalty for betting at any game or wager, includes betting on a primary election. *Commonwealth v. Helm*, 9 Ky. Law Rep. 532.

In order to constitute a "wager" there must be a risk by both parties; and where one sells another certain merchandise, to

be paid for when Henry Clay should be elected President of the United States, it does not constitute a wager, as the purchasing party loses nothing. If he lost he was to pay for the value of the goods, if he won he was to pay nothing, and the risk was all on one side. *Quarles v. State*, 24 Tenn. (5 Humph.) 561, 565.

Fee to enter a race.

The paying of an entrance fee to a driving association for the purpose of entering the horse of the payor in certain races is not a "wager," as the driving association does not jeopardize anything. *Jordan v. Kent* (N. Y.) 44 How. Prac. 206, 207.

The giving of a check to an agricultural society to pay the entrance fee of a horse entered to compete in the races was construed to be a wager. *Comly v. Hillegass*, 94 Pa. 132, 133, 39 Am. Rep. 774.

Pool-selling.

Pool-selling is neither a wager nor a game within the statutes relating to gaming. *Smith v. Commonwealth*, 3 Ky. Law Rep. 248.

Premium, purse, or stake distinguished.

The distinction between a bet or wager and a premium or purse is thus given in *Harris v. White*, 81 N. Y. 532: "A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some one of them on the happening in the future of an event at the present uncertain, and the stake is the money or thing thus put on the chance. There is in that this element that does not enter into a modern purse, prize, or premium, viz., that each party to the former gets a chance of gain from the others and takes a risk of loss of his own to them. The purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and, if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain." Competing for premiums offered by an association of horse races is not competing for bets or wagers, and therefore an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses and to divide the same equally is valid. *Hankins v. Ottinger*, 47 Pac. 254, 255, 115 Cal. 454, 40 L. R. A. 76.

In a "wager" or bet there must be two parties, and it is known, before the chance or uncertain event on which it is laid is accomplished, who are the parties who must

either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake on an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. *Alvord v. Smith*, 63 Ind. 58, 62 (cited in *Treacey v. Chinn*, 79 Mo. App. 648, 651).

A wager is a bet which is a pledge as of money to be paid to another in a certain event, the other pledging to pay a forfeit in the contrary event. Trotting for a purse or stake is not a transaction of that kind, but more properly belongs to the class of no cure no pay cases. *Ballard v. Brown*, 32 Atl. 485, 67 Vt. 586.

Bouvier's definition implies that there must be at least two parties to every wager, in which one stands to win and the other to lose some valuable thing upon the certain result of a particular event. In such a case each party jeopardizes something, and each has a chance to win something. It is clear that no such conditions exist where an association offers a price or premium to be contested for by the owners of horses. Therefore a note given in consideration for a horse, payable on demand after the horse has won a race, is not illegal, as being a contract against public policy based on a wager, as winning a horse race did not necessarily imply a horse race involving a wager. *Treacy v. Chinn*, 79 Mo. App. 648, 651.

WAGER ON AN ELECTION.

The term "wager on an election," within the meaning of a statute prohibiting wagers on elections, includes a bet upon the vote of a county in a general election, or of a precinct in a district or county election. *Commonwealth v. Kennedy*, 54 Ky. (15 B. Mon.) 531, 533.

WAGER POLICY.

Interest policy distinguished, see "Interest Policy."

A wager policy is one which shows on the face of it that the contract it embodies is really not an insurance, but a wager; a pretended insurance founded on an ideal risk, where the assured has no interest in the thing insured. *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503, 539.

A policy of insurance obtained by a party who has no interest in the subject of insurance is a mere wager policy. *Embler v. Hartford Steam Boiler Insp. & Ins. Co.*, 40 N. Y. Supp. 450, 452, 8 App. Div. 188.

A wager policy is a policy in which the insured has no interest, and which is in effect a mere betting on the chances of a ship's

safe arrival. *Cassard v. Hinman*, 1 Bosw. (14 N. Y. Super. Ct.) 207, 212.

In the law of insurance a wager policy is one in which the party assured has no interest in the thing insured, and could sustain no possible loss by the event insured against if he had not made such wager. *Amory v. Gilman*, 2 Mass. 1, 7.

In *Gambs v. Covenant Mut. Ins. Co.*, 50 Mo. 44, it was said gambling and wager policies are those where the persons for whose use they issue have no pecuniary interest in the life insured. In *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38, it was held that unless the insured had an interest in the life insured it would be a mere wager policy, contrary to the law, and therefore void. *Singleton v. St. Louis Mut. Ins. Co.*, 68 Mo. 63, 73, 27 Am. Rep. 321.

A wager policy is one where the person for whose use the policy is issued has no pecuniary interest in the life insured, and does not apply to a policy of a wife on the life of her husband, as the law requires him to support her, and in most cases she is actually dependent upon him for support. *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44, 47.

A wager policy does not include a case where insurance is underwritten on merchandise on board a ship free of salvage and average, and the policy is to be the only proof of interest required, insured having property on board, and neither he nor the underwriters intending to insure on a wager policy. *Alsop v. Commercial Ins. Co.* (U. S.) 1 Fed. Cas. 564.

If one takes out a policy of insurance upon the life of another in which he has no interest, the policy is a pure wager policy and void. But where one takes out a policy on his own life, it is a valid contract, and becomes operative just as soon as it is perfect. It is practically a promise on the part of the insurer to pay a sum of money to the insured upon the happening of a condition. As such it is a valid contract, properly a subject of sale, and is valid in the hands of any person to whom it is assigned for value. *Steinback v. Diepenbrock*, 37 N. Y. Supp. 279, 280, 1 App. Div. 417.

WAGES.

See "Current Wages"; "Full Wages"; "Prevailing Rate of Wages."

"Wages" is defined to mean a compensation given to a hired person for his or her services. *First Nat. Bank of Cleburne v. Graham* (Tex.) 22 S. W. 1101, 1102 (quoting Webster); *Dempsey v. McKennell*, 23 S. W. 525, 526, 2 Tex. Civ. App. 284; *Fidelity Ins., Trust & Safe-Deposit Co. v. Shenandoah Valley R. Co.*, 9 S. E. 759, 761, 86 Va. 1, 19 Am. St. Rep. 858; *Fidelity Ins. & Safe-De-*

posit Co. v. Shenandoah Iron Co. (U. S.) 42 Fed. 372, 376.

The word "wages" is usually employed in ordinary language to designate the sums paid to persons hired to perform manual labor. *State v. Haun*, 54 Pac. 130, 132, 7 Kan. App. 509 (quoting Worcester).

Wages are the compensations paid or to be paid for services by the day, week, etc., as of laborers, commissioners, etc. *Seiler v. State*, 65 N. E. 922, 927, 160 Ind. 605; *Cowdin v. Huff*, 10 Ind. 83, 85; *Indianapolis School Com'rs v. Wasson*, 74 Ind. 133, 142.

"Wages" are defined to be "the compensation paid or to be paid for services by the day, week, or month (Anderson's Law Dict.); or a compensation given to a hired person for his or her services (Bouv. Law Dict.). They are only delivered as the result of a hiring or employment, and involve the relation of master and servant, or employer and employé. * * * But while wages are the reward of work and labor, it by no means follows that every claim for work and labor done is a claim for wages." Where the proofs on the trial show merely work and labor done in pursuance of a special contract, it does not amount to a claim for wages, and the plaintiff, having declared for wages for manual labor, cannot recover. *Henry v. Fisher*, 2 Pa. Dist. R. 71.

Wages are the reward of labor, and always come of contract, express or implied. *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241, 244.

The term "wages," in its legal as well as in its popular sense, means compensation given by a master or employer to a hired person or employé. The law contemplates a hiring. The word "wages" as used in Act April 9, 1872, relating to liens for wages, implies a hiring and the relation of employer and employé, and the preference given by the act cannot inure to the benefit of the contractor who employs others to do the actual work. *Diller v. Frantz*, 17 Pa. Co. Ct. R. 306, 308.

There is nothing ambiguous about the use of the word "wages" in Bankr. Act July 1, 1898, § 64b, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing for priority of wage-earners. It means the agreed compensation for services rendered by the workmen, clerks, or servants of the bankrupt—those who have served him in a subordinate or menial capacity, and who are supposed to be dependent on their earnings for their present support. Whether their employer has agreed to pay them by the hour, day, week, or month, or by the job or piece, is wholly immaterial. In *re Gurewitz*, 121 Fed. 982, 983, 58 C. C. A. 320.

"Wages and earnings" of a debtor, within the meaning of the exemption statute, in-

cludes such wages and earnings as long as they can be identified, and they do not lose their character by the mere fact of their being paid to the debtor. *Rutter v. Schumway*, 26 Pac. 321, 322, 16 Colo. 95.

"Wages," as used in Rev. St. art. 2335, exempting from execution or attachment all current wages, means compensation given to a hired person for his services. Neither the amount of compensation nor the time of payment need be fixed. *Dempsey v. McKennell*, 23 S. W. 525, 526, 2 Tex. Civ. App. 284.

"Wages due workmen, clerks, or servants," which have been earned within three months, given priority by Bankr. Act July 1, 1898, c. 541, 30 Stat. 563, § 64b (4) [U. S. Comp. St. 1901, p. 3447], means wages which are owing at the time of the bankruptcy, although they may not then be due in the sense of being immediately payable. In re P. H. Glading Co. (U. S.) 120 Fed. 709, 710.

The compensation of bookkeepers or persons employed to make sales of merchandise or of property manufactured constitutes "wages" within the meaning of Laws 1885, c. 376, providing that, where a receiver of a corporation is appointed, the wages of its employes, operatives, and laborers shall be preferred in the distribution of assets. *Palmer v. Van Santvoord*, 47 N. E. 915, 917, 153 N. Y. 612, 38 L. R. A. 402.

The word "wages," in maritime law, is defined to be the compensation allowed to seamen for their services on board a vessel during a voyage. *Abb. on Shipping*, 615; 3 Kent, 185. Rev. St. U. S. § 4251 [U. S. Comp. St. 1901, p. 2929], providing that "no canal boat without masts or steam power which is required to be registered, licensed * * * shall be subject to be liable * * * for the wages of any person who may be employed on board thereof or in navigating the same," does not apply to a claim for towing such canal boat, made by a corporation. *Ryan v. Hook* (N. Y.) 34 Hun, 185, 191.

Commissions.

The term "wages" includes the compensation paid to one who, under a contract, is required to purchase materials and employ the requisite laborers for constructing certain buildings, the cost thereof to be paid by the other party, who is also required to pay the first party a certain per cent. of the entire cost of the building for his services in supervising and executing the work. *Howell v. McDowell*, 47 N. J. Law (18 Vroom) 359, 360, 1 Atl. 474; *Moore v. Heaney*, 14 Md. 558, 562.

A claim against a bankrupt merchant by one who acted as his agent in making sales of his goods on a stipulated commission is not entitled to priority of payment out of the bankrupt estate, such commissions not being included in the language of Bankr.

Act July 1, 1898, c. 541, § 64b, cl. 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], giving priority to wages due workmen, clerks, or servants. In re Mayer (U. S.) 101 Fed. 227, 4 Am. Bankr. R. 202.

"Wages," as used in Act April 15, 1845, providing that the "wages" of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer, does not include a factor's or broker's commissions. *Hamberger v. Marcus*, 27 Atl. 681, 682, 157 Pa. 133, 37 Am. St. Rep. 719.

Act April 15, 1845, providing that the wages of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer, includes the commissions owing to a traveling salesman from his employer for goods sold by him, and constituting the compensation of the salesman for services performed by him. *Hamberger v. Marcus*, 27 Atl. 681, 682, 157 Pa. 133, 37 Am. St. Rep. 719.

"Wages," as used in Laws 1885, c. 376, referring to a preference on claims against corporations for "wages" where a receiver is appointed, will include commissions earned by one employed in selling pianos under an agreement to pay him a fixed salary of so much per week and a per cent. on sales, together approximating what his services were reasonably worth. In re Luxton & Black Co., 54 N. Y. Supp. 778, 779, 35 App. Div. 243.

Compensation of employer of others.

In ordinary language the term "wages" is usually restricted to sums paid as rewards to artisans, to domestic servants, to laborers employed in manufactures, in agriculture, mines, and other manual occupations, and does not include the compensation of a contractor engaged to build a house for a fixed price, although he does part of the work himself. *Heard v. Crum*, 18 South. 934, 935, 73 Miss. 157, 55 Am. St. Rep. 520.

"Wages," as used in Laws 1885, c. 48, § 2, providing that in every voluntary assignment made for the benefit of creditors the claims of all servants, clerks, or laborers for personal service or "wages" owing from the assignor for services or labor performed for three months preceding the assignment should be preferred over the claims of all other creditors, cannot be construed to include the money due from an assignor to a firm operating a steam wood factory for sawing and working up rough planks according to the directions of the assignor, and to be paid therefor a certain sum per thousand feet at the rate of a certain sum per month. Webster defines the word "wages" as a compensation given to a hired person for his or her services. In the Imperial Dictionary

It is defined as follows: "In ordinary language, the term 'wages' is usually restricted to sums paid as rewards to artisans, to domestic servants, to laborers employed in manufactures, in agriculture, mines, and other manual occupations." Worcester says: "In ordinary language, the term 'wages' is usually employed to designate the sums paid persons hired to perform manual labor." *Lang v. Simmons*, 25 N. W. 650, 651, 64 Wis. 525; *Campfield v. Lang* (U. S.) 25 Fed. 128, 131.

"Wages of laborers," as used in Act June 16, 1836, providing that the "wages of laborers" to a certain amount are exempt from attachment, means "earnings of the laborer by his personal manual toil, and not the profits which a contractor derives from the labor of others." "The distinction between the two kinds of gains or rewards is the difference between the sale of your own labor and a sale of another man's labor at something more than you pay for it. What is received for another's labor over and above what is paid for it is called 'profit,' and such profits are not within the protection of the statute." *Smith v. Brooke*, 49 Pa. (13 Wright) 147, 150.

Within the meaning of a statute exempting the "wages" of any laborers or the salary of any person in public or private employment, the word includes the compensation of a miner who by his own labor mines coal at a certain price per ton, although he employs a common laborer to assist him at so much per day. *Pennsylvania Coal Co. v. Costello*, 33 Pa. (9 Casey) 241, 244.

Debts synonymous.

"Wages" means a compensation for labor or services, and they are usually paid at short intervals. As used in Corporation Act, § 63 (Rev. 188), which provides that in case of the insolvency of any corporation the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of "wages" due to them respectively, the word is used synonymously with "debts." *Delaware, L. & W. Ry. Co. v. Oxford Iron Co.*, 33 N. J. Eq. (6 Stew.) 192, 195.

Debts due for labor in independent business.

Debts due by customers to a blacksmith for work done by him in carrying on an independent business for himself as the proprietor of a blacksmith shop are not exempt from garnishment as "wages." *Tatum v. Zachry*, 12 S. E. 940, 86 Ga. 573.

Fees or salary.

"Salary" and "wages" are synonymous, and both mean a sum of money periodically paid for services rendered. *Morse v. Robertson*, 9 Hawaii, 195, 197.

"Wages" is defined as a compensation given to a hired person for his or her services; that for which one labors; stipulated payment for service performed. The word is synonymous with "hire," "reward," "stipend," "salary," "compensation," "remuneration." So it is held that the word "wages" in an exemption statute includes salary. *Bovard v. Ford*, 83 Mo. App. 498, 501.

According to most lexicographers, the words "wages" and "salary" are synonymous; they both mean one and the same thing—a sum of money periodically paid for services rendered. *Commonwealth v. Butler*, 99 Pa. 535, 542.

There is no substantial difference, says Mr. Freeman in his work on Executions, between the terms "wages" and "salary," when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term "earnings" is more comprehensive than either of the others. It implies, as they do, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor. *Dayton v. Ewart*, 72 Pac. 420, 421, 28 Mont. 153, 98 Am. St. Rep. 549.

It is true that in a certain sense it may be said that the word "wages" includes the salaries of public officers and clerks, and the fees of lawyers, physicians, and other professional men; but that is not the ordinary meaning of the word. Officers and clerks of the city of New York who receive salaries are not within the provisions of the weekly payment law (Laws 1890, c. 388) requiring the weekly payment of wages, and such act does not repeal the provisions of the consolidation act as to the payment of salaries, and applies only to laborers and others receiving wages. *People ex rel. Van Valkenburgh v. Myers*, 11 N. Y. Supp. 217.

A tax on salary has been held to be a tax on "wages." *Commonwealth v. Cuyler* (Pa.) 5 Watts & S. 275, 278.

"Wages," as used in Const. art. 16, § 28, and Rev. St. art. 218, providing that no current "wages" for personal services shall ever be subject to garnishment, means the compensation given to a hired person for services, and the same is true of salary. The words seem to be synonymous, convertible terms, though use and general acceptance have given to the word "salary" a significance somewhat different from the word "wages," in this: that the former is understood to relate to position or office, to be the compensation given for official or other

service, as distinguished from "wages," the compensation for labor. *Bell v. Indian Live Stock Co. (Tex.)* 11 S. W. 344, 348, 3 L. R. A. 642.

The term "wages" indicates inconsiderable pay received from a lower degree of employment than that denoted by the word "salary," which is suggestive of a larger compensation for more important services. *Meyers v. City of New York*, 69 Hun, 291, 23 N. Y. Supp. 484, 486; *People v. Brookfield*, 34 N. Y. Supp. 674, 13 Misc. Rep. 566.

"Wages" is compensation given to a hired person for services rendered, and is applied to designate the sums paid to persons hired to perform manual labor, and is distinguished from "salary," which ordinarily means natural or periodical recompense or pay, and applies to those holding official positions. *Cane v. Mayor*, 34 N. Y. Supp. 675; *Sullivan v. Gilroy*, 55 Hun, 285, 8 N. Y. Supp. 401; *People v. Myers*, 11 N. Y. Supp. 217, 218, 25 Abb. N. C. 368; *Gordon v. Jennings*, 9 Q. B. Div. 45, 46.

The word "wages," as applied in common parlance specifically to the payment made for manual labor or other labor of menial or mechanical kind, is distinguished from "salary" and from "fee," which denotes compensation paid to professional men; and hence under *Laws 1885, c. 376*, providing that claims of employes, operatives, and laborers of an insolvent corporation for "wages" shall be first paid out of funds in the hands of a receiver, unpaid salaries of bookkeepers, foremen, superintendents, and draftsmen employed on monthly salaries are not entitled to preference. In *re Stryker*, 53 N. E. 525, 158 N. Y. 526, 70 Am. St. Rep. 489; *Cochran v. A. S. Baker Co.*, 61 N. Y. Supp. 724, 725, 30 Misc. Rep. 48.

Acts 1885, c. 376, provides that, where a receiver of a corporation of the state shall be appointed, the "wages" of employes, operatives, and laborers thereof shall be preferred to every other debt of the corporation. Held, that the word "wages" did not embrace compensation paid the superintendent and the attorney for the corporation. *People v. Remington*, 45 Hun, 329, 338.

Under *Act April 15, 1845 (P. L. 459)*, providing that the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer, compensation due for services rendered "to hunt up witnesses and testimony to defeat a recovery on a forged note" is nonattachable. "Wages" is defined to be a compensation given to the hired person for his or her services. *Bouv. Law Dict.* "Salary" is said to be a reward or recompense for services performed. *Id.* In the common use of

those terms the word "salary" is employed in referring to a stated allowance for services of a superior grade or for longer than a daily period, while the word "wages" seems to be applied generally to compensation for short periods or for smaller sums. Taken together, they are broad enough to cover all compensation for services rendered, in whatever occupation or capacity, no matter how extended or short the period of employment, or how large or small the amount. In *Commonwealth v. Butler*, 99 Pa. 535, the court said: "According to the most approved lexicographers, the words 'wages' and 'salary' are synonymous. They both mean one and the same thing: a sum of money periodically paid for services rendered. The truth is, and these lexicographers seem to hold, that, if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to more or less honorable services." *Hartman v. Mitzel*, 8 Pa. Super. Ct. 22, 24, 25.

Salaries of public officers are not exempt from garnishment under statutes exempting wages. *McLellan v. Young*, 54 Ga. 399, 400, 21 Am. Rep. 276.

Interest on wages due.

The term "wages," in a statute giving employes a lien for the amount of wages due them, does not include interest on wages due, although it appeared that the term "wages" was used as synonymous with "debt." *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. (6 Stew.) 192, 199.

Manner of payment.

"Wages" means the compensation paid to a hired person for his services. This compensation to the laborer may be a specified sum for a given time of service, or a fixed sum for a specified work; that is, payment may be made by the job. The word "wages" does not imply that the compensation is to be determined wholly upon the basis of time spent in service, but it may be determined by the work done. The compensation to a laborer in a factory of so many cents per "hank" for every hank made, payable bi-weekly, is "wages," and as such exempt from the process of garnishment. *Swift Mfg. Co. v. Henderson*, 25 S. E. 27, 99 Ga. 136 (citing *Ford v. St. L. & N. W. R. Co.*, 7 N. W. 126, 54 Iowa, 728; *Appeal of Selders*, 46 Pa. [10 Wright] 57; *Hamberger v. Marcus*, 27 Atl. 681, 157 Pa. 136, 137, 37 Am. St. Rep. 719).

Payment in property.

The term "wages," within the meaning of the exemption statute, includes compensation for labor performed under a contract by which the laborer is to have the price of his services applied on a lot of ground which

his employer contracts to sell to him, although the contract is broken by the employer. *Scott v. Watson*, 36 Pa. (12 Casey) 342, 346.

Price of supplies furnished.

"Wages" are defined to be a compensation given to a hired person for his or her services. The idea of personal employment and rendition of personal service seems to be regarded as indispensable requisites to the payment of wages; so it is held that where an act was entitled "An act to secure payment of wages or salary to certain employes of a railway corporation," and declared that persons furnishing certain supplies to such corporation, including engines and cars, shall have a lien on the property of the corporation, the act was repugnant to a constitutional provision requiring the object of a law to be expressed in its title. *Fidelity Ins., Trust & Safe-Deposit Co. v. Shenandoah Valley R. Co.*, 9 S. E. 759, 761, 86 Va. 1, 19 Am. St. Rep. 858; *Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co.* (U. S.) 42 Fed. 372, 376.

Subordinate occupation implied.

"Wages" are defined to be the compensation paid by the day, week, month, etc., for the services of laborers or other subordinate or menial employes. *Adcock v. Smith*, 37 S. W. 91, 92, 97 Tenn. (13 Pickle) 373, 56 Am. St. Rep. 810 (citing And. Law Dict.).

"Wages" has a less extensive meaning and embraces a smaller class of credits than "earnings," and, as used in its application to laborers and employes, conveys the idea of a subordinate occupation which is not very remunerative, one of not much independent responsibility, but rather to immediate supervision (*Railroad Co. v. Falkner*, 49 Ala. 115); and such is its use in Laws 1885, c. 376, providing that wages of employes of an insolvent corporation shall be preferred to other creditors. In re New York Locomotive Works, 28 N. Y. Supp. 209, 212, 73 Hun. 327.

The term "wages" applies to payment of laborers, mechanics, and domestic servants, and is not applied to the remuneration of a high and important officer of the state. *Greenberg v. Laeov*, 84 N. Y. Supp. 930, 932.

In the sense of the exempting statutes, "wages" are held to be such as are earned by the hands and labor of the individual himself and his family under his direction, and do not extend to what he earns as superintendent or master of other laborers. The compensation of the person who is employed by an iron company to puddle iron at a fixed rate per ton, who receives his pay monthly on a particular day, and who is required to begin and quit work at certain hours, is "wages" within Mill. & V. Code, § 2931, ex-

empting from execution or attachment a certain amount of the wages of every mechanic or laboring man. *Adcock v. Smith*, 37 S. W. 91, 92, 97 Tenn. (13 Pickle) 373, 56 Am. St. Rep. 810.

WAGES OF HER PERSONAL LABOR.

"Wages of her personal labor," as used in Code Iowa, § 2211, providing that a wife may maintain an action in her own name for "wages of her personal labor," means her earnings while in the employ of another than her husband, or while engaged in an independent occupation of her own. Her husband is entitled to her labor and assistance in the discharge of those duties and obligations which arise out of the marriage relation. Hence a husband may maintain an action against a physician for malpractice in the treatment of his wife, whereby he has been deprived of her labor and assistance. *Mewhirter v. Hatten*, 42 Iowa, 288, 291, 20 Am. Rep. 618; *Omaha & R. V. R. Co. v. Chollete*, 59 N. W. 921, 923, 41 Neb. 578.

WAGON.

See "Broad-Tired Wagon"; "Lumber Wagon"; "Narrow-Tired Wagon"; "Truck Wagon."

A wagon is a wheeled carriage, a vehicle on four wheels, and usually drawn by horses, especially one used for carrying freight and merchandise. *Hamilton v. State*, 52 N. E. 419, 420, 22 Ind. App. 479; *Spikes v. Burgess*, 27 N. W. 184, 65 Wis. 428.

"Wagon," as used in a statute exempting wagons from execution, "is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions." *Quigler v. Gorham*, 5 Cal. 413, 63 Am. Dec. 139.

"Wagon," as used in Sess. Acts 1866, 160, exempting from levy and sale on execution the horse and wagon of certain judgment debtors, should be construed in its general sense to include all four-wheeled vehicles, for whatever use employed, whether covered or placed upon springs. *Rodgers v. Ferguson*, 32 Tex. 533, 534.

Buggy or carriage.

As carriage, see "Carriage."

The word "wagon" is a generic term, and includes every other species of vehicle, by whatever other name the same may be called, but in a statute exempting from execution wagons, carts, or drays and other farm utensils, does not include a buggy adopted and designated for the carrying of persons only, as the term "wagon" is used

in a limited sense; the clause being obviously for the protection of the farmer, and to secure to him his instruments of husbandry. *Gordon v. Shields*, 7 Kan. 320-325. See, also, *Dingman v. Raymond*, 8 N. W. 597, 27 Minn. 507.

The term "wagon," as used in a statute of exemptions declaring that one wagon shall be exempt to a debtor from execution, includes a buggy; and hence, where the only conveyance which a debtor possessed was a light open buggy with side springs, such buggy was within the meaning of the term "wagon" as so used, and was therefore exempt. *Allen v. Coates*, 11 N. W. 132, 133, 29 Minn. 46.

"Wagon," as used in Ohio Laws 1878, § 59, p. 692, exempting from execution to every head of a family engaged in agriculture "one horse, or one yoke of cattle, with the necessary gearing for the same and one 'wagon,'" does not include a buggy, as the term applies to vehicles in the use of which the farmer would be enabled to prosecute his business of farming, in the usual and ordinary sense of the word. *Dulgar v. Harbmeyer*, 8 Am. Law Rec. 15, 20, 6 Ohio Dec. 762.

"Wagons," as used in a bill of sale purporting to convey all of the grantor's stock and farming implements and "farming utensils," "wagons," etc., should be construed to include a hack and a buggy used on the farm. *Royston v. McCulley* (Tenn.) 59 S. W. 725, 730, 52 L. R. A. 899.

"Wagon," as used in a statute exempting a wagon from execution, includes a two-seated upholstered one-horse carriage built and used for easy riding only. *Kimball v. Jones*, 43 N. W. 74, 41 Minn. 818.

In an action to recover for injuries caused by a collision between teams, it was alleged that the plaintiff was driving in a wagon, and that defendant was driving in another wagon on the same side of the same highway, so that the team of said defendant was approaching that of the plaintiff from the opposite direction, and that the teams of defendant and plaintiff would have to meet, and that treble damages were sought to be recovered under a statute which provides that the driver of any vehicles, for the conveyance of persons, meeting each other on the highway, who shall fail to turn to the right and slacken speed, shall pay to the party injured treble damages for driving against the other vehicle. It was held that the word "wagon" and "team" might as properly be used to designate a vehicle for the carriage of goods as one for the conveyance of persons. Neither of them, nor both of them, constitute a sufficiently specific description of the vehicle named in the statute to entitle the recovery of treble damages. *Rowell v. Crothers*, 52 Atl. 818, 75 Conn. 124.

Coach or hearse.

The term "wagon," in an exemption statute, does not include a hackney coach. *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139.

Rev. St. § 2982, subsec. 6, as amended by Laws 1882, c. 117, exempting one wagon from execution, includes a hearse. *Spikes v. Burgess*, 27 N. W. 184, 65 Wis. 428.

Oil wagon.

As used in Rev. St. 1894, § 2047, prohibiting hauling a load of more than 2,500 pounds on a broad-tired wagon over graveled roads when they are thawing, etc., the word "wagon" should be construed so that where an oil wagon had the front and rear wheels held together by side bars between which rested an iron tank bolted permanently to the side bars by iron straps, there being no coupling bolt to the wagon, the tank would be construed as a part of the load and not of the wagon. *Hamilton v. State*, 52 N. E. 419, 420, 22 Ind. App. 479.

WAGON CROSSING.

Laws 1876, c. 24, amended by Laws 1877, c. 73 (Gen. St. 1878, c. 34, § 5457), requiring all railroads to build and maintain good and sufficient cattle guards at all "wagon crossings," and good and substantial fences on each side of such road, refers to crossings for public travel on roads, highways, or streets. It means established wagon roads intersecting railroads, and does not include private ways or farm crossings, so called. *Sather v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 458, 40 Minn. 91.

WAGON WORK.

In a written instrument promising to pay a certain number of dollars in "wagon work" for value received, the words "wagon work" do not mean labor, as hauling or otherwise, with a wagon or wagons, nor do they mean simply labor or work to be performed by the maker of the note in the construction of wagons, but they mean wagons, or perhaps parts of wagons—wagons, either complete or incomplete, including both the materials and the labor bestowed upon them. *Johnson v. Seymour*, 19 Ind. 24, 25.

WALF.

Walfs are goods thrown away by a thief in his flight. *People v. Kaatz* (N. Y.) 3 Parker, Cr. R. 129, 138.

A stolen horse left by the thief in his flight is a walf. *Hall v. Gildersleeve*, 86 N. J. Law (7 Vroom) 235, 237.

WAIT.

See "Await."

The word "wait," as used in a promise to wait for the payment of a debt, and used without any adjunct whatever in a popular sense means precisely the same thing as the word "forbear," which, when unqualified by terms of restriction, has regard to a general forbearance. *Downing v. Funk* (Pa.) 5 Rawle, 69, 73.

WAIVE.

The meaning of the word "waive" is to put off, to put aside for the present, or to omit to pursue. *Webst. Dict.* To waive for an unspecified term does mean to abandon or forsake, but to waive for a specified time means always to omit to pursue for the time specified, and no longer. *Virginia Fire & Marine Ins. Co. v. Aiken*, 82 Va. 424, 428.

"To waive" is defined by Webster as being "to throw away; to relinquish voluntarily; as a right which one may enforce if he chooses." This does not imply that one may not relinquish a thing to which he has no right, and an example might be given of such relinquishment of a claim to something without right. *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393, 395, 27 Pac. 302.

"Waive," as used in a statute providing that the time for bringing a suit on a promissory note may be extended or waived by consent of the indorsers, does not mean that the suit is waived, but only the time for bringing it. The suit must still be brought during the running of the statute of limitations. *Walker v. Wigginton's Adm'r*, 50 Ala. 579, 582.

WAIVER.

See "Implied Waiver."

A waiver is an intentional abandonment or relinquishment of a known right. *Christenson v. Carleton*, 37 Atl. 226, 227, 69 Vt. 91; *Donahue v. Windsor County Ins. Co.*, 56 Vt. 374, 382; *Ward v. Metropolitan Life Ins. Co.*, 33 Atl. 902, 904, 66 Conn. 227, 50 Am. St. Rep. 80; *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 40; *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 134, 17 Atl. 411, 7 Am. St. Rep. 288; *Lewis v. Phoenix Mut. Life Ins. Co.*, 44 Conn. 72, 91; *State v. Hartley*, 52 Atl. 615, 617, 75 Conn. 104; *First Nat. Bank v. Hartford L. & A. Ins. Co.*, 45 Conn. 22, 44; *Johnson v. Schar*, 70 N. W. 838, 839, 9 S. D. 536; *Corey v. Bolton*, 63 N. Y. Supp. 915, 917, 31 Misc. Rep. 138; *Masons' Supply Co. v. Jones*, 68 N. Y. Supp. 806, 809, 58 App. Div. 231; *Monroe Waterworks Co. v. City of Monroe*, 85 N. W. 685, 688, 110 Wis. 11; *Fraser v. Aetna Life Ins. Co.*, 90 N. W. 476, 481, 114 Wis. 510; *Cedar Rapids Water Co. v. Cedar Rapids*, 90 N. W. 746,

749, 117 Iowa, 250; *Kennedy v. Roberts*, 75 N. W. 363, 366, 105 Iowa, 521; *Shaw v. Spencer*, 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115; *West v. Platt*, 127 Mass. 367, 372; *Fulkerson v. Lynn*, 64 Mo. App. 649, 653; *Michigan Savings & Loan Ass'n v. Missouri, K. & T. Trust Co.*, 73 Mo. App. 161, 165; *Perin v. Parker*, 18 N. E. 747, 748, 126 Ill. 201, 2 L. R. A. 336, 9 Am. St. Rep. 571; *Keller v. Robinson Co.*, 38 N. E. 1072, 1075, 153 Ill. 458; *Star Brewery Co. v. Primas*, 45 N. E. 145, 148, 163 Ill. 652; *United Firemen's Ins. Co. v. Thomas* (U. S.) 82 Fed. 406, 408, 27 C. C. A. 42, 47 L. R. A. 450; *Rice v. Deposit Co.* (U. S.) 103 Fed. 427, 43 C. C. A. 270; *Sidway v. Missouri Land & Live Stock Co.* (U. S.) 116 Fed. 381, 395; *Cable v. United States Life Ins. Co.* (U. S.) 111 Fed. 19, 81, 49 C. C. A. 216; *Peninsular Land Transp., etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 676, 14 S. E. 237; *Dey v. Martin*, 78 Va. 1, 7; *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 951, 11 Okl. 585; *Livesey v. Omaha Hotel*, 5 Neb. 50, 69; *Cutler v. Roberts*, 7 Neb. 4, 14, 29 Am. Rep. 371; *Warren v. Crane*, 50 Mich. 300, 301, 15 N. W. 465; *Portland & F. R. Co. v. Spillman*, 23 Or. 587, 592, 32 Pac. 688, 689; *First Nat. Bank v. Maxwell*, 55 Pac. 980, 982, 123 Cal. 360, 69 Am. St. Rep. 17; *Robinson v. Pennsylvania Fire Ins. Co.*, 38 Atl. 320, 322, 90 Me. 385; *Reed v. Union Cent. Life Ins. Co.*, 61 Pac. 21, 21 Utah, 295; *Dale v. Continental Ins. Co.*, 31 S. W. 266, 269, 95 Tenn. 38; *Supreme Lodge K. P. v. Quinn*, 29 South. 826, 827, 78 Miss. 525; *Bucklen v. Johnson*, 49 N. E. 612, 617, 19 Ind. App. 406.

A "waiver" is defined by Bouvier to be the relinquishment of or refusal to accept a right. *Kervan v. Townsend*, 49 N. Y. Supp. 137, 141, 25 App. Div. 256; *Hecht v. Brandus*, 23 N. Y. Supp. 1004, 1006, 4 Misc. Rep. 58; *In re Auerbach's Estate*, 65 Pac. 488, 491, 23 Utah, 529; *Bennecke v. Insurance Co.*, 105 U. S. 355, 26 L. Ed. 990; *Cole v. Dial*, 12 Tex. 100, 102.

Waiver is really implied consent by a failure to object. *Roseberry v. Valley Building & Loan Ass'n*, 68 Pac. 1063, 17 Colo. App. 448.

Waiver is the renunciation of some rule which invalidates a contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure. *Reid v. Field*, 1 S. E. 395, 399, 83 Va. 26.

A waiver, in the general sense, is the voluntary and intentional abandonment, renunciation, or relinquishment of a known legal right. To waive is to give up; to abandon and relinquish. It leaves the thing abandoned as though it had never been. *Caulfield v. Finnegan*, 114 Ala. 39, 48, 21 South. 484.

A waiver is but a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it must operate as a trap to the other party to insist upon it afterwards. *Lyman v. Littleton*, 50 N. H. 42, 54; *Lisbon v. Bath*, 23 N. H. (3 Fost.) 9.

A waiver is a relinquishment of, or a refusal to accept, a right. The waiver of one of several remedies, or the waiver of a remedy as against one of several parties, does not extinguish the right. Thus, it is said, a party in seeking his remedy may waive a part of his right and sue for another part. *White v. Nashville & N. W. R. Co.*, 54 Tenn. (7 Heisk.) 518, 534 (citing 1 Chitty, Pl. 90).

Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards. *Smiley v. Barker*, 83 Fed. 684, 687, 28 C. C. A. 9.

It is required of every one to take advantage of his rights at a proper time, and the neglect to do so will be considered a waiver. *Browning v. Smith*, 139 Ind. 280, 293, 37 N. E. 540 (quoting *Bouvier, Law Dict.*).

A waiver of the right to rescind, or an election not to rescind, is either a matter of express declaration, or, as is more frequently the case, arises as a matter of necessary inference from the acts or conduct of the person against whom it is asserted. Where, after the discovery of the fraud, the person claiming the right to rescind continues to deal with the property as if he were the owner, and does acts which are consistent only with an affirmation of the transaction attacked, he must be held to have elected not to rescind. *Hallahan v. Webber*, 37 N. Y. Supp. 618, 615, 15 Misc. Rep. 327.

It is a rule of the civil law, consonant with reason, that any one may renounce or waive that which was established in his favor. The same rule obtains at the common law. In practice it is required of every one to take advantage of his rights at a proper time, and neglecting to do so will be considered a waiver. *Cole v. Dial*, 12 Tex. 100, 102.

Bishop, in his work on Contracts (section 792), defines waiver as "where one in possession of any right, whether conferred by law or by contract, and a full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of his right or of his intention to rely on it. Thereupon he is said to have waived it, and he is precluded from claiming anything

by reason of it afterwards." *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Imp. Co.* (U. S.) 96 Fed. 34, 35; *Smiley v. Barker* (U. S.) 83 Fed. 684, 687, 28 C. C. A. 9; *Cable v. United States Life Ins. Co.*, 111 Fed. 19, 31, 49 C. C. A. 216; *United Firemen's Ins. Co. v. Thomas*, 27 C. C. A. 42, 82 Fed. 407, 47 L. R. A. 450; *Burnham v. Interstate Casualty Co.*, 75 N. W. 445, 449, 117 Mich. 142; *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 951, 11 Okl. 585.

Where a person passively encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position, so that he will be peculiarly prejudiced by the assertion of such adverse claim. *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Imp. Co.* (U. S.) 96 Fed. 34, 35 (citing *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 274, 19 L. Ed. 554).

By "waiver" is meant an act done showing impliedly or expressly that the party agreed to rely on some security other than the estate mortgaged for the purchase money, or, without any security, to rely upon the personal responsibility of the vendee alone. The taking by a vendor of a mortgage to secure the payment of the purchase money of land sold does not operate as a waiver of his right to an equitable lien for such purchase price. *Boos v. Ewing*, 17 Ohio, 500, 523, 49 Am. Dec. 478.

Based on acts or words.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such intent. *Dale v. Continental Ins. Co.*, 31 S. W. 266, 269, 95 Tenn. (11 Pickle) 38. This intention may be shown by conduct, as well as by express agreement. *Fraser v. Aetna Life Ins. Co.*, 90 N. W. 476, 481, 114 Wis. 510.

To make out a case of waiver of a legal right there must be a fair, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part. *First Nat. Bank v. Maxwell*, 55 Pac. 980, 982, 123 Cal. 360, 69 Am. St. Rep. 64 (citing *Roso v. Swan*, 75 Tenn. [7 Lea] 467).

A waiver of an existing right, to be effectual, must be made intentionally, and, when there is no express agreement to surrender a right, the mere action of a person, to have that effect, must be such as to evince clearly an intention in the mind of the actor to make the surrender. *Balfour v. Parkinson* (U. S.) 84 Fed. 855, 861.

Waiver is a matter of intention, outwardly manifested in some unequivocal manner; and the fact that in an action against a city for personal injuries it suffered a de-

fault is not a waiver of any defect in the notice of the injury, required by statute to be given to the city. *Gardner v. City of New London*, 28 Atl. 42, 46, 63 Conn. 267.

Mere silence at a time when there was no requirement to speak is not a waiver, nor evidence from which waiver may be inferred (*Armstrong v. Insurance Co.*, 180 N. Y. 560, 29 N. E. 991); so that the mere retention of proofs served after the time limited for their service is not a waiver of performance of the conditions precedent. *Rademacher v. Greenwich Ins. Co.*, 27 N. Y. Supp. 155, 158, 75 Hun, 83.

A waiver implies the idea that one has a right, and, with knowledge of his rights and that which might defeat his rights, does an act by which he waives the right to stand upon his legal position or his legal right. *Hollings v. Bankers' Union of the World*, 41 S. E. 90, 92, 63 S. C. 192.

Waiver is the giving up, relinquishing, or surrendering some known right, and may be found to exist if one acts in such a way that his conduct implies that he has waived his right, and amounts to a bar or obstruction only when established, and may be said to be an estoppel. *Crosswell v. Connecticut Indemnity Ass'n*, 29 S. E. 236, 239, 51 S. C. 469.

Waiver of defects in machinery consists in retaining it after knowledge, without objection and without promise of amendment. *Ford v. Chicago, R. I. & P. Ry. Co.*, 75 N. W. 650, 651, 106 Iowa, 85.

A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that, not only by saying that he dispenses with it—that he excuses the performance—or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other. *Thompson v. Gorner* (Cal.) 36 Pac. 434, 435 (citing 2 Herm. Estop. § 825).

There is no ground for a satisfactory distinction between a waiver by word and a waiver by an act. Each is evidence of a new promise, sufficient to take the case out of the statute of limitations, and operative only as such; and, while the cause of action is the old promise, the measure of the liability is determined by the new one. The waiver in either case must be taken as it is—absolute, if absolute; conditional, if conditional. *Gillingham v. Brown*, 60 N. E. 122, 124, 178 Mass. 417, 55 L. R. A. 320.

Based on estoppel.

A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. *Supreme Tribe of Ben*

Hur v. Hall, 56 N. E. 780, 783, 24 Ind. App. 316, 79 Am. St. Rep. 262 (citing *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410); *Westchester Fire Ins. Co. v. McAdoo* (Tenn.) 57 S. W. 409, 411.

There need be no direct and specific agreement to waive the forfeiture in an insurance policy. A waiver may be implied by the acts and conduct of the party. It is now settled, says the court in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419, that such a waiver need not be based on any new agreement or an estoppel. *Joyce* says (section 1370), as a general rule, if the company has treated the policy as valid, and has sought to enforce payment of the premium, and has otherwise with knowledge recognized by its own acts or declarations or those of its agents the policy as still subsisting, it waives thereby prior forfeitures. *Knarston v. Manhattan Life Ins. Co.*, 56 Pac. 773, 774, 124 Cal. 74 (citing *Robinson v. Pacific Fire Ins. Co.* [N. Y.] 18 Hun, 395; *Murray v. Home Ben. Life Ass'n*, 90 Cal. 406, 27 Pac. 309, 25 Am. St. Rep. 133).

While a waiver of a condition of forfeiture need not be based upon a technical estoppel, yet, in the absence of an express waiver, some of the elements of an estoppel must exist—the insured must have been misled by some action of the company which caused the omission to comply with the condition, which could only be done by virtue of the policy. *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991, 992; *Ronald v. Mutual Reserve Life Ass'n*, 30 N. E. 739, 740, 132 N. Y. 378; *Rademacher v. Greenwich Ins. Co.*, 27 N. Y. Supp. 155, 158, 75 Hun, 83.

In *Weed v. London & Lancashire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229, it was decided that, to establish a waiver of a forfeiture in a policy of insurance, the proof must show a distinct recognition of the validity of the policy after knowledge of the forfeiture by the person by whom it is claimed such forfeiture was waived. In the absence of an express waiver, some of the elements of estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of a breach, have done something which would only have been done by virtue of the policy, or have required something of the assured which he was bound to do only under a valid policy, or have exercised a right which he had only by virtue of the policy. *Gibson Electric Co. v. Liverpool & London & Globe Ins. Co.*, 54 N. E. 23, 25, 159 N. Y. 418.

It is not necessary, in order to constitute a waiver, that the facts shall be such as would support a plea of estoppel. A waiver of conditions in a fire policy is in fact an election not to take charge of a technical defense in the nature of a forfeiture, and

should be looked upon with liberality rather than with strictness. *Corson v. Anchor Mut. Fire Ins. Co.*, 85 N. W. 806, 807, 113 Iowa, 641.

The doctrine of waiver is not necessarily predicated upon an estoppel. While an estoppel carries with it a waiver, the latter may arise where, strictly speaking, on the same state of facts, an estoppel would not. *Cassimus v. Scottish Union & National Ins. Co.*, 33 South. 163, 167, 135 Ala. 256.

Capacity of parties.

A waiver must be by one capable of binding himself (*Am. & Eng. Enc. of Law*, 525), and so cannot be made by an infant personally, for he has a right to be protected against his own imprudence. *Corey v. Bolton*, 63 N. Y. Supp. 915, 917, 81 Misc. Rep. 138.

Consideration.

A waiver, being merely a voluntary relinquishment of a right, cannot be regarded as a contract, and does not require a new consideration to support it. *Schwartz v. Wilmer*, 44 Atl. 1059, 1061, 90 Md. 136. To constitute a waiver, it must be founded on a consideration. *Linwood Park Co. v. Van Dusen*, 58 N. E. 576, 580, 63 Ohio St. 183.

A waiver, to be binding, must operate by way of estoppel, or amount to a promise supported by a valuable consideration. One does not waive the defense that he is a surety, and as such discharged by the neglect of the payee, by merely writing the payee that he is going to try to have the note settled, and asking whether, in case he had to pay it all himself, he could pay it in installments; the payee not having by reason thereof done, or omitted to do, anything to his prejudice. *Crandall v. Moston*, 50 N. Y. Supp. 145, 147, 24 App. Div. 547.

A waiver, to be operative, must be supported by an agreement founded on valuable consideration, or the act relied on as a waiver must be such as to estop the party from insisting on performance of a contract or forfeiture of the consideration. *Ripley v. Aetna Life Ins. Co.*, 30 N. Y. 138, 164, 86 Am. Dec. 362; *Decker v. Sexton*, 43 N. Y. Supp. 167, 171, 19 Misc. Rep. 59.

Election to forego advantage.

A waiver implies an election of the party to forego some advantage which he might have had. *Supreme Lodge K. P. v. Quinn*, 29 South. 826, 827, 78 Miss. 525.

A waiver is an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren v. Crane*, 15 N. W. 465, 50 Mich. 300; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 951, 11 Okl. 585; *Cable v. United States Life*

Ins. Co. (U. S.) 111 Fed. 19, 81, 49 C. C. A. 216; *United Firemen's Ins. Co. v. Thomas (U. S.)* 82 Fed. 406, 408, 27 C. C. A. 42, 47 L. R. A. 450; *Decker v. Sexton*, 43 N. Y. Supp. 167, 171, 19 Misc. Rep. 59; *Oedar Rapids Water Co. v. City of Cedar Rapids*, 90 N. W. 746, 749, 117 Iowa, 250.

A waiver implies an election of a party to dispose of some advantage which he might at his option demand or insist upon, and it is applied on the principle that, when a party whose right it is to object takes no objection to the proceedings or the power of the court to hear the case, he is held to have waived all objections to formal and technical defects. *French v. Seamans*, 48 N. Y. Supp. 9, 13, 21 Misc. Rep. 722; *Cowenhoven v. Ball*, 118 N. Y. 231, 234, 23 N. E. 470, 471.

Equitable estoppel distinguished.

Equitable estoppel arises when the purpose or natural consequence of a person's representations or conduct is such as to induce another person to do or omit some act, the doing or omission of which would turn out to his detriment and to the inducing party's benefit, if the latter were permitted to take advantage of it; and such an estoppel more often carries the implication of fraud than waiver does. *Bales v. Perry*, 51 Mo. 449. Waiver depends on what one intended to do himself; estoppel rather on what he caused his adversary to do. There may be a valid waiver of rights of a certain kind—that is, formal as distinguished from substantial rights—without consideration, showing that waiver differs from contract. But where rights are involved we apprehend that a waiver must be supported by a consideration, to be valid. *Fairbanks, Morse & Co. v. Baskett*, 71 S. W. 1113, 1116, 98 Mo. App. 53.

As estoppel.

"Waiver" belongs to the family of "estoppel" and often they are convertible terms. *Maloney v. Northwestern Masonic Aid Ass'n*, 40 N. Y. Supp. 918, 921, 8 App. Div. 575.

A waiver or dispensation is not in the nature of a contract, which requires the support of a consideration, but rather of an estoppel, whereby on account of acts or admissions, either recognizing a contract as of binding force after a forfeiture, or holding out that performance of some condition is dispensed with, the validity of the contract may not be denied. *Knartson v. Manhattan Life Ins. Co.*, 73 Pac. 740, 742, 140 Cal. 57.

In strictness, the term "waiver" is used to designate the acts, or consequences of the acts, on one side only, while the term "estoppel" (in pairs) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his act;

but in laws of insurance the terms are ordinarily used indiscriminately. *McCormick v. Orient Ins. Co.*, 24 Pac. 1003, 1004, 86 Cal. 260. And such is the rule in quo warranto proceedings to determine the validity of corporations. *State v. School Dist. No. 108*, 88 N. W. 751, 753, 85 Minn. 230.

In May, Ins. § 505, cited with approval in 2 Bac. Ben. Soc. § 42, it is stated that the terms "estoppel" and "waiver," though not technically identical are so near allied, as applied to the law of insurance, and so like in the consequences which follow their application, that they are used indiscriminately by the courts. In *Diehl v. Adams County Ins. Co.*, 58 Pa. (8 P. F. Smith) 443, 98 Am. Dec. 302, it is said that a waiver of a breach or condition never occurs unless intended, or where the act, if relied on in equity, ought to estop the party from denying it. The doctrine of waiver by estoppel is stated in *Cannon v. Home Ins. Company*, 53 Wis. 585, 593, 11 N. W. 11, to be that a party cannot occupy inconsistent grounds or positions; that one who relies on the forfeiture of the contract cannot at the same time treat the contract as an existing valid one, nor call upon the other party to the contract to do anything required by it. Several former cases in this court were cited in support of this proposition, and it was said that "they certainly settled the rule of law for this state." *Kidder v. Knights Templars & Masons Life Indemnity Co.*, 69 N. W. 364, 367, 94 Wis. 538.

In considering whether there has been a waiver or estoppel, the difference between waiver and estoppel is that in the former the result is voluntary, while in the latter the conduct of the party may have been voluntary, but with intention not to lose any existing rights, yet, if such conduct mislead, then estoppel arises. One is the voluntary surrendering of a right (*Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240), and the other is the inhibition to assert it from the mischief that has followed (*Shaw v. Spencer*, 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115). *Libby v. Haley*, 39 Atl. 1004, 1005, 91 Me. 331.

In an action on an insurance policy, brought after the time limited by the terms of the policy, plaintiff excused the delay, alleging negotiations with defendant's agents to settle the loss without litigation, and their request not to bring suit, and promising to pay without; and the defendant set up the provision of the policy that no officer or agent should have power to waive any provision therein contained. Discussing this, the court said: "As this clause, in its terms, applies only to matters constituting a waiver, it is clear that it can have no application to facts creating an estoppel; for, though the terms 'estoppel' and 'waiver' may sometimes loosely be used interchangeably, there is a clear distinction between them. A waiver

arises by the intentional relinquishment of a right by a person or party, or by his neglect to insist upon his right at the proper time, and does not imply any conduct or dealing with another by which that other is induced to act, or forbear to act, to his disadvantage; while an estoppel necessarily presupposes some such conduct or dealing with another. The matters set up by the plaintiff are matters operating by way of estoppel, and not as a waiver." *Metcalf v. Phenix Ins. Co.*, 43 Atl. 541, 542, 21 R. I. 307.

Where it appears that an insurance company refused to pay a claim for loss on other grounds than that of insufficient proofs, they are deemed to have waived a failure to furnish sufficient proof; but such waiver is not avoided by a provision in the policy providing that no waiver of the policy shall be effectual unless indorsed thereon, since such facts constitute an estoppel in pais, though called a "waiver." *Roberts v. Northwestern Nat. Ins. Co.*, 62 N. W. 1048, 1050, 90 Wis. 210.

Existing right.

There can be no waiver of a nonexisting right. *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 951, 11 Okl. 585.

The word "waiver" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver unless at the time there is some right or privilege in existence. *San Bernardino Inv. Co. v. Merrill*, 41 Pac. 487, 488, 108 Cal. 490.

Knowledge and intention.

To constitute a waiver, it must fairly appear that there was an intent to waive the right. *Linwood Park Co. v. Van Dusen*, 58 N. E. 576, 580, 63 Ohio St. 183.

To constitute a waiver there must be both knowledge of the existence of the right and an intention to relinquish it. *Portland & F. R. Co. v. Spillman*, 23 Or. 587, 592, 32 Pac. 688, 689; *Cutler v. Roberts*, 7 Neb. 4, 14, 29 Am. Rep. 371; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, 69; *Dey v. Martin*, 78 Va. 1, 7; *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 40, 85 Am. Dec. 240; *Supreme Lodge K. P. v. Quinn*, 29 South. 826, 827, 78 Miss. 525; *Reed v. Union Cent. Life Ins. Co. of Cincinnati*, 61 Pac. 21, 21 Utah, 295; *Star Brewery Co. v. Primas*, 45 N. E. 145, 148, 163 Ill. 652; *Perin v. Parker*, 18 N. E. 747, 748, 126 Ill. 201, 2 L. R. A. 336, 9 Am. St. Rep. 571. The intention courts often find from conduct that is inconsistent with an intent to insist upon the right, but the right relinquished must be one that is actually known to the party making the waiver. *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116, 134, 17 Atl. 411, 7 Am. St. Rep. 288.

A person cannot be bound by a waiver of his rights unless such waiver is made distinctly, and with a full knowledge of the rights which he intends to waive. In some cases it has been held that a waiver must be an intentional act with knowledge of the facts. *Bucklen v. Johnson*, 49 N. E. 612, 617, 19 Ind. App. 406.

A waiver is effective only when it is made intentionally and with knowledge of the circumstances. In *re Auerbach's Estate*, 65 Pac. 488, 491, 23 Utah, 529 (citing *Ben-neck v. Connecticut Mut. Life Ins. Co.*, 105 U. S. 355, 28 L. Ed. 990).

Waiver is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts. *Freedman v. Fire Ass'n of Philadelphia*, 82 Atl. 89, 40, 168 Pa. 249.

A waiver, to be binding, must be made with full knowledge of the right which the party intends to waive. *Johnson v. Schar*, 70 N. W. 838, 839, 9 S. D. 536.

To constitute a waiver, the party upon whom it operates must have full knowledge of all the essential or material facts of the acts or conduct of the other party, and with such knowledge consent to proceed notwithstanding; and the party relying upon such waiver assumes the burden of proof as to the knowledge of the party making the waiver. *St. Louis Electric Light & Power Co. v. Edison General Electric Co.* (U. S.) 64 Fed. 997, 1001.

Waiver must be by one in possession of full knowledge of the material facts and with intent to waive. *Decker v. Sexton*, 43 N. Y. Supp. 167, 171, 19 Misc. Rep. 59.

Where it does not appear that the parties to an action knew of the disqualification of a judge, such disqualification was not waived by the parties by merely proceeding to trial. *State v. Hartley*, 52 Atl. 615, 617, 75 Conn. 104.

Waiver, it has been said, is a question of intention, to be determined as a fact. Conduct or consent, therefore, to show a waiver, should be inconsistent with an intention to claim exemptions. *State v. Gardner*, 73 Pac. 690, 691, 32 Wash. 550, 98 Am. St. Rep. 858.

Waiver by a party of any contractual right is a matter of intention. *Sullivan v. Prudential Ins. Co. of America*, 65 N. E. 268, 269, 172 N. Y. 482.

A waiver presupposes a knowledge of the thing to be waived. *Callies v. Modern Woodmen of America*, 72 S. W. 718, 714, 98 Mo. App. 521.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the waiver of

such rights. But where it appears that there was no such intent in fact, there is no waiver. *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 676, 14 S. E. 237.

A waiver involves the idea of assent, and assent is primarily an act of the understanding. *Jewell v. Jewell*, 84 Me. 304, 307, 24 Atl. 858, 18 L. R. A. 473.

Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on the right. *Fairbanks, Morse & Co. v. Baskett*, 71 S. W. 1113, 1116, 98 Mo. App. 53 (citing *Stiepel v. German-American Mut. Life Ass'n*, 55 Mo. App. 224).

"To make a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party, showing such a purpose, or acts amounting to estoppel on his part." In *Stiepel v. Life Ass'n*, 55 Mo. App. 224, it is said that "waiver depends solely upon the intention of the party against whom it is invoked, and it is in that respect different from estoppel." It is not meant by this, however, that one's secret understanding is to control, for a party's intent will be construed from his acts or what he may do or write. *Michigan Sav. & Loan Ass'n v. Missouri, K. & T. Trust Co.*, 73 Mo. App. 161, 165.

It is said, in *West v. Platt*, 127 Mass. 367, 372: "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is, what was said or written, and whether what was said indicated the alleged intention. The secret understanding or intent of the defendants or their agents could not affect his [plaintiff's] rights." A waiver may be made by an agreement, but it may also be made without an agreement. It depends altogether on the nature of the matter to which the waiver pertains. *Fulkerson v. Lynn*, 64 Mo. App. 649, 653.

Voluntary act.

Waiver is the voluntary relinquishment of a right. *Gandy v. Orient Ins. Co.*, 29 S. E. 655, 656, 52 S. C. 224; *French v. Seamans*, 48 N. Y. Supp. 9, 13, 21 Misc. Rep. 722.

Waiver is the voluntary relinquishment of some known right, benefit, or advantage which, except for such waiver, the party otherwise would have enjoyed. *Peabody v. Maguire*, 79 Me. 572, 585, 12 Atl. 630.

A waiver is a voluntary relinquishment of some right which, but for such waiver, the party would have enjoyed. *Austin v. Welch*, 72 S. W. 881, 883, 31 Tex. Civ. App. 526; *Stewart v. Crosby*, 50 Me. 130, 134; *Dalley v. Kennedy*, 81 N. W. 125, 128, 64 Mich. 208; *Warren v. Crane*, 15 N. W. 465,

50 Mich. 300; Cowenhoven v. Ball, 28 N. Y. St. Rep. 870, 872; *Id.*, 118 N. Y. 231, 234, 23 N. E. 470, 471. Hence voluntary choice is of the essence of waiver, and not mere negligence, though from such negligence, unexplained, such intention may be inferred. Fishback v. Van Dusen, 22 N. W. 244, 245, 33 Minn. 111; Moore v. Order of Railway Conductors of America, 57 N. W. 623, 625, 90 Iowa, 721; Kilpatrick v. Kansas City & B. R. Co., 57 N. W. 664, 671, 38 Neb. 620, 41 Am. St. Rep. 741. But that action is in no sense voluntary which a party cannot decline to take at the peril of life or property. Warren v. Crane, 15 N. W. 465, 50 Mich. 800; Dailey v. Kennedy, 64 Mich. 208, 214, 31 N. W. 125, 128.

The very term "waiver" imports a voluntary act, and an act cannot be thus denominated when performed under conditions of practical compulsion. State v. Davis, 66 Mo. 684, 686, 27 Am. Rep. 387 (cited in State v. Bell, 65 S. W. 736, 166 Mo. 106).

WAIVER BY ELECTION.

The defense of "waiver by election" arises where the remedies are inconsistent, as where one action is founded on an affirmation, and the other upon the disaffirmance of a voidable contract or sale of property. In such cases any decisive act of affirmation or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act. Any decisive act by a party with knowledge of his rights and of the facts determines his election in the case of inconsistent remedies. Robb v. Vos, 15 Sup. Ct. 4, 14, 155 U. S. 13, 39 L. Ed. 52.

WAIVER OF EXEMPTION.

A covenant in a lease, by which the lessee agreed "that all the personal property on the premises shall be liable to distress, and also all the personal property, if removed therefrom, * * * hereby waiving all right to the benefit of any laws now made or hereafter to be made exempting personal property from levy and sale for arrears of rent," waived the exemption only to the extent of the personal property on the premises, and the exemption does not extend to the debt for the rent. Hence, where the lessee gave notes for the rent, without waiver, and afterwards a judgment for the amount of the notes was recovered, the lessee was entitled to claim his exemption in a chose of action levied on. Mitchell v. Coates, 47 Pa. (11 Wright) 202, 203.

Exempted property is a personal privilege of the debtor. He may waive it, and certainly does waive it when he conveys it to another. His interest in the property is then gone. He cannot reclaim it or recover

it. If the conveyance works a fraudulent preference under the insolvent law, the assignee may recover the property or its value. Wyman v. Gay, 37 Atl. 325, 326, 90 Me. 36, 60 Am. St. Rep. 238 (citing Nason v. Hobbs, 75 Me. 396).

A waiver, by an obligor in a bond, of "the benefits of every law made or to be made to exempt the premises described in the accompanying mortgage, or any other premises whatsoever, from levy and sale under execution, or any part of the proceeds arising from the sale thereof from the payment of the moneys secured by the bond," is confined to the obligor's real estate, and does not waive his exemption of a judgment recovered by him. Howard Bldg. & Loan Ass'n v. Philadelphia & Reading R. Co., 102 Pa. 220, 223.

WAIVER OF PROTEST.

Whether waiver of protest amounts to a waiver of demand and notice must be determined without reference to the Code as direct authority in the case of a nonnegotiable note. Neither the Code nor the law merchant requires protest in such a case, but neither is it required in the case of an inland bill. In Daniel on Negotiable Instruments it is said on this point: "But the word 'protest' has by general usage acquired a more extensive signification than the mere formal declaration of a notary. Inland bills and promissory notes may be protested by statutory enactment in many states, and the protest is accorded the same weight to them when it is made, though it be not necessary to make it. And the weight, as well as the number, of authorities, predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill." The expression "waiver of protest," when applied to paper which cannot or is not required to be protested, acquires the meaning of waiver of demand and notice of nonpayment. First Nat. Bank of San Diego v. Falkenhan, 29 Pac. 866, 867, 94 Cal. 141.

Where an indorser of a note, before its maturity, wrote to the holder, "Please do not protest and I will waive the necessity of a protest," it dispensed with a demand of the maker and notice to the indorser. Codrington v. Davis, 1 N. Y. (1 Comst.) 186, 190.

WAIVING DEMAND AND NOTICE.

The words "waiving demand and notice" are apt words to use in indorsing a note to waive the rights of technical indorsers. Jackson Bank v. Irons, 30 Atl. 420, 421, 18 R. I. 718.

It is held that the use of the words "waiving demand and notice" in a note does not weaken the effect of the presumption

that when one not a party to a note, either as payee or indorsee, has put his name upon it, he thereby becomes the original promisor. These words, says the court, "are applicable to an indorser, and not to an original promisor, or one primarily liable by presumption of law or in fact, and are therefore mere surplusage." *Bradford v. Prescott*, 27 Atl. 461, 462, 85 Me. 482.

Where an indorser indorsed a note before its indorsement by the payee, the fact that the words "waiving demand and notice" were written above the name of such indorser could not be construed to restrain his relation as accommodation indorser or joint maker. *Pearson v. Stoddard*, 75 Mass. (9 Gray) 199, 201.

WALK.

See "Cross-Walk."

A Sunday statute operating as a prohibition against walking on Sunday is to be construed as meaning unnecessary walking only, and not to interfere with the comfort and conduct of individuals in walking when necessary for the promotion of health. *Sullivan v. Maine Cent. R. Co.*, 19 Atl. 169, 82 Me. 196, 8 L. R. A. 427.

On roadbed.

"Standing or walking on the roadbed of any railway," within the meaning of an accident policy exempting the company from liability for injuries while standing or walking on the roadbed of any railway, does not include the mere crossing of railroad tracks for the purpose of reaching the railroad station. To stand or walk on a roadbed implies some sensible duration of the act, and does not describe the mere crossing, made for a justifiable purpose, such as reaching the station. Common language distinguishes between standing, walking, and crossing. *Duncan v. Preferred Mut. Acc. Ass'n of New York*, 18 N. Y. Supp. 620, 621, 59 N. Y. Super. Ct. 145. And this is so especially where the crossing is made at a well-recognized place of crossing. *Payne v. Fraternal Acc. Ass'n*, 93 N. W. 361, 363, 119 Iowa, 342; *Dougherty v. Pacific Mut. Life Ins. Co.*, 25 Atl. 739, 154 Pa. 385; *Traders' & Travelers' Acc. Co. v. Wagley* (U. S.) 74 Fed. 457, 20 C. C. A. 588. *Contra*, *Keene v. New England Mut. Accident Ass'n*, 41 N. E. 203, 164 Mass. 170.

WALK OUT OF BOUNDS.

A statute relating to prison bounds, and providing that, if a prisoner "walk out of bounds," the bond should be forfeited, means no other than such walking out as before the passing of the act would have been an escape—a walking out by which the plaintiffs would have been damnified, for which they

would have had their action against the sheriff, and he against the prisoner. The words "walking out," etc., mean an escape—an escape as understood in law language. A prisoner stepping by mistake a few feet over the prison limits, and instantly returning, did not "walk out of bounds," within the meaning of the statute. *Howard v. Blackford*, 3 N. J. Law (2 Penning.) 777, 785.

WALL.

See "At the Wall."

As building, see "Building"; "Building (In Lien Laws)."

A wall is but a portion of a house, and the one is valueless without the other. *Hoffman v. Kuhn*, 57 Miss. 746, 751, 34 Am. Rep. 491.

Code 1873, § 2019, which provides that the owner of a city lot, who is about to build contiguous to the land of his neighbor, may, if there be no "wall" on the line between them, build a brick or stone wall, and rest one-half of the same on his neighbor's land, is not to be limited in meaning to a wall of a building erected on the line, but includes any part of a building thereon; and hence the statute does not authorize the person building on the contiguous lot to erect a wall which will destroy a stairway on the adjoining land. *Cornell v. Bickley*, 52 N. W. 192, 85 Iowa, 219.

WALL COUNT SOLID MEASURE.

A building contract provided that the building was to be erected of bricks at \$2.40 per 1,000, "wall count solid measure." Held, that evidence was competent to show that these words were expressly understood among brick masons and contractors to mean that the space occupied by doors and windows was to be included in the estimate as if built up with brick. *Long v. Davidson*, 7 S. E. 758, 759, 101 N. C. 170.

WANDERING.

"Wandering," as used in the definition of an estray as being a wandering beast, etc., means "free from the care, control, and custody of the owner, or where no one seeks, follows, or claims." *Robert v. Burns*, 27 Wis. 422, 425.

WANT.

See "When Wanted."

The word "want" is an apt word to be used in a will to show testator's intent to make a will. It was so said in a case in which testator wrote his lawyer that he wanted his will changed, which letter was

held to be a valid holographic will. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

Acceptance of a written proposal to furnish for a given period all the goods of a specified character which the promisee might "want" does not bind the promisor to furnish or the promisee to order any of the goods so specified. *McCaw Mfg. Co. v. Felder*, 41 S. E. 664, 666, 115 Ga. 408.

As need or require.

"Want," as used in a will, giving all of testatrix's estate to her husband to use and improve during his natural life, and, if he should want for his support, to sell any part or the whole of it for his maintenance, means "necessity." The term in itself is ambiguous, being very commonly used to mean wish or desire, and as frequently in the sense of need or require. *Hull v. Culver*, 84 Conn. 403, 405.

In a guaranty whereby the promisor became liable to a certain amount for what stock a shoemaker "has had or may want thereafter," the words "may want" are significant as to the character of future dealings in contemplation, and mean the same thing as "may need or require," or "may have occasion for." *Gates v. McKee*, 13 N. Y. (3 Kern.) 232, 234, 64 Am. Dec. 545.

Where a statute provided that the president and directors, or a majority of them, might agree with the owners of land which may be wanted for the construction or repair of a road for the purchase in fee simple, and, if they could not agree, the land might be acquired by condemnation proceedings, the word "wanted" is not synonymous with "desired," but was used by the Legislature in the sense of "necessary"; and therefore land could not be acquired by the exercise of the power of eminent domain, unless its use and occupation was "required" by the company. *Tracy v. Elizabethtown, L. & B. S. R. Co.*, 80 Ky. 259, 267.

St. 6 Geo. IV, c. 125, § 72, requiring a pilot, not having a lawful excuse, to take charge of any ship "wanting a pilot," does not refer merely to such vessels as are by the provisions of the act bound to take a pilot, but means any vessel, the master or owner of which thinks fit to require one. *Lucey v. Ingram*, 8 Mees. & W. 302, 312.

WANT OF CARE.

See "Care."

"Want of care" is the absence of such caution as a man of common prudence—that is, the average man—takes when it concerns him to be vigilant, sufficient to protect himself from apparent or suspected danger.

Jones v. Carey (Del.) 31 Atl. 976, 977, 9 Houst. 214.

In an action on the case against the bailee of hogs taken to be fed, for a loss through negligence, in an instruction that, if the hogs were lost by the negligence and want of care of defendant, he was liable, it was held that the words "want of care" meant a want of reasonable and ordinary care, and were not calculated to mislead the jury. *Warner v. Dunnavan*, 23 Ill. (13 Peck) 324.

WANT OF FORM.

See "Form."

WANT OF INTEGRITY.

Code Civ. Proc. § 1350, providing that no person shall be competent to serve as an executor in whom there is a "want of integrity," cannot be construed to include a simple conflict of interest in regard to the estate between the executor named in the will and the other legatees. The fact that an executor claims property as her own, which the other legatees insist belongs to the estate, does not of itself, without reference to the honesty of the claim, show want of integrity. In *re Bauquier's Estate*, 26 Pac. 178, 180, 88 Cal. 302.

WANT OF ISSUE.

See "For Want of Issue."

The words "want of any issue," unexplained by any context, are held to mean a failure of issue generally. *Hertz v. Abrahams*, 36 S. E. 409, 413, 110 Ga. 707, 50 L. R. A. 361 (citing *Goodrich v. Cornish*, 4 Mod. 256, 258; *Boehm v. Clarke*, 9 Ves. 580).

WANT OF ORDINARY CARE.

See "Ordinary Care."

"Want of ordinary care" means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of the particular case. *Smith v. Day* (U. S.) 86 Fed. 62, 64 (citing *The Farmer v. McCraw*, 26 Ala. 189, 72 Am. Dec. 718).

"Want of ordinary care," as used with reference to "negligence," means want of ordinary attention to the rights of others. *White v. Dresser*, 135 Mass. 150, 152, 46 Am. Rep. 454.

The words "want of ordinary care and skill," as used in a policy insuring the owner of a tug against loss or damage, containing the stipulation to the effect that the insured warrants that the tug shall not be damaged

from the want of ordinary care and skill, must be construed as meaning that the master of the tug shall be a person possessing the necessary qualifications of ordinary care and skill, and that the assured warrants against loss arising from the want of those general qualifications, but not that the master and pilot shall never be remiss in a particular instance. The most intelligent and the most careful and skillful may at times be remiss, and it was this liability that the policy was designed to cover, provided that the master and pilot were persons of known care and skill. *Egbert v. St. Paul Fire & Marine Ins. Co. (U. S.)* 71 Fed. 739, 741.

WANT OF PROBABLE CAUSE.

See "Probable Cause."

"Want of probable cause" means an absence of rational ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious and reasonable man in the belief that the person accused is guilty of the crime. *Davie v. Wisher*, 72 Ill. 262, 264.

WANT OF PROSECUTION.

See "For Want of Prosecution."

WANT OF UNDERSTANDING.

"Want of understanding," sufficient as a disqualification from receiving letters of administration, is a phrase the meaning of which has been well settled and ascertained. It does not refer to a want of understanding of the law, but means a lack of intelligence, which is not to be presumed from mere lack of information upon legal subjects or business matters. In *re Shilton's Goods (N. Y.)* 1 Tuck. 73, 74; In *re Manley's Estate*, 34 N. Y. Supp. 258, 259, 12 Misc. Rep. 472.

WANTON.

"Wanton" means without regard to the rights of others. *Tatum v. State*, 66 Ala. 465, 467.

The word "wanton," as applied to the case of one person injuring another, is somewhat indefinite in its meaning. It may apply to a case in which the defendant sees the danger of the plaintiff in time to prevent his injury and takes no steps to prevent it. *McDonald v. International & G. N. R. Co.*, 22 S. W. 939, 945, 86 Tex. 1, 40 Am. St. Rep. 803.

A wanton act is an illegal act done when it is needless for any rightful purpose, without adequate legal provocation, and manifests a reckless indifference to the interests and rights of others. *Everett v. Receivers of Richmond & D. R. Co.*, 27 S. E. 991, 992,

121 N. C. 519 (citing *State v. Brigman*, 94 N. C. 888).

In the *Century Dictionary and Encyclopedia* "wanton" is defined as follows: "Characterized by extreme recklessness, foolhardiness, or heartlessness; malicious; recklessly disregarding of the right or of consequences." An allegation in a complaint that the plaintiff fell into a cut and was injured by reason of the wanton and reckless carelessness and negligence of the defendant in not properly guarding and protecting said excavation was sufficient to warrant a charge in reference to exemplary damages. *Brasington v. South Bound R. Co.*, 40 S. E. 665, 667, 62 S. C. 325, 89 Am. St. Rep. 906; *Watts v. South Bound R. Co.*, 38 S. E. 240, 242, 60 S. C. 67.

Gross carelessness or negligence constitutes wanton misconduct. *Welch v. Durand*, 36 Conn. 182, 184, 4 Am. Rep. 55.

On a prosecution for wantonly killing a horse, it appeared that the horse was a bad fence breaker, and that on the day before the horse was killed defendant loaded his gun and swore that if the horse came in his field he would "fix him." The next day the horse came in, and defendant drove him out; he came in in the afternoon, and was driven out again; and entering again later in that day, defendant shot him. Held, that the facts did not show a wanton killing. *Davis v. State*, 12 Tex. App. 11, 14.

Malicious intent.

To make the killing of a sheep a wanton act, it must have been committed, regardless of the loss of the owner of the sheep, in reckless sport or under such circumstances as evinced a wicked or malicious intent, and without excuse. It is not every intentional act that is a wanton act. *Thomas v. State*, 14 Tex. App. 200, 206.

Willful distinguished.

The word "wanton" does not mean willful. It is defined by Webster as follows: "Wandering or roving in gayety or sport; licentious; lewd; extravagant," etc. The word adds no force to the charge that the act was done in a careless manner. The words "reckless and wanton" do not mean willful, and express nothing more than negligence. *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 288, 92 Am. Dec. 318 (quoted in *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 296, 298, 48 Am. Rep. 719).

"Wanton," as used in a complaint characterizing an alleged trespass as a wanton act, does not make the trespass willful. *Durkee v. City of Kenosha*, 17 N. W. 677, 679, 59 Wis. 123, 48 Am. Rep. 480.

The word "wanton," as used in characterizing the degree or kind of negligence, does not imply the same thing as willful or

intentional, but means something less than willfulness and nothing more than negligence. *Cleveland, C., C. & St. L. R. Co. v. Tartt* (U. S.) 64 Fed. 823, 825, 12 O. C. A. 618.

The word "wanton," in a statute making the willful and wanton killing of animals criminal, imports that the act is directed toward the animal itself, as distinguished from a willful killing with intent to injure the owner. The act must be done intentionally, by design, without excuse, and under circumstances evincing a lawless and destructive spirit. *Jones v. State*, 8 Tex. App. 223, 230.

WANTON AND OBSCENE LANGUAGE.

An ordinance prohibiting the use of wanton or obscene language should be so construed as not to include opprobrious and insulting language, which, although tending to a breach of the peace, is not lewd or lascivious. *Sutton v. McConnell*, 50 N. W. 414, 46 Wis. 269.

WANTON NEGLECT.

Gen. St. c. 107, § 9, authorizing a divorce where the husband has been guilty of "wanton and cruel neglect" of the wife, means something more than mere desertion, and requires that the wife should actually have been permitted to suffer by reason of the husband's failure to provide her with necessities; and if the wife had supported herself and children for 15 years, and neither she nor her children had suffered or been in danger of suffering for want of support, though there might have been neglect, there was no wanton and cruel neglect, within the statute. *Peabody v. Peabody*, 104 Mass. 195, 197.

WANTON NEGLIGENCE.

In "wanton negligence," the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will naturally or probably result in injury. *Louisville & N. R. Co. v. Webb*, 12 South. 374, 375, 97 Ala. 308; *Stringer v. Alabama Mineral R. Co.*, 13 South. 75, 79, 99 Ala. 397; *Richmond & D. R. Co. v. Vance*, 9 South. 574, 576, 93 Ala. 149, 80 Am. St. Rep. 41; *Louisville & N. R. Co. v. Richards*, 13 South. 944, 945, 100 Ala. 365; *Birmingham Railway & Electric Co. v. Bowers*, 20 South. 345, 346, 110 Ala. 328; *Louisville & N. R. Co. v. Anchors*, 22 South. 279, 281, 114 Ala. 492, 62 Am. St. Rep. 116.

Before one can be held guilty of wanton and reckless negligence, the facts must show either that the party knew his conduct would inflict injury or the facts must show that on

account of the attending circumstances, which were known to him, or knowledge of which he was chargeable with, the inevitable or probable consequences of his conduct would be the infliction of injury, or with reckless indifference to the consequences he committed the act or omitted to perform his duty. Evidence that a freight train at the time of an accident was being run at the rate of 40 miles per hour, supported by the statement of an expert that such speed is dangerous, but that freight trains are often run at that speed without accident, is not sufficient to show wanton and reckless negligence. *Alabama G. S. R. Co. v. Hall*, 17 South. 176, 179, 105 Ala. 599.

In construing a charge in an action for personal injuries the court said: "All that is meant in this case by wanton, willful, or intentional negligence is the conscious failure on the part of the defendant to use reasonable care under the circumstances to avoid the injury, after discovering the danger of the child, if the jury finds from the evidence that there was such failure and that the injury resulted therefrom." *Alabama G. S. R. Co. v. Burgess*, 25 South. 251, 254, 119 Ala. 555, 72 Am. St. Rep. 943 (quoting *Alabama G. S. R. Co. v. Burgess*, 22 South. 913, 116 Ala. 509).

In an action against a railroad company for injury to a team at a crossing, where the evidence shows no more than that defendant's servants failed to give the signals required by statute, it is error to submit to the jury the question of wanton negligence. *Alabama G. S. R. Co. v. Linn*, 15 South. 508, 510, 103 Ala. 134.

WANTONLY.

"Wantonly" means not having a reasonable cause. *Everett v. Receivers of Richmond & D. R. Co.*, 27 S. E. 991, 992, 121 N. C. 519 (citing *Clarke v. Hoggins*, 103 E. C. L. 543).

The term "wantonly" implies turpitude; that the act done is of willful, wicked purpose. *North Carolina v. Vanderford* (U. S.) 35 Fed. 282, 287; *State v. Massey*, 2 S. E. 445, 446, 97 N. C. 465.

An act, to be done "wantonly," must be done intentionally and by design, and without excuse, and under circumstances evincing a lawless and destructive spirit. *Branch v. State*, 41 Tex. 622, 625.

A person may be regarded as acting "wantonly" who acts without regard to propriety or the rights of others, or is careless of consequences, and yet without settled malice. *National Folding Box & Paper Co. v. Robertson's Estate* (U. S.) 125 Fed. 524, 525.

The term "wantonly," when applied to the commission of an act, implies that the

act was done with a purpose to injure or destroy without cause and without reference to any particular person. *Ann. Codes & St. Or.* 1901, § 2182.

As felonious.

"Wantonly" is not synonymous with "feloniously." *State v. Morgan*, 3 S. E. 927, 928, 98 N. C. 641.

As intentional disregard of right.

"Wantonly" is the licentious acting by one man toward the person of another without regard to his rights, and may include the element of recklessness. As used in an instruction, in an action to recover possession of personal property seized under a chattel mortgage, that plaintiffs, in knowingly and wantonly allowing and permitting H. to represent himself as owner of the property, etc., "wantonly" is used in a passive, rather than an active, sense. *Harward v. Davenport*, 75 N. W. 487, 489, 105 Iowa, 592.

If one intentionally does a wrongful act, and knows at the time that it is wrongful, then he does it "wantonly," by which is meant without restraint and in reckless disregard of the rights of others. *Trauerman v. Lippincott*, 39 Mo. App. 478, 488.

As used in an instruction, in an action for killing a dog, that if the jury find that defendant intentionally and "wantonly" shot the dog they might render certain damages, etc., "wantonly" should be construed as synonymous with purposely and recklessly, or without proper regard for the rights of the plaintiff. *Wright v. Clark*, 50 Vt. 130, 136, 28 Am. Rep. 496.

"Wantonly," when used conjunctively with "recklessly," always means more than "negligently." The two words, used together, never import less than such conscious disregard of and indifference to the probable consequences of the act to which they refer as is the legal equivalent of willful misconduct and intentional wrong. *Highland Ave. & B. R. Co. v. Robinson*, 28 South. 28, 30, 125 Ala. 483.

Maliciously.

"Wantonly," as used in an instruction that, to entitle plaintiff to recover in an action for assault, the jury must find that he was wantonly assaulted, means willfully and intentionally, and not maliciously. *Brantz v. Marcus*, 73 Iowa, 64, 35 N. W. 115.

"Wantonly," in a criminal sense, implies that the act was done of a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others, careless of consequences, and yet without settled malice. *State v. Morgan*, 3 S. E. 927, 928, 98 N. C. 641; *State v. Gilligan*, 50 Atl. 844, 847, 23 R. I. 400.

Unlawfully distinguished.

The word "wantonly," required to be used in charging an offense, is not supplied in substance by the words "unlawfully and maliciously." The term "unlawfully" implies that an act is done or not done as the law allows or requires, but the term "wantonly" implies turpitude; that the act done is of willful, wicked purpose. *State v. Massey*, 2 S. E. 445, 446, 97 N. C. 465. See, also, *State v. Harwell*, 40 S. E. 48, 129 N. C. 550.

WANTONLY BEAT.

"Wantonly and cruelly beat," within the meaning of the statute making it criminal for any person to wantonly or cruelly beat, torture, kill, or maim any horse or other domestic animal, does not import that the beating is serious enough to kill the animal, although the crime is aggravated if such result follows. *Commonwealth v. Miller (Pa.)* 3 *Lanc. Law Rev.* 175.

WANTONNESS.

"Wantonness" is action without regard to the rights of others. *Everett v. Receivers of Richmond & D. R. Co.*, 27 S. E. 991, 992, 121 N. C. 519; *Welch v. Durand*, 36 Conn. 182, 184.

"Wantonness" is defined by Bouvier to be a licentious act of one man toward the person of another, without regard to his rights. *State v. Brigman*, 94 N. C. 888, 889.

"Wantonness" is reckless sport, willful, unrestrained action, or running immoderately into excess. *Cobb v. Bennett*, 75 Pa. (25 P. F. Smith) 328, 330, 15 Am. Rep. 752; *Kansas Pac. Ry. Co. v. Whipple*, 18 Pac. 730, 735, 39 Kan. 531.

That degree of recklessness, with a conscious knowledge of its probable harmful consequences, constitutes that wantonness which in law finds its equivalent in willful or intentional wrong. *Birmingham Southern Ry. Co. v. Powell*, 33 South. 875, 878, 136 Ala. 232.

"Wantonness," is defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent injury after the discovery of a peril, or under circumstances where he is charged with the knowledge of such peril and being conscious of the inevitable or probable results of such a failure. *Birmingham Ry. & Electric Co. v. Pinckard*, 26 South. 880, 881, 124 Ala. 372 (citing *Birmingham Ry. & Electric Co. v. Bowers*, 20 South. 345, 110 Ala. 328; *Railway Co. v. Lee*, 9 South. 230, 92 Ala. 262; *Louisville & N. R. Co. v. Webb*, 12 South. 374, 97 Ala. 308; *Highland Ave. & B. R. Co. v. Sampson*, 8 South. 778, 91 Ala. 560; *Kansas City, M. & B. Ry. Co. v. Crocker*, 11 South. 262, 95 Ala. 412; *Louisville & N. R.*

Co. v. Markee, 15 South. 511, 103 Ala. 160, 49 Am. St. Rep. 21).

In popular use "wantonness" is a stronger term than mere or ordinary negligence. *Kansas Pac. Ry. Co. v. Whipple*, 18 Pac. 730, 735, 39 Kan. 531.

"Wantonness," as authorizing exemplary damages, does not mean necessarily malice, but a reckless disregard of the rights of others. *Western Union Telegraph Co. v. Lawson*, 72 Pac. 283, 284, 66 Kan. 660.

WANTS.

See "Artificial Wants"; "Natural Want."

The term "wants," as used in a conveyance in trust for the support of the grantors during their lives, and, in case the income should prove insufficient to supply the wants and necessities of the grantors, the trustee should sell or mortgage a portion or all of the real estate for that purpose, includes both shelter and occupation. *Taylor's Appeal* (Pa.) 11 Atl. 307, 310.

WAR.

See "Civil War"; "Imperfect War"; "Mixed War"; "Perfect War"; "Private War"; "Public War"; "Solemn War."

"War," in its legal sense, has been aptly defined to be "the state of nations among whom there is an interruption of all pacific relations and a general contestation of arms authorized by the sovereign." There can be no war by its government of which the court can take judicial knowledge until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with the war-making power. War does not exist merely on the suspension of the usual relations of peace. Commerce may be interdicted without producing it. Reprisals and embargoes are forcible measures of redress, but do not per se constitute war. Hostile attacks and armed invasions of the territory or jurisdiction of a nation, accompanied by the destruction of life and property, by officers acting under the sanction and authority of their governments, however great and flagrant provocations to war, are often atoned for and adjusted without its ensuing. *Bishop v. Jones*, 28 Tex. 294, 319.

Vattel lays it down (Lib. 3, p. 267, c. 1, § 1) that "war is that state in which a nation procures its rights by force of arms." *Robson v. Wall* (S. C.) 2 Nott & McC. 497, 501, 10 Am. Dec. 623.

War is an armed contest between different states on a question of public right.

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Brown v. Hiatt (U. S.) 4 Fed. Cas. 384, 388 (citing Bluntschli's Code Internat. Law, 270).

War is the exercise of force by bodies politic against each other for the purpose of coercion. *Lewis v. Ludwick*, 46 Tenn. (6 Cold.) 368, 373, 98 Am. Dec. 454.

A "time of war," as defined by Lord Coke, is when by invasion, insurrection, rebellions, or such like the peaceable course of justice is disturbed and stopped, so that the courts be, as it were, shut up. *Skeen v. Monkeimer*, 21 Ind. 1, 3.

"War" has been defined to be that state in which a nation prosecutes its right by force. Parties belligerent in a war are independent nations, but it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. War may exist where one of the belligerents claims sovereign rights against the other. Where the parties in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. It is none the less a civil war because one side may call it an insurrection. *Prize Cases*, 67 U. S. (2 Black) 635, 666, 17 L. Ed. 459; *The Chapman* (U. S.) 5 Fed. Cas. 471, 475; *Hubbard v. Harnden Express Co.*, 10 R. I. 244, 249.

As used in an insurance policy, which provided that there should be no liability on the part of the insurer in case of "death from any of the casualties or consequences of war or rebellion" or other belligerent forces, such phrase meant death as a consequence of war or rebellion carried on by authority of some de facto government; and hence, where the insured, while engaged in building a bridge under the direction of the military authorities of the United States about 30 miles from the rear of the Federal army and still further from the Confederate forces, was killed by two of a party of men not in uniform, the insurer was liable. *Welts v. Connecticut Mut. Life Ins. Co.*, 48 N. Y. 34, 40, 8 Am. Rep. 518.

War means and intends the destruction of life and property. *The Ambrose Light* (U. S.) 25 Fed. 408, 412, 427.

A charter party by which, in case of war having commenced previous to and continuing on the ship's arrival at Constantinople, the merchant was bound to load the ship at that port at a reduced rate of freight, meant such a war as would render the voyage of an English ship from that port unlawful, and which without this clause would have dissolved the contract. It cannot extend to any war in any part of the world, nor even to a war that would render the adventure more perilous and probably raise the

rate of insurance. *Avery v. Bowden*, 5 Bl. & Bl. 714, 724.

Every contention by force between two nations in external matters under authority of their respective governments is war. If it be declared in form, it is called "solemn," and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under general authority, and all the rights and consequences of war attach to their condition. But hostilities may exist between two nations, more confined in their nature and extent, being limited as to places, persons, and things; and this is more properly termed "imperfect war," because not solemn, and because those who are authorized to commit hostilities acted under special authority and can go no further than the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 38, 42, 1 L. Ed. 781.

WAR CLAIM.

A claim for cotton taken from a citizen during the war, so long as it remained in an unliquidated condition, was a "war claim"; but after it has been passed on by the commission, and adjudicated in the claimant's favor, it was no longer a "war claim." *Bodemueller v. United States* (U. S.) 39 Fed. 437, 438.

WAR DEBT.

Within the meaning of Ordinance No. 37 of the Convention of 1867, declaring the "war debt" of Alabama void, a war debt is a debt contracted to feed or provide for the support of the families of Confederate soldiers, as if contracted to feed and provide for the soldiers themselves. Such a debt can be held to have been contracted to aid and promote the Rebellion, and therefore contracted in violation of the laws and public policy of the United States. *Bibb v. Court of County Com'rs*, 44 Ala. 119, 121.

WAR RISK.

The term "war risk," in a charter party to which the United States government was a party, which provided that the marine risk should be borne by the owners and the war risk by the United States, was construed to mean some risk resulting directly or approximately at least from some act or operation of the public enemy. In *re Morgan* (U. S.) 5 Ct. Cl. 182, 189.

WARD.

As town, see "Town."

As township, see "Township."

The person over whom or over whose property a guardian is appointed is called his "ward." Civ. Code Cal. 1903, § 237; Rev. Codes N. D. 1899, § 2808; Civ. Code S. D. 1903, § 140; Civ. Code Mont. 1895, § 331; Rev. St. Okl. 1903, § 3809.

The use in the Penal Code of any word expressive of "relationship," "state," "condition," "office," or "trust," of any person, as the "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they," in reference thereto, includes both males and females. Pen. Code Tex. 1895, art. 22.

WARD CLERKS.

The words "ward clerks" may be construed to include clerks of election districts. Pub. St. R. I. 1852, p. 77, c. 24, § 8.

WARE.

See "Cabinet Ware."

Webster defines "ware" to be an article of merchandise, especially in the plural; goods. *Commonwealth v. Keller*, 9 Pa. Co. Ct. R. 253, 255.

"The word 'wares' is defined for the first time in Cotgrave's Dictionary of 1632 as merchandise, and in Phillip's New World of Words, as merchandise, or commodities; and this is the definition successively given to it down to the time of Johnson, showing that down to the middle of the last century it was regarded as having exactly the same meaning as merchandise; and, indeed, such seems to have been the understanding of Johnson, who defines it, commonly, something to be sold." *Passaic Mfg. Co. v. Hoffman* (N. Y.) 3 Daly, 495, 512.

The words "goods, wares, chattels, implements, fixtures, tools, and other personal property," in a chattel mortgage so describing the mortgaged property, is insufficient in failing to identify any particular property, so that it can be known as to what it is intended to apply. *Buskirk v. Cleveland* (N. Y.) 41 Barb. 610, 611.

The term "wares," as used in a lease providing that the lease shall be a lien on all goods, wares, and merchandise in and about such building, cannot be properly so construed as to include the horses, harnesses, and wagons employed in delivering the goods, kept in a barn about three blocks from the building. *Van Patten v. Leonard*, 8 N. W. 334, 337, 55 Iowa, 520.

WAREHOUSE.

See "Bonded Warehouse"; "Distillery Warehouse"; "Public Warehouse."

A warehouse is a building in which goods are stored or deposited. *State v. Huffman*, 37 S. W. 797, 798, 136 Mo. 58.

"Warehouse" is defined as a building or place adapted to the reception and storage of goods and merchandise; but the kind of goods, produce, or commodity for which it is kept is not within the intentment of such definition. *State v. Koshland*, 35 Pac. 32, 34, 25 Or. 178.

"Warehouse" is a house in which wares or goods are kept; a storehouse; "a store for the sale of goods at wholesale; also, often, a large retail establishment." Where an indictment charges one with committing a burglary and larceny in a storehouse, and the evidence shows that it was a warehouse, there is no variance; the two terms being synonymous. *State v. Sprague*, 50 S. W. 901, 903, 149 Mo. 409.

"Warehouse," in the sense in which the word is used in relation to the seizure of property deposited in a warehouse by distress for rent, is a building or an apartment in a building used and appropriated by the occupant, not for the deposit and safe-keeping or selling of his own goods, but for the purpose of storing the goods of others placed there in the regular course of commercial dealing and trade, to be again removed or reshipped. *Owen v. Boyle*, 22 Me. (9 Shep.) 47, 60, 64.

A "warehouse" is a building in which any kind of goods, wares, or merchandise is kept and stored. In a more limited sense it is the building or place in which a warehouseman deposits the goods of others in the course of his business, but in common discourse it is applied to buildings used for the temporary storage of merchandise before it is put into market for sale, or put in the course of transportation by sea or land to another place, though the buildings may not belong to a warehouseman, but to the owners of the goods. Such are the buildings in which manufacturers keep their goods for a time before they put them into market for sale or send them abroad. *State v. Wilson*, 47 N. H. 101, 104.

A house used exclusively for storing goods is a "warehouse," within the meaning of Crimes Act March 7, 1835, § 12, making it an indictable offense to burn a warehouse. *Allen v. State*, 10 Ohio St. 287, 304.

"Warehouse," as used in Ky. St. § 1164, providing for the punishment of any person who shall break a "warehouse" with intent to steal therefrom, means any house not an

office or a shop, or a room on a steam or other boat, in which goods, wares, and merchandise are usually deposited for safe-keeping or for sale. *Hunter v. Commonwealth* (Ky.) 48 S. W. 1077; *Ray v. Commonwealth* (Ky.) 12 Bush, 397, 398.

The word "warehouse" is sometimes used in a very strict sense, as a somewhat technical term, in commercial language, and it is not infrequently in law confined to this restrictive sense; but the word "warehouse" is one of much more comprehensive import. A house used exclusively for storing goods is a warehouse, within the meaning of Crimes Act March 7, 1835, making it an offense to procure another to burn a warehouse, although the building had been constructed and formerly used for another purpose. *Allen v. State*, 10 Ohio St. 287, 304.

The word "warehouse," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry with intent to commit a felony of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any warehouse, without regard whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

On trial of a mill company's manager for shipping wheat stored in the company's warehouse without written assent of the holder of the receipt therefor, it appeared that according to its usual course of business, known to the person whose wheat was shipped, all wheat received became a part of the consumable stock of the mill, was manufactured into flour and other mill products, and was sold; that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat; that in the former case no storage was charged, but in the latter a charge of 8 cents a bushel was made. Held, that the company was not engaged in the warehouse business, and the wheat was not received for storage, within Hill's Ann. Laws, § 4201 et seq. *State v. Stockman*, 46 Pac. 851, 852, 30 Or. 86.

Bank.

A banking house is a "store, shop, or warehouse," within the meaning of St. 1854, p. 812, making it a crime to break and enter in the night season a store, shop, or warehouse of another, wherein goods, wares, or merchandise are deposited, with intent to commit theft. *Wilson v. State*, 24 Conn. 57, 70.

Buggy or toolhouse.

A warehouse is a storehouse for goods, and includes a buggy house, in which goods, wares, and merchandise and other valuable things are kept and deposited. *State v. Garrison*, 34 Pac. 751, 52 Kan. 180.

A building 21 feet by 15, placed on a market garden, and used for storing the tools and agricultural implements and seeds and manures employed in the garden, will not be deemed a "warehouse," nor a granary, within the meaning of the New Hampshire statute punishing as a distinct offense stealing in a warehouse or granary after entering in the nighttime. *State v. Wilson*, 47 N. H. 101, 104.

A granary, built and used for keeping and preserving farm utensils, etc., is a warehouse. *Ray v. Commonwealth*, 75 Ky. (12 Bush) 397, 398.

A building used only by the owner in storing therein the tools and materials used by him in his personal business is a "warehouse," within the meaning of Pub. St. c. 203, §§ 2, 4, providing punishments for whoever shall burn a warehouse. *Commonwealth v. Uhrig*, 45 N. E. 1047, 1048, 167 Mass. 420.

Depot.

In its popular acceptance, "warehouse" signifies an apartment or building for the temporary reception and storing of goods and merchandise. *Lynch v. State* (Ala.) 7 South, 829; *Bishop, Stat. Crimes*, § 293. Hence evidence that money taken from a safe in an office in a building one room of which is used for storage of freight, two for waiting rooms, and one for the office, was admissible under a charge for stealing money from a warehouse. *Andrews v. State*, 26 South, 522, 123 Ala. 42.

A railroad depot is a "warehouse," within Gen. St. c. 113, § 7, relating to the breaking and entering of warehouses in the nighttime with intent to commit larceny or burglary. *State v. Bishop*, 51 Vt. 287, 290, 31 Am. Rep. 690.

Floating dock.

A float belonging to barge owners, which was kept in the basin of a river for the purpose of receiving goods brought by their barges and transferring them to canal boats, which came alongside, is not a "warehouse." *Goold v. Chapin* (N. Y.) 10 Barb. 612, 616.

Inclosure.

"Warehouse," as used in Code Ala. 1886, § 3789, making it larceny to steal from a warehouse, implies an inclosure of some sort, some kind of structural barrier to the ingress of the public, designed to afford protection to the goods deposited therein and to

contribute to their safe-keeping; and a trunk near the door of a baggage room, on a platform covered by the same roof, but not inclosed, which is used as a common passageway by all going about the depot, is not in a warehouse. *Lynch v. State*, 7 South, 829, 830, 89 Ala. 18.

A covered structure used for storing cotton bales, one side and end of which were planked up and the other left open, so that wagons could drive under to load and unload, which, together with two acres of land connected with it, was inclosed by a plank fence nine feet high, the gates of which were kept locked, constitutes a "warehouse," within Rev. Code, § 3707, providing that any person who commits the crime of larceny in any dwelling house, storehouse, warehouse, or steamboat shall be punished as if he were guilty of grand larceny. *Hagan v. State*, 52 Ala. 373, 374.

St. 2 Wm. IV, c. 45, § 27, conferring the right of voting upon one who occupies as owner or tenant any house, warehouse, counting house, shop, or other building, should be construed to include a shed closed on two sides, having a roof, and used for the purposes connected with the occupation of the wharf, and which was also used by a certain person as a place of deposit for goods. *Watson v. Cotton*, 5 Man., G. & S. 50, 53.

Livery stable.

A livery stable, in which bridles, bugles, and farming implements are kept, is a storehouse or warehouse, within the meaning of the statute relating to burglary. *Webb v. Commonwealth* (Ky.) 35 S. W. 1038, 1039.

Opera house.

An opera house, used for the storage of stage properties between occasions when it is used for entertainments, is a warehouse. *Hunter v. Commonwealth* (Ky.) 48 S. W. 1077.

Room in cellar.

A small room, forming part of a cellar, in which a few jugs of wine are kept for family consumption, is not a "warehouse," within the meaning of Ky. St. § 1164, providing a penalty for breaking a warehouse with intent to steal. *Mason v. Commonwealth*, 41 S. W. 305, 101 Ky. 397.

WAREHOUSE RECEIPT.

As negotiable instrument, see "Negotiable Instrument."

A "warehouse receipt" is a receipt issued by a warehouseman for goods deposited in his warehouse. It need not be in any particular form, but it usually, after describing the property, contains an agreement on the

part of the warehouseman to redeliver the property on demand to the bailor or his order. *Merchants' Warehouse Co. v. McClain* (U. S.) 112 Fed. 787, 789.

A warehouse receipt is a written simple contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay the compensation for that service; and nothing short of the delivery of the identical goods received in fulfillment of the contract discharges the obligation or amounts to a performance, and in the absence of fraud or misrepresentation or negligence in giving the receipt nothing more than this can under any circumstances be demanded of the warehouseman, unless he has failed to properly care for and store the goods. *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 485, 486, 9 Am. Rep. 603.

A warehouse receipt is strictly but the written evidence of a contract between the depositor of grain and the warehouseman. It is an acknowledgment by the latter that he has received and holds in store for the former the amount and description of grain named in the receipt, and from this acknowledgment the law imposes certain duties upon the warehouseman, which become as much a part of the contract as if written in the receipt. *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281, 293.

The phrase "warehouse receipts given for any goods stored or deposited with any warehouseman," as used in a statute (Laws 1858, c. 326, § 6) making such receipts transferable by indorsement, and providing that any "person to whom they may be so transferred shall be deemed the owner of the goods therein specified, so far as to give validity to any pledge, lien, or transfer made by such person," was held to mean receipts given for goods so stored or deposited by any person having the title thereto, real or apparent, or authority from such other person therefor. "This section of the act proceeds upon the assumption that the receipt is so issued. Any other consideration would enable warehousemen to issue receipts for goods known by them to be stolen, and so convey title to them, or even thus to permit larceny, and by issuing receipts for the stolen property defraud the plundered owner of all title to and power of reclaiming it." *Collins v. Ralli* (N. Y.) 20 Hun, 246, 255 (quoted and approved in *Commercial Bank of Selma v. Hurt*, 12 South. 568, 570, 99 Ala. 130, 19 L. R. A. 701, 42 Am. St. Rep. 38).

"Warehouse receipts," in the commercial world, have a well-understood meaning, and, when indorsed and delivered, the transfer of the goods or chattels as therein named, as do bills of sale. When the warehouseman issues a receipt, he puts it in the power of the holder to induce others to believe that the property represented by it can be sold by him, and when one thus receives a ware-

house receipt, and indorses and delivers it, he transfers that right to the one thus receiving it. *Theis v. Canmann* (Ky.) 59 S. W. 1093.

A warehouse receipt is a document issued by warehousemen who have in store quantities of grain, and each one shows the receipt and holding of so much grain as it represents. By operation of law the transfer of a warehouse receipt is a delivery of the grain it represents. *Edwards v. Hoeflinghoff* (U. S.) 38 Fed. 635, 641.

A warehouseman's receipt for particular property may be used in commercial transactions as the representative of and substitute for property which has been deposited with him, and the delivery of the property described in such receipt may be affected by the delivery of the receipt; but the delivery of a so-called wharfinger's receipt, which represents nothing in his possession, is not a symbolic delivery of anything, and consequently could not form a good basis for a pledge of such property, though subsequently the property was delivered to the wharfinger. *Commercial Bank v. Flowers*, 42 S. E. 474, 475, 116 Ga. 45.

Receipt of bonded warehouse.

A warehouse keeper's receipt, within the meaning of the New York factors act of 1830, which provides that every factor or other agent, intrusted with the possession of any warehouse keeper's receipt for the delivery of merchandise, shall be deemed the true owner for the purpose of sales, means the receipt of the keeper of a private warehouse, in which the person named in the receipt has deposited the goods for safe-keeping, and by its terms binds such warehouse keeper, upon the surrender of the receipt, to deliver the goods to the bearer of it, or to the holder of it, if duly indorsed to him. It does not include such a receipt as the keeper of a bonded warehouse, on receiving goods for storage therein on which the duties are unpaid, is authorized to give by the acts of Congress. *Bonito v. Mosquera*, 15 N. Y. Super. Ct. (2 Bosw.) 401, 444.

In a statute (Factor's Act 1863, c. 91), providing that warehouse receipts may be transferred by delivery, with or without indorsement, and that the transferee shall be deemed to be the owner of the goods, etc., the term "warehouse receipt" is to be understood as applying to private warehouses, and not merely to custom houses or bonded warehouses. *Price v. Wisconsin Marine & Fire Ins. Co.*, 43 Wis. 267, 275.

By the custom of the trade, whisky and rum are sold or hypothecated by the execution and delivery of certificates containing a serial number of the barrels, the date when bonded, and the gauge of the contents thereof, attested by the United States gauger,

which certificates pass from hand to hand by indorsement, and are called on their face "warehouse receipts." *Miller v. Browarsky*, 18 Atl. 643, 130 Pa. 372.

WAREHOUSEMAN.

"Warehouseman" is defined as the owner of a warehouse, who as a business and for hire keeps and stores the goods of others; a person who receives goods and merchandise to be stored in his warehouse for hire. *Franklin Nat. Bank v. Whitehead*, 49 N. E. 592, 595, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302.

A warehouseman is one who receives and stores goods as a business for compensation. *Bucher v. Commonwealth* (Pa.) 2 Kulp, 476, 480.

The term "warehouseman" includes a person who receives goods in his own store, standing upon his own wharf, for the purpose of forwarding them. *Bush v. Miller* (N. Y.) 13 Barb. 481, 488.

Warehousemen are of the class of bailees known as "paid agents," exercising private employments, whose liability and relation is essentially different from that of common carriers. Their duty is to bring to the business in which they are employed reasonable skill and diligence, and they are answerable only for ordinary negligence. *Moore v. City of Mobile* (Ala.) 1 Stew. 284; *Hatchett v. Gibson*, 13 Ala. 587; *Gibson v. Hatchett*, 24 Ala. 201; *Jones v. Same*, 14 Ala. 743. As they do not exercise a public employment, and as they are at liberty to select their own customers, to accept only such business or services as they may choose, and to fix the measure of compensation to be paid for their services, they have the right by special contract to enlarge or narrow their liability, as in the absence of contract it is defined by law. *Alexander v. Greene* (N. Y.) 3 Hill, 9. The only limitation upon the powers of such bailee, to protect himself against loss occurring in the course of his employment, seems to be that he shall not stipulate for immunity from responsibility for his own fraud. For the law will not tolerate such an indecency and immorality as that a man shall contract to be safely dishonest. It therefore declares all such contracts utterly void, and holds the bailee liable in the same manner and to the same extent as if no contract ever existed. *Seals v. Edmondson*, 71 Ala. 509, 511, 512 (citing *Story*, Bailm. § 32).

"Warehouseman," as used in Act Sept. 24, 1866 (P. L. 1867, p. 1363), relating to receipts for goods deposited with a warehouseman, wharfinger, or other person, should be construed in its ordinary signification of one who carries on the business of receiving and keeping goods on storage for the owners for compensation or profit. *Tradesmen's Nat.*

Bank v. Thomas Kent Mfg. Co., 40 Atl. 1018, 186 Pa. 556, 65 Am. St. Rep. 876; *Bucher v. Commonwealth*, 103 Pa. 528, 534.

A warehouseman is a depositary of goods for hire. *Schmidt v. Blood* (N. Y.) 9 Wend. 268, 269, 270, 24 Am. Dec. 143.

Const. 1871, art. 13, § 1, declares that all elevators or storehouses where grain or other property is stored for a compensation are warehouses. Held, that one who was operating an elevator in which grain was stored for compensation, though the receipt given by him to the owner of the grain was not in the form adopted by those acting under the warehouse law, was a warehouseman. *National Bank of Pontiac v. Langan*, 28 Ill. App. 401, 406.

WAREHOUSING.

"Warehousing" is a privilege given by the statutes, by which, in lieu of compelling the importer to make immediate payment of his debt, he is permitted to postpone payment until he withdraws the merchandise from the warehouse for consumption. *Mosie v. Bidwell* (U. S.) 119 Fed. 490, 481.

WARFARE.

See "Maritime Warfare."

WARM ROLLING.

A claim for a patent for a new food product from maize, which includes hulling, granulating, and steaming, without cooking, and then pressing and drying the particles by "warm rolling," so as to reduce them to dry, hard flakes, does not disclose that such a degree of heat is to be applied or developed between the rolls as to convert starch into dextrine; nor do the words show that the invention consists in so adjusting and crowding the rolls together as to develop by contact the necessary heat. *Cerealine Mfg. Co. v. Bates* (U. S.) 77 Fed. 970, 975.

WARNING—WARNED.

"Warning," as used in Code, § 4419, providing for a prosecution for trespass after warning, implies notice, and notice brought home to the knowledge of the party to be affected by it. Actual knowledge, not constructive notice, is what the law exacts. Without such knowledge or actual notice, there can be no criminality. To constitute written notices posted at public places, not on the land, but in the neighborhood of it, warning, the notices must be carried home to the defendant. *Owens v. State*, 74 Ala. 401, 404.

The word "warned," as applied to notice of a meeting, according to its common use

and acceptance, implies that notice had been given. *Perry v. Inhabitants of Dover*, 29 Mass. (12 Pick.) 206, 211.

WARRANT.

See "Search Warrant."

To collect taxes as process, see "Process."

A "warrant" is an order by which the drawer authorizes one person to pay a particular sum of money. *Shawnee County Com'rs v. Carter*, 2 Kan. 115, 116.

Whatever may be the definition of the word "warrant" given by lexicographers, a lawyer's idea of the thing is a writing from competent authority, in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damages if he does. *People v. Wood*, 71 N. Y. 371, 376.

The warrant for a town meeting "is, as its name imports, a warrant or authority under which such meeting is held." *Commonwealth v. Smith*, 132 Mass. 289, 295.

A "warrant for the delivery of goods" is given when the person has a right and warrants the person who has the goods to deliver them as far as he is concerned. An "order" is given when the party has a right to have the goods delivered. A "request" is given when the maker of it has no interest in the goods at all. *Reg. v. Illidge*, 2 Car. & K. 871, 874.

In conveyances or sales.

The words "convey and warrant" comprehend and express all the covenants of warranty as fully as if they were written out at full length. *Jackson v. Green*, 112 Ind. 341, 342, 14 N. E. 89.

Under the express provision of Rev. St. c. 30, § 13, the words "convey and warrant" in a deed amount to the conveyance in fee simple. *Palmer v. Cook*, 42 N. E. 796, 159 Ill. 300, 50 Am. St. Rep. 165.

As used in a deed providing that the grantor conveyed and warranted unto the grantee the property conveyed, the expression "convey and warrant" is to be construed as containing a covenant not only of title and seisin, and against incumbrances, but also for quiet enjoyment; and where the original grantor either had the title or was in possession under claim of title, such covenant is in futuro and runs with the land, and binds the grantor himself, and his heirs and personal representatives, to the grantee, his heirs and assigns, that the grantor is lawfully seised of the premises, has good right to convey the same, and guarantees possession thereof, that the same are free

from incumbrances, and that he will warrant and defend the title to the same against all lawful claims. *Worley v. Hineman*, 33 N. E. 260, 261, 6 Ind. App. 240.

Under the statute of Indiana, a deed containing the words "conveys and warrants" shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor, for himself and his heirs and personal representatives, and he is lawfully seised of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims. Rev. St. 1881, § 2927. Each one of these covenants is contained in the general warranty, the same as if they had been separately written in the deed. *Kent v. Cantrall*, 44 Ind. 452. In construing such a deed the court said: "It is thus seen that the deed in question contained, amongst other things, a covenant of general warranty, and this covenant, beyond all doubt, runs with the land." *Dehority v. Wright*, 101 Ind. 382, 383.

The words "convey and warrant," in a deed, operate to pass all the grantor's estate by virtue of legal implication only when there is nothing in the deed showing a contrary intent on the part of the grantor, and therefore the words in a deed reciting that, in consideration of a small cash payment and an agreement to furnish the grantor with support for life, she did convey and warrant to the grantee certain premises, "it being understood that possession of said property is to be given at my death," does not have such effect, but the deed must be construed as reserving a life estate to the grantor. *Hart v. Gardner*, 20 South. 877, 879, 74 Miss. 153.

The statutory form of mortgage, containing the word "warrant," carries with it all covenants of title. *Esker v. Heffernan*, 41 N. E. 1113, 1114, 159 Ill. 38.

A covenant of a deed which recites that the grantor "covenants, grants, and agrees" that he, "against all and every person or persons lawfully claiming or to claim the same or any part thereof, shall and will warrant and defend," means that the grantor warrants a quiet enjoyment, and is not an assurance against incumbrances. *Leddy v. Enos*, 33 Pac. 508, 509, 6 Wash. 247.

Of municipal corporations.

See "County Warrant."

All outstanding warrants, see "All."

"A warrant, under our statute, is a promise to pay it in its order of issue when money applicable to it comes into the treasury, and its maturity, by analogy with a note, is the time when the treasurer gives notice

of his readiness to pay it and stops the interest." *Savings Bank & Trust Co. v. Gelbach*, 36 Pac. 467, 468, 8 Wash. 497; *Potter v. City of New Whatcom*, 56 Pac. 394, 20 Wash. 589, 72 Am. St. Rep. 135.

"Warrants" of a municipal corporation are generally orders payable when funds are found. They are issued for the payment of general municipal debts and expenses, subject to a rule providing that they shall be paid in the order of presentation; the time of presentation to be indorsed by the treasurer on the warrants. *Shelley v. St. Charles County Court* (U. S.) 21 Fed. 699, 701.

The word "warrant," as used in an indictment charging a person with forging a county warrant, like the word "check," imports a writing. *State v. Fenly*, 18 Mo. 445, 454.

A warrant is lacking in one of the qualities which make notes, bills, checks, etc., commercial paper, viz., negotiability. This lack is due, however, entirely to the fact that it is open to all the defenses which might have been made to the claim on which it was founded. In *Allison v. Juniata County*, 50 Pa. (14 Wright) 351, following *Dyer v. Covington Tp.*, 19 Pa. (7 Harris) 200, it was held that warrants or county orders were not even contracts on which a suit could be maintained; but this court in *Seymour v. City of Spokane*, 6 Wash. 362, 33 Pac. 832, maintained a contrary doctrine, and it cannot now be held that a warrant is not a contract to pay money. *Union Sav. Bank & Trust Co. v. Gelbach*, 36 Pac. 467, 468, 8 Wash. 497, 24 L. R. A. 359.

Minutes of the meeting of village auditors, showing the audit of plaintiff's claim, are not a warrant of the auditors. They are not addressed to or contemplative of the receiver of taxes. They are in no sense meant or operative as a voucher for him, or a direction or authority to him to pay. *People v. Wood*, 71 N. Y. 371, 376.

Same—As bill of credit.

See "Bill of Credit."

Same—Bonds distinguished.

Warrants are general orders, payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation; the time of presentation to be indorsed by the treasurer on the warrants. They are thus distinguished from bonds, which are obligations payable at a definite time, running through a series of years, and payable when the time of their maturity arrives, independent of any presentation. *Shelley v. St. Charles County Court* (U. S.) 21 Fed. 699, 701.

Same—As debts.

Warrants drawn upon designated funds in anticipation of uncollected revenue have

always been regarded in this state as "debts" in only a restricted sense. In re *State Warrants*, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; *Western Town Lot Co. v. Lane*, 7 S. D. 1, 62 N. W. 982; *Shannon v. City of Huron*, 9 S. D. 356, 69 N. W. 598; *Lawrence County v. Meade County*, 10 S. D. 175, 72 N. W. 405. They are not outstanding debts, so as to authorize the creation of a sinking fund for their payment. *Chicago & N. W. Ry. Co. v. Faulk County*, 90 N. W. 149, 15 S. D. 501.

Same—As draft or negotiable instrument.

See "Draft"; "Negotiable Instrument."

As money.

See "Money."

As written instrument.

See "Written Instrument."

In practice.

The term "warrant" imports no more than the process or writ in the case, civil or criminal. *Cannon v. Phillips*, 34 Tenn. (2 Sneed) 185, 190.

The Bill of Rights, declaring that "no warrants can issue but upon probable cause supported by oath," refers only to criminal process, and has no application to arrests and civil suits. *Walker v. Cruikshank* (N. Y.) 2 Hill, 296, 300.

The term "warrant," as used in Const. art. 1, § 9, prohibiting the issuance of a warrant without cause being shown therefor on oath or information, means "an authority for the arrest of a person upon a criminal charge, with a view to his commitment and trial thereof. All process for the arrest of a party is not included in the word 'warrant' as used in the Constitution. A *capias* or writ of arrest in a civil action is not a warrant in that sense, and it is issued at common law as a matter of course without oath. The arrest of a person upon a charge of insanity, for the purpose of his commitment or confinement in an asylum, is, strictly speaking, not an arrest in a civil or criminal proceeding, but is one *sui generis*." *Sprigg v. Stump* (U. S.) 6 Fed. 207, 214.

"Warrant," is a term of wide significance, and may be applied to process in civil, as well as in criminal, cases; but as a general rule its use is restricted to such writs as authorize the taking of the body of the defendant in answer to a criminal charge, and such is the sense in which it would be understood by one not learned in the law, where there was nothing in the context to show the contrary; and a publication stating that plaintiff had been arrested on a warrant, in a suit to recover money, would be calculated to produce the impression that in the transaction there was some criminal con-

duct. *Belo & Co. v. Smith* (Tex.) 42 S. W. 850, 851, 91 Tex. 221.

The term "writ," as used in the Connecticut statutes, generally means process in a civil suit, while that in a criminal case is usually denominated a "warrant." *Stoddard v. Couch*, 23 Conn. 238, 240.

A warrant is both the process to procure the defendant's appearance, and is in the place of the declaration, to inform him of the nature of the demand. It need not contain any special day or place of return, unless so provided by statute; nor is a seal requisite thereto, except in the case of the state's warrant on a criminal charge, which at common law requires a seal. *Duffy v. Averitt*, 27 N. C. 455, 457.

There is no settled rule at common law invalidating warrants not under seal, unless the magistrate issuing the warrant had a seal of office or a seal as required by statute; and a warrant of the commissioner of the United States, not having a seal of office and not being required to affix a seal thereto, cannot be held void for its omission. *Starr v. United States*, 14 Sup. Ct. 919, 920, 153 U. S. 614, 38 L. Ed. 841.

A "warrant for a fine or penalty" imposed for a violation of a town ordinance is civil in character, being in the nature of an action of debt; and hence a plea of former jeopardy is of no avail. *City of Memphis v. Smythe*, 58 S. W. 215, 104 Tenn. 702.

WARRANT CREDITORS.

"Warrant creditors" of a city are those that become creditors from the fact that the money is not on hand derived from the revenues to pay them when the debt is created. *Johnson v. City of New Orleans*, 15 South. 100, 101, 46 La. Ann. 714.

WARRANT IN DEED.

"Warrant in deed," in speaking of the commitment of a man by lawful warrant in deed, or commitment by lawful warrant in law, means a warrant in writing and under seal. *State v. Shaw*, 50 Atl. 863, 869, 73 Vt. 149.

WARRANT IN LAW.

See "Without Warrant of Law."

Lord Coke (2 Inst. 51, 52) says: "Process of law is twofold, viz., by the king's writ or by due proceeding, and warrant either in deed or in law without writ." By "warrant in law" he comprehends any authority of law, as is plain by the instances which he gives. He adds: "If treason or felony be done, and one hath just cause of suspicion, this is a good cause and war-

rant in law to arrest any man. A watchman may arrest a night-walker by warrant in law." And he concludes by saying that "a commitment by lawful warrant, either in deed or in law, is accounted in law due process or proceeding in law." *People v. Nevins* (N. Y.) 1 Hill, 154, 171.

"Warrant in law," in speaking of the commitment of a man by lawful warrant in deed or by lawful warrant in law, is understood to apply to a commitment by authority of law without a written warrant. *State v. Shaw*, 50 Atl. 863, 869, 73 Vt. 149.

WARRANT OF ARREST.

See "Legal Warrant."

As process, see "Process."

A "warrant of arrest" is defined by *Crim. Code Ala. § 4259*, as an order in writing, issued and signed by a magistrate, stating the substance of a complaint, directed to a proper officer, and commanding him to arrest the defendant; and such warrant must designate the name of the defendant, if known, but, if it states that the name is unknown to the magistrate, then no name must be inserted. He must also state the offense by name, so that it can be clearly inferred. The county in which it is issued must appear from some part of the warrant, and the warrant must be signed by the magistrate with his name and initials of office, and the same must appear in some way in the warrant. It must be directed to any local officer in the state; but, if executed by any officer who has power to execute, it is valid, without regard to the direction. A warrant issued by a justice of the peace for the arrest of a defendant for larceny, of which office the justice has jurisdiction, which is regular and sufficient on its face, though it does not state in which capacity the justice acted in this instance, is sufficient as a protection to the officer serving it, and no error or irregularity in the previous proceedings can affect it or excuse defendant in killing the officer, or one called to his assistance, from the crime of murder. *Brown v. State*, 20 South. 103, 109, 109 Ala. 70.

A warrant is sufficient if it designates the offense by name or describes it, or if it employs terms from which the offense may be inferred. *Brown v. State*, 63 Ala. 97. Under *Code 1896, § 5253*, providing that a writ of arrest shall contain a statement of the offense charged by name, a writ of arrest reciting that accused was indicted for the offense of carrying a concealed pistol sufficiently designates the offense charged. *Spear v. State*, 25 South. 46, 48, 120 Ala. 351.

A warrant of arrest is a written order from a magistrate, directed to a peace officer or some other person specially named,

commanding him to take the body of the person accused of an offense, to be dealt with according to law. Code Cr. Proc. Tex. 1895, art. 253.

A warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, commanding the arrest of the defendant. Rev. St. Utah 1898, § 4616; Rev. St. Okl. 1903, § 5240.

A warrant of arrest is an order in writing in the name of the state, signed by a magistrate with his name of office, commanding the arrest of the defendant. Ann. Codes & St. Or. 1901, § 1586.

WARRANT OF ATTACHMENT.

A warrant of attachment is "a summary provisional remedy to take from a debtor the custody of his property, and, to support the remedy, the provisions of the statute in this respect must be substantially observed." An unqualified averment of facts of which it is not apparent that the deponent actually had, or from his situation probably had, personal knowledge, is insufficient to sustain an attachment. *Hoorman v. Climax Cycle Co.*, 40 N. Y. Supp. 1067, 17 Misc. Rep. 734.

A warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused in behalf of the people on the relation of the complainant. Code, § 2273; *People v. Grant* (N. Y.) 13 Civ. Proc. R. 305, 312.

WARRANT OF ATTORNEY.

A warrant of attorney is an instrument authorizing an attorney at law to appear in an action on behalf of the maker or to confess judgment against him. It differs from a power of attorney, which is an instrument by which the authority of an attorney in fact or private attorney is set forth. *Treat v. Tolman* (U. S.) 113 Fed. 892, 893, 51 C. C. A. 522.

WARRANT OF COMMITMENT.

As process, see "Process."

WARRANT OF DISTRESS.

A warrant of distress is nothing but a power of attorney. The bailiff or other person executing the warrant is only the agent or landlord. *Bagwell v. Jamison* (S. C.) Cheves, 249, 252.

A warrant of distress is a judicial writ in the nature of an execution, the final process of the law. *Inhabitants of Baileyville v. Lowell*, 20 Me. (2 App.) 178, 181.

WARRANT OF LAW.

Under Act 1866 (13 St. at Large, p. 408), declaring that if any person shall have gone into or shall hereafter go into possession of any land or tenement of another, without his consent or without warrant of law, it shall be lawful, etc., to oust him, etc., if there be such consent, there is "warrant of law." *Baldwin v. Cooley*, 1 S. C. (1 Rich.) 256, 260.

WARRANT OFFICER.

A warrant officer in the navy is an officer, within the meaning of the act of Congress of March 27, 1794, March 3, 1801, and April 21, 1806. *Johnson v. United States* (U. S.) 2 Ct. Cl. 167, 177.

WARRANTOR.

One who has contracted the obligation of warranty is called the "warrantor." *Flanders v. Sellye*, 105 U. S. 718, 726, 26 L. Ed. 1217 (citing Code Prac. La. art. 379).

WARRANTIA CHARTÆ.

The writ of warrantia chartæ also lay only for a tenant of the freehold, and was only used when voucher did not lie, because the tenant was not impleaded, or because he was impleaded in an action in which it was the policy of the law to prohibit delay, and therefore forbid the voucher, and it lay in such cases only because the voucher did not lie. Vin. Abr. tit. "Warrantia Chartæ," D. It was then supplementary to, and in lieu of, voucher. *Stout v. Jackson* (Va.) 2 Rand. 132, 142.

WARRANTY.

See "Affirmative Warranty"; "Express Warranty"; "Implied Warranty"; "Personal Warranty"; "Promissory Warranty"; "Special Warranty."

See "Covenant of Warranty"; "Breach of Warranty."

At common law, a warranty was the foundation of a voucher by a tenant when impleaded; and, if he lost the land, he might have judgment to recover of the guarantor other lands to the value. It is of feudal origin. According to 2 Bl. Comm. 801, warranties were introduced in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. The use of this covenant is superseded by the introduction of other personal covenants. In many, if not most, cases there is no occasion for resorting to the covenant of warranty. In some, however, it is the only express covenant inserted. *Townsend v. Morris* (N. Y.) 6 Cow. 123, 126.

The word "warrant" is defined as an assurance of title to property sold, and a stipulation by an express covenant that the title of the grantor shall be good and his possession undisturbed. *Black, Law Dict.* p. 1233. Indeed, it has been said to have been fully established as a principle by the best authority that the doctrine of estoppel applies to conveyances without warranty, where it appears by the deed that the parties intended to deal with and convey a title in fee simple. *Graham v. Meek*, 1 Or. 325. And if this is not true the estoppel certainly arises when the conveyance of the land is coupled with the warranty. *Hallyburton v. Slagle* (N. C.) 44 S. E. 655, 657, 132 N. C. 947.

The obligation which one contracts to defend another in some action which may be instituted is termed "warranty." *Flanders v. Sellye*, 105 U. S. 718, 726, 26 L. Ed. 1217 (citing Code Prac. La. art. 379).

"Warranty," in a deed, means protection of or indemnification for what is given. *Allison v. Allison*, 9 Tenn. (1 Yerg.) 16, 19.

A warranty in a deed does not enlarge a grant. It is a covenant of indemnity for a disturbance of it. *Babcock v. Wells* (R. I.) 54 Atl. 596, 598.

The term "warranty" usually implies a warranty of title, and, where the language of a contract provided for a conveyance by a good warranty deed and abstract of title, it was the matter of title that the parties had in mind. *People's Sav. Bank Co. v. Parisette*, 67 N. E. 896, 897, 68 Ohio St. 450, 96 Am. St. Rep. 672.

"Warrant," in a contract to warrant upon a conveyance of a freehold estate, was a technical term at common law, having its own peculiar signification, and without the use of which the contract imported by that term could not be created, unless in cases in which the law implied the contract. The import of the word, when applied to freehold estates, was that the warrantor would upon voucher, or by judgment in a writ of *warrantia chartæ*, yield other lands and tenements to the value of those that shall be evicted by a former title. The contract to warrant has the same effect in all respects as if the party had contracted in the terms of this definition, if such a contract were allowed, and the specific execution of it could be enforced. *Stout v. Jackson* (Va.) 2 Rand. 132, 142 (citing Co. Litt. 365a, 366a, 389a).

Guaranty distinguished.

"Warranty" and "guaranty," being derivatives from the same root, are identical in signification and effect; the one usually, but not always, denoting a covenant in a conveyance, and the other denoting a parol promise. *Ayres v. Findley*, 1 Pa. (1 Barr) 501.

The term "warranty" is applied to a contract as to title, quality, or quantity of

something sold. A guaranty is held to be a contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party. A guaranty is perhaps always understood in its strict legal and commercial sense as a collateral warranty against some default or event in futuro, while a warranty is generally understood as an absolute undertaking in present. *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 169, 78 Am. Dec. 296.

In legal contemplation there is a wide difference between "warranty" and "guaranty." The term "warranty" is an engagement or understanding forming a part of the transaction. It is an absolute understanding or liability on the part of the warrantor, and the contract is void unless it is strictly and literally performed. "Guaranty," on the other hand, is a collateral promise to answer for the debt, default, or miscarriage of another. Consequently an instruction in a life insurance case that a "warranty means more than agreement, it means a guaranty," is erroneous. *Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 497, 20 Ind. App. 206.

In contracts of affreightment.

The term "warranty" imports an absolute undertaking that the fact is as represented, and it was the settled meaning of the term as implied in contracts of affreightments or of insurance that it is an undertaking by the shipowner, not only that he will exercise due diligence to have the vessel seaworthy, but that she shall really be so. It has long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless it is superseded by some expressed condition in the contract. *The Silvia* (U. S.) 68 Fed. 230, 232, 15 C. C. A. 362.

In insurance.

A contract of insurance in its essence is a mere promise to pay money on the happening of a specified loss or injury. In practice such happening is not the only condition on which the payment depends. The payment is usually made conditional on the truth of certain statements made by the applicant. The falsity of such statements prevents the liability of the insurer from taking effect. When such statements have this effect, they are called "warranties." A warranty may relate to an existing fact, or it may relate to the doing or not doing of some particular act in the future. A warranty is a stipulation in a contract adverse to the interest of the insured and in the interest of the insurer. *Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 36 N. E. 779, 781, 9 Ind. App. 443.

An express warranty, as applied to an application for insurance, is a stipulation in-

serted in a writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. *Arn. Ins.* 577. This definition is adopted by May and sustained by several adjudications in this country. *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 87 (Gil. 32, 36) (citing *May, Ins.* [2d Ed.] p. 179, § 156; *Angell, Ins.* § 140); *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251 (citing *Bac. Ben. Soc.* § 1940); *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 545, 35 Am. Dec. 92; *McKenzie v. Scottish Union & National Ins. Co.*, 44 Pac. 922, 924, 112 Cal. 548; *Home Life Ins. Co. v. Sibert*, 31 S. E. 519 (citing *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Virginia Fire & Marine Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191); *Petit v. German Ins. Co. (U. S.)* 98 Fed. 800, 802. The stipulation is considered to be on the face of the policy, although it may be written on the margin, or transversely, or on a subjoined paper referred to in the policy. A false statement in the application and physician's report, which is not referred to in the policy, is not a warranty, though it is agreed in the application and report that the statements therein are warranties. *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251; *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 87 (Gil. 32, 36); *Ætna Ins. Co. v. Simmons*, 69 N. W. 125, 133, 49 Neb. 811; *Ætna Life Ins. Co. v. Rehlaender (Neb.)* 94 N. W. 129, 132.

By warranty, as the term is used in the law of insurance, the insured stipulates for the absolute truth of the statement and the strict compliance with some promised line of conduct, upon penalty of a forfeiture of his right to recover in case of loss, should the statement made prove untrue or the course of conduct promised be unfulfilled. *Palatine Ins. Co. v. Brown (Tex.)* 34 S. W. 462, 465.

In insurance a warranty is a stipulation expressly set out, or by inference incorporated into the policy, whereby the assured agrees that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done. Its purpose is to define the limits of the obligation assumed by the insurer, and it is a condition which must be strictly complied with or literally fulfilled before the right to recover on the policy can accrue. *Providence Life Assur. Soc. v. Reutlinger*, 25 S. W. 835, 836, 58 Ark. 528.

A warranty in an insurance contract is a statement made therein by the assured which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statements be literally true. *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg.*

Co., 49 S. W. 222, 225, 92 Tex. 297 (citing *Goddard v. Ins. Co.*, 67 Tex. 69, 1 S. W. 906; *Bills v. Ins. Co.*, 87 Tex. 547, 29 S. W. 1036; *Moulor v. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447).

A "warranty," as used in a policy of insurance, is a part of the contract of insurance, and must be exactly and literally fulfilled. Where a representation is inserted in the policy, or where it is referred to in the policy as forming a part thereof, the representation becomes a warranty. Conditions annexed to a policy are likewise a part thereof, and are of the same effect as if incorporated in it. *Mers v. Franklin Ins. Co.*, 68 Mo. 127, 131.

A "warranty," as used in a contract of insurance, is a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent. It may be affirmative of some fact, or only promissory. It must be strictly complied with or literally fulfilled before the insured is entitled to recover on the policy. *Alabama Gold Life Ins. Co. v. Johnston*, 2 South. 125, 80 Ala. 467, 59 Am. Rep. 816.

A warranty in a policy of insurance is an express stipulation that something then exists, or has happened or been done, or shall happen or be done; and this must be literally and strictly complied with by the assured, whether the truth of the fact or the happening of the event be or be not material to the risk, or be or not connected with the cause of loss. It is a strict condition. Its effect is that the assured takes on himself the responsibility of the truth of the fact, or the happening or not of such contingency; and, unless the warranty be strictly complied with, the policy does not take effect. It is a condition precedent, and the assured is estopped from denying or asserting anything contrary to his express warranty. *Forbush v. Western Massachusetts Ins. Co.*, 70 Mass. (4 Gray) 337, 340.

The purpose of a "warranty" in an insurance policy is not to set a trap for the applicant, but to inform the company about important facts upon which the contract is based. When, therefore, a company is in actual possession of knowledge of a fact, and by turning to its own record can assure itself better than by the imperfect memory of an applicant, it is a perversion of the purpose of a warranty to allow it to avoid a contract. Where, therefore, an insurance company had notice at the time of the issuance of a policy that the applicant had been rejected by it, it could not set up the falsity of the statement in the application that he had not been rejected. *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 50 Atl. 834, 835, 23 R. L. 457, 57 L. R. A. 496, 91 Am. St. Rep. 643.

A warranty, in insurance, is a part of the contract evidenced by the policy, and a binding agreement that the facts stated are strictly true. *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497, 503 (Gil. 473, 481), 10 Am. Rep. 166.

Same—As a condition precedent.

A "warranty," in a policy of insurance, is a condition or contingency, and unless that be performed there is no contract. *Trench v. Chenango County Mut. Ins. Co.* (N. Y.) 7 Hill, 122, 124 (citing *De Hahn v. Hartley*, 1 Term R. 343); *Western Assur. Co. v. Redding* (U. S.) 68 Fed. 708, 714, 15 C. C. A. 619. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist, unless it is literally complied with. *Mackie v. Pleasants* (Pa.) 2 Bin. 363, 372. In contracts of insurance a warranty is regarded as very much like a condition precedent, which, if violated, voids the policy, and no recovery can thereafter be had thereon. *Day v. Orient Mut. Ins. Co.* (N. Y.) 1 Daly, 13, 17 (citing *Mead v. Northwestern Ins. Co.*, 7 N. Y. [3 Seld.] 530; *Duncan v. Sun Fire Ins. Co.* [N. Y.] 6 Wend. 488, 494, 22 Am. Dec. 539).

A warranty in an insurance policy is an agreement in the nature of a condition precedent, and, like that, it must be strictly complied with. *Boyd v. Insurance Co.*, 90 Tenn. 212, 215, 16 S. W. 470, 25 Am. St. Rep. 676.

In *American Popular Life Ins. Co. v. Day*, 39 N. J. Law (10 Vroom) 89, 23 Am. Rep. 198, in our court of last resort, "warranties" and "conditions" in insurance policies are treated as synonymous terms, as indeed they are. In *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law (15 Vroom) 220, 222, 43 Am. Rep. 365, it was declared in the same court that a promissory warranty had the nature of a condition precedent. That every inducing statement, made a warranty by a policy of life insurance, shall be true, is plainly a condition precedent to the insurer's liability under such policy. In *Eddy St. Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.* (U. S.) 8 Fed. Cas. 300, Clifford, J., said that in the law of insurance a warranty is a stipulation forming a part of the contract, and is construed as a condition; and in *Hearn v. Equitable Safety Ins. Co.* (U. S.) 11 Fed. Cas. 965, he reaffirmed that doctrine. In *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563, Harlan, J., said that, when warranted, the exact truth of statements in an application for insurance became a condition precedent to any binding contract; and he repeated the expression in *Moulter v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 468, 28 L. Ed. 447. See *Dimick v. Metropolitan Life Ins. Co.*, 51 Atl. 692, 694, 67 N. J. Law, 367.

May, in his work, states this proposition to be the law, and cites numerous authorities in support of his position. *May*, Ins. p. 179, § 156; *Petit v. German Ins. Co.* (U. S.) 98 Fed. 800, 802. See, also, *Mers v. Franklin Ins. Co.*, 68 Mo. 127, 131; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 582; *Virginia Fire & Marine Ins. Co. v. Morgan*, 18 S. E. 191, 192, 90 Va. 290; *Home Life Ins. Co. v. Sibert*, 31 S. E. 519, 96 Va. 403; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 615, 35 Am. Rep. 623; *Hendricks v. Commercial Ins. Co.* (N. Y.) 8 Johns. 1, 13; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 545, 35 Am. Dec. 92; *McKenzie v. Scottish Union & National Ins. Co.*, 44 Pac. 922, 924, 112 Cal. 548; *Palatine Ins. Co. v. Brown* (Tex.) 34 S. W. 462, 465.

A "warranty" in a policy of insurance is in the nature of a condition precedent, and devolves upon the insured in an action upon the policy the burden of averring performance in his pleading and proving it strictly by evidence. *American Credit Indemnity Co. v. Wood* (U. S.) 73 Fed. 81, 84, 19 C. C. A. 264.

Same—Materiality.

A warranty in insurance law is the assertion by the insured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted such assertion. *Aetna Life Ins. Co. v. Rehlaender* (Neb.) 94 N. W. 129, 132 (citing *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125).

A warranty in an application for an insurance policy must be strictly complied with, whether material or not. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 583, 44 Am. Rep. 177; *Virginia Fire & Marine Ins. Co. v. Morgan*, 18 S. E. 191, 90 Va. 290; *Home Life Ins. Co. v. Sibert*, 31 S. E. 519, 96 Va. 403.

A warranty in a policy of insurance is in the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact warranted. *Mers v. Franklin Ins. Co.*, 68 Mo. 127, 131.

It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so. *Providence Life Assur. Soc. v. Reutlinger*, 25 S. W. 835, 836, 58 Ark. 528.

"Whether the facts stated or the acts stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented or shall be promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause not proceeding from the insurer, the intervention of law or the act of God, the insured can have no claim. Indeed, one of the very objects of warranty is to preclude

all controversy about the materiality or immateriality of the statement." *Palatine Ins. Co. v. Brown* (Tex.) 34 S. W. 462, 465.

Warranties in the law of insurance are conditions precedent to a valid policy, whether such conditions are material or not, if the parties have regarded them as material and clearly intended them to be so treated. *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 615, 35 Am. Rep. 623; *Alabama Gold Life Ins. Co. v. Johnston*, 2 South. 125, 80 Ala. 467, 59 Am. Rep. 818.

Where the word "warranty" is used in a policy of insurance with reference to a requirement that the insured shall have stated in the survey a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, the term "warranty" is not to be construed in its strict literal sense as requiring that the survey should be absolutely true, but requires only that such statements as are material to the risk should be truthfully stated. *Lee v. Howard Fire Ins. Co.*, 65 Mass. (11 Cush.) 324, 328.

Same—Representations distinguished.

The essential difference between a "representation" and a "warranty" in a contract of insurance, when there is no statute touching the matter, is that a representation is a statement by the applicant to the insurer of information which the latter may desire in order to determine whether the risk will be written; the statement being no part of the contract, but only the inducement to make it, but a warranty becomes a part of the contract. *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 389. That is the difference between the two things, and the difference between the legal effect is that, if a representation turns out to be substantially true as to facts material to the risk, the policy will be upheld, though the representation was false in unessential particulars; but a warranty must be strictly true, and if it is false in any part, whether that part affects the risk or not, there can be no recovery on the contract. *McDermott v. Modern Woodmen of America*, 71 S. W. 833, 836, 97 Mo. App. 636.

A warranty as to any fact, which becomes an integral part of the basis of the contract, differs from a mere representation of such fact in this: It precludes any controversy as to the materiality of such fact, whereas a false representation is not ground for avoiding a contract, unless the party to whom it is made relies upon it and is actually induced by it to enter into an agreement or consent to terms disadvantageous to

him. *Selby v. Mutual Life Ins. Co.* (U. S.) 67 Fed. 490, 491.

A "warranty" in the law of insurance, differs from a representation in this: that the former is a stipulation inserted in writing on the face of the policy, or in another writing referred to and made a part of it, on the literal truth or fulfillment of which the validity of the entire contract depends. A representation is a verbal or written statement made by the insured to the underwriter before the subscription of the policy. *Cushman v. United States Life Ins. Co.* (N. Y.) 4 Hun, 783, 786 (citing *Pierce v. Empire Ins. Co.* [N. Y.] 62 Barb. 644).

"Warranty," in insurance law, is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion. "Representation," in insurance law, is also the assertion by the insured of some fact, but the validity of the policy does not depend upon the literal truth of the assertion. The falsity of a representation is a defense to a suit on the policy only when made of a fact material to the risk. Whether an assertion made by the insured of the existence of a fact is a warranty or representation is a question of law. Where an application for insurance is made a part of the insurance policy, the two are to be construed together for the purpose of ascertaining whether the contracting parties intended that statements and assertions made by the insured should be regarded as warranties or representations. If a doubt exists whether a statement made is a warranty or representation, it will be held a representation. Warranties are not to be created or extended by construction. In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties, and that the mind of each party consciously intended and consented that such should be the interpretation of his statements. *Aetna Ins. Co. v. Simmons*, 69 N. W. 125, 133, 49 Neb. 811.

In insurance a "representation" is a statement by the applicant to the insurer regarding a fact material to the proposed insurance, and it must be not only false, but fraudulent, to defeat the policy; while a warranty in the law of insurance is a binding agreement that the facts stated by the applicant are true, and is a part of the contract, a condition precedent to a recovery

upon it, and its falsity in any particular is fatal to an action on the policy. A representation is a mere declaration of a fact; but it is neither a condition precedent, nor a part of the contract, like a warranty. The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy. A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employé, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree by the statement itself and by the bond shall be the basis of the latter and a condition precedent to a recovery upon it, is of the nature of a "warranty," and not of a "representation," and, therefore, a failure to comply with the promise it contains is fatal to an action on the bond. *Rice v. Fidelity & Deposit Co. of Maryland* (U. S.) 103 Fed. 427, 430, 43 C. C. A. 270.

St. 1887, c. 214, § 21, providing that no misrepresentations made in the negotiation of a policy of insurance shall avoid the policy, unless the misrepresentation was fraudulently made or increased the risk, applies to warranties incorporated in the policy by reference to the application. *White v. Provident Sav. Life Assur. Soc.*, 39 N. E. 771, 772, 163 Mass. 108, 27 L. R. A. 398.

Where the word "warranty" is used in an application for insurance as applied to the answers of the applicant, but the policy on its face characterizes the statements of the insured as representations, the doubt as to the intent of the parties must, according to the settled doctrines of the law of insurance, be resolved against the party whose language it becomes necessary to interpret, and that construction must prevail which protects the insured from the obligations arising from a strict warranty. *Moulton v. American Life Ins. Co.*, 4 Sup. Ct. 466, 469, 111 U. S. 342, 28 L. Ed. 447.

Where the contract of insurance contained inconsistent expressions, one part tending to show an intention to make the answers warranties, and another treating them as representations merely, the answers will be regarded, not as warranties, but in the nature of representations, or, if warranties, only of an honest belief of their truth. *Alabama Gold Life Ins. Co. v. Johnston*, 2 South. 125, 80 Ala. 467, 59 Am. Rep. 816.

The true rule as to what amounts to a warranty or what amounts to a representation in insurance is: "Whenever the answers are responsive to direct questions they are to be regarded as warranties, and when they are not so responsive, but voluntary, without being called for, they are to be con-

strued as representations." *Buell v. Connecticut Mut. Life Ins. Co.* (U. S.) 4 Fed. Cas. 590.

A warranty by an applicant for insurance must be literally and exactly fulfilled; but a representation is satisfied by showing a substantial compliance, and a slight variance, which would not have influenced the action of the insurer in making the contract, will not defeat the policy. *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.* (U. S.) 124 Fed. 25, 29, 59 C. C. A. 545.

A warranty is an agreement, an answer is a statement, and a policy of insurance therefore says, in other words, that in consideration, *inter alia*, of the answers and warranties of the application, the contract is made; and where in the application the applicant warrants said answers to be true, the answers are warranties, and not merely representations. *McClain v. Provident Savings & Life Assur. Soc.* (U. S.) 105 Fed. 834, 835. See, also, *Providence Life Assur. Soc. v. Reutlinger*, 25 S. W. 835, 836, 58 Ark. 528.

In order to make any statements binding as warranties, they must appear upon the face of the instrument itself by which the contract of insurance is effected. They must either be expressly set out, or by inference incorporated in the policy. If they are not so, they are not warranties, but representations. *Dime Sav. Inst. v. American Surety Co.*, 53 Atl. 217, 218, 68 N. J. Law, 440 (citing *American Popular Life Ins. Co. v. Day*, 39 N. J. Law [10 Vroom] 93, 23 Am. Rep. 198).

In contracts of insurance, a representation differs from a warranty, and from a condition expressed in the policy, in that the former is part of the preliminary proceedings which propose the contract, and the latter is part of the contract when completed. The validity of the contract depends upon the fulfillment of the warranties and conditions, and noncompliance therewith is an express breach, which, of itself, avoids the contract; whereas a misrepresentation, to avoid the policy, must have been made with a fraudulent intent, or with respect to some material matter. *Deweese v. Manhattan Ins. Co.*, 34 N. J. Law (5 Vroom) 244, 247.

An approved writer on the law of insurance, distinguishing between a representation and a warranty, describes a warranty to be a condition precedent, and part of the written policy, and a representation to be a matter collateral, making no part of the policy. A representation in the body of a policy, stating the goods insured to belong to American citizens resident in Charleston, amounts to an express warranty that the same were neutral property at the time of the contract. *Walton v. Bethune* (S. C.) 2 Brev. 453, 454, 4 Am. Dec. 597.

A representation, as used in insurance, is a part of the preliminary proceedings preceding and proposing a contract of insurance, while a warranty is a part of the contract of insurance as completed. Ordinarily a statement made in an application for insurance is a representation only; but it may be incorporated into the policy, and so become a part of the contract and a warranty. *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219, 224.

In sales of personalty.

A warranty consists in representations and statements of and concerning the condition and quality of personal property, the subject of sale, made by the person making the sale to induce it and bring it about. *Pemberton v. Dean*, 92 N. W. 478, 479, 88 Minn. 60, 60 L. R. A. 331, 97 Am. St. Rep. 508.

A warranty is a collateral undertaking by which the warrantor contracts that certain facts in relation to the property are or shall be as represented. A warranty is always a representation, but the reverse is not necessarily true. *Matteson v. Rice*, 92 N. W. 1109, 1110, 116 Wis. 328.

A warranty in a sale of personal property is a statement or representation of fact made by the vendor as to the character or quality of the article sold, or of the title thereto, whereby the vendor promises that the thing is or shall be as represented. It is otherwise defined as a statement of fact as to an article sold, coupled with an agreement to make the statement good. Such an agreement may be express or implied. *Ingraham v. Union R. Co.*, 33 Atl. 875, 876, 19 R. I. 356.

A warranty is a promise by the seller that the property proposed to be sold belongs to him, or is of the description or quality alleged. The allegation must be made at or before the sale, and must be of something that is material and calculated to induce the purchaser to buy. *Brown v. Tuttle* (N. Y.) 66 Barb. 169, 173.

A warranty is a stipulation in writing, on the literal truth or fulfillment of which the validity of the entire contract depends. A stipulation is considered to be on the face of the policy, although it may be written on a subjoined paper referred to in the policy. *Levell v. Royal Arcanum*, 9 Misc. Rep. 257, 258, 30 N. Y. Supp. 205, 206 (citing *Alex. Ins.* 51).

A warranty is a contract by which the person who makes it engages to become responsible to the other party for any damage which he may sustain by a breach of it. It does not necessarily include a declaration by the maker that the fact is so, but merely that he will be responsible if it shall not prove to be so. A warranty of the soundness of a slave, contained in a bill of sale, is not evi-

dence that the party making it at that time admitted the soundness of the slave. *Patton v. Porter*, 48 N. C. 539.

Under a contract of warranty the liability of the warrantor is in no wise dependent on the degree of faith or belief that the warrantee may have in the words used in the contract of warranty, and the title does not pass simply on condition that no breach of such warranty shall occur. The term "warranty," therefore, has a technical meaning, and simply contemplates a liability for damages in case of breach. *Newman v. H. B. Claflin Co.*, 32 S. E. 943, 945, 107 Ga. 89.

In a bill of sale a warranty of soundness is a contract which binds the warrantor to indemnify the warrantee in the event of unsoundness. Though it is not strictly a promise to pay money, nor to do any specified act, it is an undertaking in effect to do something that will oblige the obligor to pay money or perform some act, and is therefore in its legal effect any contract to do some act. *Tribble v. Oldham*, 28 Ky. (5 J. J. Marsh.) 137, 139.

"Warranty" and "guaranty," being derivatives from the same root, are identical in signification and effect; the one usually, but not always, denoting the covenant in a conveyance, and the other denoting a parol promise. *Ayres v. Findley*, 1 Pa. (1 Barr) 501.

Though the term "warrant" may not have been employed in regard to the sale of personalty, nevertheless representations and statements may be sufficient to constitute an express warranty. The term "warrant," especially where the contract of sale is reduced to writing, while most generally and appropriately used, is not absolutely necessary to express a warranty by the seller; for the rule is well settled that in sales of personalty no particular form of words is necessary to establish a warranty. Any positive representation made by the seller during the pendency of the negotiations for the sale, not the mere expression of opinion, which fairly expresses the intent of the seller to warrant the article sold to be what it is represented, will constitute an express warranty. *Smith v. Borden*, 66 N. E. 681, 683, 160 Ind. 223 (citing *Conant v. Nat. State Bank of Terre Haute*, 121 Ind. 323, 22 N. E. 250).

Representations made by the vendor on a sale, for the purpose of inducing the vendee to purchase, and which did induce him to purchase, amount to a warranty. *Marsh v. Webber*, 13 Minn. 109 (Gil. 99, 100).

No particular phraseology is requisite to constitute a warranty, nor is it necessary that the vendor should have intended the misrepresentation to constitute a warranty. A representation in an agreement to sell beef that, before being killed, it has not been

heated, amounts to an express warranty. *Fairbank Canning Co. v. Metzger*, 23 N. E. 372, 373, 118 N. Y. 260, 16 Am. St. Rep. 753.

The word "warrant" is not indispensably necessary to make a contract of warranty. Any language which clearly shows that the seller affirms the property to be sound is sufficient. *Buckman v. Haney*, 11 Ark. (6 Eng.) 339, 341.

No particular words are necessary to constitute a warranty of quality on a sale of chattels. If a man say, at the time of a sale of a horse, "This horse is sound," it amounts to a warranty. *Norton v. Doherty*, 69 Mass. (3 Gray) 372, 373, 63 Am. Dec. 758.

A warranty in a contract of sale is an agreement by the vendor that the thing he sells is of a certain kind, character, or quality, affecting its value to the vendee. No particular form of words is necessary to constitute such a warranty. Any covenant, promise, or assertion of the vendor concerning the quality of the article sold, if relied on by the vendee and understood by both parties as an absolute promise or assertion, and not a mere expression of opinion, will amount to a warranty. *Smith v. Holbrook* (N. Y.) 1 Buff. Super. Ct. 474, 477.

A warranty or condition in a contract of sale that the article sold has certain qualities excludes the implication of the warranty or condition that it possesses other qualities. *Carleton v. Lombard Ayres & Co.*, 25 N. Y. Supp. 570, 573.

There is an apparently irreconcilable conflict of authority as to the distinction between warranties and conditions, and as to the rights and obligations of parties thereunder. Much of the confusion has arisen from the fact that what were generally considered in this country as warranties that the article shall be of the kind or species contracted for were, prior to the passage of the sales of goods act in England, and are in some of the courts of this country, treated as conditions precedent. *Benj. Sales*, p. 589, 594, 677; *Carleton v. Lombard Ayres & Co.*, 149 N. Y. 147, 43 N. E. 422. Furthermore, the word "warranties" has been used in such a great variety of senses, and the decisions thereon have been so anomalous, that, as a distinguished jurist has said, "an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless, if not absurd." *McFarland v. Newman* (Pa.) 9 Watts, 55, 34 Am. Dec. 497. *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753, approves the doctrine that a positive affirmation, relied on as such by the vendee, is an express warranty, and quotes with approval from an opinion by Judge Learned as follows: "There can be no difference between an executory contract to sell and de-

liver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. 905. Manifestly there is no distinction in principle, as to the rights and remedies of a purchaser, between causes of action arising out of a breach of contract by the vendor to deliver an article of a specified quality or description, or out of a breach of representation which is material to the contract, or out of such a breach when the representation or warranty is implied instead of express. In either case there is an agreement in substance and purport to the same effect; in either, a breach of it works the same injury to the vendee. Whether the cause of action is for a breach of contract or for the breach of a warranty is a mere matter of nomenclature. *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons* (U. S.) 120 Fed. 906, 908, 57 C. C. A. 498 (citing *Bagley v. Cleveland Rolling Mill Co.* [U. S.] 21 Fed. 159).

A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future. *Civ. Code Cal.* 1903, § 1763; *Civ. Code Mont.* 1895, § 2370; *Rev. Codes N. D.* 1899, § 3970; *Civ. Code S. D.* 1903, § 1322; *Harley v. Golden State & Miners' Iron Works*, 66 Cal. 238, 239, 5 Pac. 160.

Words of description may amount to a warranty, if it appears that they were so intended by the parties; but courts are usually disinclined, in doubtful cases, to construe words of description as amounting to a warranty of quality. Whether language of description is to be construed as a warranty of quality must depend ordinarily upon the intention or understanding of the parties as collected from the entire contract. *Maxwell v. Lee*, 84 Minn. 511, 515, 27 N. W. 196, 198.

Same—As collateral undertaking.

A "warranty" is an express or implied statement of something which the party undertakes shall be part of a contract, and, though part of the contract, yet collateral to the express object of it. *Lunt v. Wrenn*, 113 Ill. 168, 175 (citing *Obanther v. Hopkins*, 4 Mees. & W. 399); *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504, 510; *Tower v. Howe Scale Co.* (N. Y.) 2 City Ct. R. 47, 48; *Neave v. Arntz*, 56 Wis. 174, 176, 14 N. W. 41, 42; *Fairbank Canning Co. v. Metzger*, 28 N. Y. St. Rep. 775, 777; *Id.*, 23 N. E. 372, 373, 118 N. Y. 260, 16 Am. St. Rep. 753; *Reynolds v. Palmer* (U. S.) 21 Fed. 433, 439 (citing *Obanther v. Hopkins*, 4 Mees. & W. 404); *Jones v. George*, 61 Tex. 345, 349, 48 Am. Rep. 280.

A warranty is, in general, a collateral undertaking, forming part of a transaction

of sale. *Morris v. Bradley Fertilizer Co.* (U. S.) 64 Fed. 55, 58, 12 C. C. A. 34.

Originally the word "warranty," as used in connection with sales, was applied solely to contracts for the sale of existing articles, identified at the time of the sale, the title to which passes under the contract, and the obligation arising from a warranty was held to be a purely collateral undertaking, which survived the delivery of and the payment for the article sold. But in modern cases the word has been used as synonymous with stipulations in executory contracts prescribing the qualities of the goods to be sold, the title to which is to be vested in the vendee at a future date. In the case of executed sales, the warranty is a collateral undertaking, but in the case of executory sales the agreement to deliver articles of a specified standard is a part of the contract to sell and deliver. Warranties are express or implied. *Carleton v. Lombard, Ayres & Co.*, 25 N. Y. Supp. 570, 573, 72 Hun, 254.

No particular form of words is necessary to create a warranty. Any definite statement or affirmation as to the quality of the thing sold, made by the seller at the time, which it may reasonably be supposed was intended to induce the sale, and which is relied on by the purchaser, may be regarded as constituting a warranty. *Ingraham v. Union R. Co.*, 33 Atl. 875, 876, 19 R. I. 356.

To constitute a warranty in the sale of goods, it is not necessary that the vendor should use the word "warrant" or "warranty." If the language actually used at the time of the sale by a fair construction amounts to, or is equivalent to, an undertaking on the part of the owner that the property is what it is represented to be, it is sufficient to create a warranty. A description of a printing press, in a bill of sale thereof, as being "in good working order, with all parts intact," is a warranty. *Udell v. Sarafian*, 43 N. Y. Supp. 1092, 1094, 19 Misc. Rep. 542.

Selling a particular thing by its proper description cannot be said with accuracy to create a warranty. *Heine Safety Boiler Co. v. Francis Bros. & Jellott* (U. S.) 105 Fed. 413, 417.

To make an affirmation at the time of the sale a "warranty," it must appear by the evidence to be so intended, and not to have been a mere matter of judgment and opinion, of which the defendant had no particular knowledge. *Waring v. Mason* (N. Y.) 18 Wend. 425, 426.

A "guaranty," or "warranty," is not an independent agreement, but a mere incident, and part of the principal contract of sale, and, when the latter is formally reduced to writing, whatever incidents exist are presumed by the rules of evidence to have been

incorporated thereunder. *Jones v. Alley*, 17 Minn. 292, 295 (Gil. 269, 272).

Same—Fraud distinguished.

See "Fraud."

Same—Noncompliance with contract distinguished.

A warranty is an express or an implied statement of something which a party undertakes shall be a part of the contract, and, though a part of the contract, collateral to the express object of it; but, in many of the cases, the circumstances of a party selling a particular thing by its proper description has been called a "warranty," and a breach of such a contract a breach of the warranty; but it would be better to distinguish such cases as noncompliance with a contract which a party has engaged to fulfill, as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty. There is no warranty that he should sell him beans. The contract is to sell peas, and, if he sell him anything else in their stead, it is a non-performance of it. *Columbian Iron Works & Dry Dock Co. v. Douglas*, 34 Atl. 1118, 1121, 84 Md. 44, 33 L. R. A. 103, 57 Am. St. Rep. 362. See, also, *Waeber v. Talbot*, 60 N. E. 288, 290, 167 N. Y. 48, 82 Am. St. Rep. 712.

WARRANTY DEED.

See "Good Warranty Deed."

A "warranty deed" is a deed with covenants of general warranty. This is the common understanding of the term. *Allen v. Hazen*, 28 Mich. 142, 146.

In popular phrase, a "warranty deed" is one with special warranty. *Withers v. Baird* (Pa.) 7 Watts, 227, 229, 32 Am. Dec. 754.

A warranty deed is nothing more than a deed containing a covenant of warranty. *Kinney's Law Dict.* An instrument may be a warranty deed without containing any covenant that the property was free of liens for taxes, and it will not be inferred that such a deed contains a covenant against taxes or tax liens, or that it contains any other specific covenant. *State Sav. Bank v. Gregg*, 67 Mo. App. 303, 307.

In a contract for a warranty deed, a deed containing the usual covenants of seisin and against incumbrances is intended. *Bowen v. Thrall*, 28 Vt. (2 Williams) 882.

A contract to sell and convey land by a deed of warranty is complied with by a delivery to, and acceptance by, one of the three vendees, of a deed of special warranty. *Payne v. Echols* (Pa.) 15 Atl. 895.

Perfect title implied.

A contract for the conveyance of land, by which the vendor obligated himself to execute and deliver to the appraisers a warranty deed of the land, and conditioned that they pay the purchase price at the times and in the manner specified, obligated the vendor to give the appraisers a perfect title, including the inchoate right of dower of the vendor's wife. *Pomeroy v. Drury* (N. Y.) 14 Barb. 418.

In common parlance, a "warranty deed" means a perfect title, and in legal contemplation, when parties contract for warranty deed, they must be understood to mean a title paramount to all others; and where the payee of a note was to deliver warranty deeds of two quarter sections of land to the maker on the payment of the same, and could only give good title to one quarter, the contract was rescindable by the maker of the note. *Tupy v. Kocourek*, 51 S. W. 69, 70, 66 Ark. 433.

If it was considered that the letters "W. D." in an application for insurance, meant that the title was a warranty deed, still that is not an assertion that such a title is a fee. No member of the profession, we presume, would say that it was. All know that a warranty deed may pass a term of years, a life estate, a fee or less estate, or it may pass no estate whatever. It conveys, as all know, only the estate of the grantor, whatever it may be. If he has none, it can pass none to the grantee. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 419.

WARRANTY OF FACT.

At common law, a warranty of fact in a material matter is a guaranty that the fact is as stated. *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 616, 35 Am. Rep. 623.

WARRANTY OF NEUTRALITY.

A "warranty of neutrality" means that the ship shall maintain a neutral conduct, and not forfeit it during the voyage. *Vandenheuvel v. United Ins. Co.* (N. Y.) 2 Johns. Cas. 127, 148.

WARREN.

See "Birds of Warren."

WAS—WERE.

Rev. St. 1893, c. 77, § 123, provides that the purchaser of land at a tax sale seeking a deed shall serve notice on "the person in whose name the same was taxed or specially assessed," etc. Held, that the phrase should be construed to mean that a notice shall be served upon the person in whose name the

land "is" taxed or specially assessed, as appears upon the last assessment thereof in the taxbook in the office of county treasurer. *Thomsen v. Dickey*, 60 N. W. 558, 560, 42 Neb. 814.

The words "was built and intended," in a statute authorizing the appointing of a receiver for any railroad company failing to operate daily trains over any part of its road for the space of ten days, but providing that the act shall not apply to any railroad company whose road is constructed at any seaside resort not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists, imports roads already in existence. *Delaware Bay & C. M. R. Co. v. Markley*, 16 Atl. 436, 438, 45 N. J. Eq. (18 Stew.) 139.

The words "were and still are," in an indictment charging that a dam and pond were and still are a nuisance to the public, import a prior and continuing offense, and therefore evidence of the existence of the nuisance at any time within two years prior to the date laid in the indictment is admissible. *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

WASH SALE.

A wash sale is at most an affirmation that the buyer is paying a certain price for a certain lot of stock. It is not an affirmation that the stock has any intrinsic value, that a company owns any property of value, or that the buyer will ever again bid the same price for the stock. It is made on account of persons who are anonymous. If a man buys stock because he is led by wash sales to believe that he can make a fortunate speculation, he cannot have an action of deceit against those who have made the wash sales. The sales, though fictitious, are not representations of any fact on which a man has a right to rely. They are at most false affirmations of an opinion as to value. Such affirmations are not regarded as statements of fact. Wash sales are condemned, as they ought to be, because they are fictitious, but they are not false representations made to the public in general, which give a right of action to any one who is led by them to take an erroneous view of market prices, and to invest unprofitably in consequence. *McGlynn v. Seymour*, 14 N. Y. St. Rep. 707, 709.

WASHING POWDER.

The words "washing powder" on a label are no more descriptive or indicative of the soap manufactured by the parties using such label than of any other of a great variety of powders that are or may be compounded suitable for washing. They simply indicate

a compound in the form of a powder used for washing, possessing many attributes common to many other compounds. They point to no particular person as the maker, and do not express the origin, ownership, or place of sale or manufacture. It is a sort of generic, and not a peculiar, term, and hence not suitable to use as a trade-mark which will be protected. The name "washing powder" is one by which compounds of like kind are known in the law, and which every person has an equal right to use. *Falkinburg v. Lucy*, 35 Cal. 52, 67, 95 Am. Dec. 76.

WASTE.

See "Commissive Waste"; "Equitable Waste"; "Further Waste"; "Impeachment of Waste"; "Permissive Waste."

Standard lexicographers use "refuse" as synonymous with "waste." Thus, Worcester: "Refuse: (a) Left as worthless when the rest is taken; worthless; waste." And one of the meanings given by him of "waste" is "refuse." *State v. Howard*, 72 Me. 459, 465.

"Waste," within the meaning of the provisions of the Code authorizing an action by a taxpayer to prevent waste of or injury to municipal property, is confined to cases where the acts complained of are without power; but where corruption, fraud, or bad faith amounting to fraud is charged, the word only includes illegal, wrongful, or dishonest action. *Basselin v. Pate*, 63 N. Y. Supp. 653, 657, 80 Misc. Rep. 368.

The terms "waste" and "injury," as used in a statute authorizing a taxpayer to maintain an action against a city officer for any waste or injury of city property, comprehend only illegal, wrongful, or dishonest official acts, and were not intended to subject the official of boards, officers, or municipal bodies, acting within the limitations of their jurisdiction and discretion, but which some taxpayer might conceive to be unwise, improvident, or based on errors of judgment, to the supervision of the judicial tribunals. *Talcott v. City of Buffalo*, 26 N. E. 263, 264, 125 N. Y. 280; *Parfitt v. Kings County Gas & Illuminating Co.*, 33 N. Y. Supp. 1111, 1118, 12 Misc. Rep. 278; *Sweet v. City of Syracuse*, 14 N. Y. Supp. 421, 424, 60 Hun, 28.

Waste includes every wrongful act, the mismanagement of the property, rights, or interests of the municipality, causing a loss or damage. *Ayers v. Lawrence*, 59 N. Y. 192, 197.

The terms "waste" and "injury," as used in the statute authorizing any taxpayer to maintain an action against an officer for waste or injury to property of a city, do not

comprehend individual acts, but only illegal, wrongful, and dishonest acts of public officials. The fact that a private individual is unlawfully enjoying the property of a city without the knowledge of the official does not render him liable to such action. *Sheehy v. McMillan*, 49 N. Y. Supp. 1088, 1090, 26 App. Div. 140.

In real property law.

"Waste," or "vastum," is a spoliation or destruction of houses, etc., to the disherison of him that hath the remainder or reversion in fee simple or fee tail. *White v. Wagner* (Md.) 4 Har. & J. 373, 391, 7 Am. Dec. 674; *Davenport v. Magoon*, 4 Pac. 299, 301, 13 Or. 3, 67 Am. Rep. 1; *Sanderson v. Jones*, 6 Fla. 430, 480, 481, 63 Am. Dec. 217; *Dills v. Hampton*, 92 N. C. 565, 570.

"Waste" is defined to be a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee simple; and it is said that whatever is done which tends to the destruction of the inheritance or the impairing of its value is waste. *Smith v. Sharpe*, 44 N. C. 91, 93, 57 Am. Dec. 574.

Waste is "the destruction or material alteration of any part of a tenement by a tenant for life or years, to the injury of the person entitled to the inheritance." 1 Steph. Comm. 241. "And it may be committed as well by destruction to any part of a tenement. It is waste to alter buildings, or vary, in any manner, the permanent erections." 5 Wait, Act. & Def. 239; *Tayl. Landl. & T.* § 348. The injury to the reality must be of a permanent character—some act which does a lasting injury to the property or tends to destroy its identity; and this may be accomplished by any alteration of the property which is material and of a substantial nature. *Davenport v. Magoon*, 4 Pac. 299, 301, 13 Or. 3, 67 Am. Rep. 1.

"Waste" is defined to be any unlawful act or omission of duty on the part of the tenant which results in permanent injury to the inheritance. *Whitney v. Huntington*, 34 Minn. 458, 462, 28 N. W. 631, 632, 57 Am. Rep. 68 (citing *Whart. Law Dict.*; *Abb. Law Dict.*; *Bouv. Law Dict.*).

In general, waste is the abuse or destructive use of property by him who has not an absolute, unqualified title. And in general, trespass is an injury, or use without authority, of the property of another, by one who has no right thereto. *Duvall v. Waters* (Md.) 1 Bland, 569, 572, 18 Am. Dec. 350.

Waste, in its simplest definition, is whatever does a lasting damage to the freehold or inheritance. *Beekman v. Van Dolson*, 18 N. Y. Supp. 376, 377, 63 Hun, 487; *McGregor v. Brown*, 10 N. Y. (6 Seld.) 114, 117.

Waste is an improper destruction or material alteration or deterioration of the freehold, or of things forming an essential part of it, done or suffered by a person rightfully in possession as tenant, or having but a partial estate, like a mortgagor. *Hamilton v. Austin* (N. Y.) 36 Hun, 138, 143.

Whatever the act of omission is, in order to constitute waste it must either diminish the value of the estate or increase the burden upon it, or impair the evidence of title of he who has the inheritance. *Eysaman v. Small*, 15 N. Y. Supp. 288, 289, 61 Hun, 618.

"Waste is understood in law as permanent or lasting injury done or permitted to be done by the holder of a particular estate to the inheritance, to the prejudice of any one who has an interest in the inheritance." *Price v. Ward*, 58 Pac. 849, 850, 25 Nev. 203, 46 L. R. A. 459.

Waste is voluntary, a crime or commission, as pulling down a house; or permissive, which is a matter of omission only, as by suffering it to fall for necessary repairs. *White v. Wagner* (Md.) 4 Har. & J. 373, 391, 7 Am. Dec. 674.

"Waste" may be defined to be whatever does a lasting damage to the freehold and tends to the permanent loss of the owner, or to destroy or lessen the value of the inheritance. *Eysaman v. Small*, 15 N. Y. Supp. 288, 289, 61 Hun, 618.

"Waste" is defined by Washburn, in his work on Real Property (volume 1, p. 126), to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee or to destroy or lessen the value of the inheritance. It is a question of fact as to what constitutes waste, and a finding on such question will not be disturbed on conflicting evidence. *Eysaman v. Small*, 15 N. Y. Supp. 288, 289, 61 Hun, 618.

"Waste" is defined to be the destruction of such things on the land by a tenant for life or years as are not included in its temporary profits; in other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. *Proffitt v. Henderson*, 29 Mo. 325, 327.

The term "waste," when applied to a tenant in common for life or for years, has a very extensive meaning. It includes the opening of new mines on lands; so, taking away soil is waste, though the purpose is to convert it into bricks for sale. Waste need not consist of loss of market value. It may be an actionable injury in the sense of destroying identity. *Cosgriff v. Dewey*, 58 N. E. 1, 164 N. Y. 1, 79 Am. St. Rep. 620.

Where a lessee of a building, without permission of the lessor, partially destroys

a party wall by cutting out an opening for a door, actually removing the bricks and mortar, it was a spoil and destruction pro tanto of the building, constituting waste. *Kerr*, Inj. 250, 251, says an alteration of buildings which changes their nature and character is waste, even though the value of the premises be thereby increased. *Kille v. Van Broock*, 37 Atl. 469, 473, 56 N. J. Eq. (11 Dick.) 18.

"Waste" may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property or impair the evidence of the title. Where, owing to the growth of business interests, residence property became valueless for that purpose, and incapable of any use as business property in the condition in which it was, a life tenant was not guilty of waste in removing the dwelling house standing thereon 30 to 40 feet above the street, and in cutting the lot down to grade, so as to make it useful for business and enhance its value. *Melms v. Pabst Brewing Co.*, 79 N. W. 738, 739, 104 Wis. 7, 46 L. R. A. 478.

It is waste for a tenant for life to take the petroleum oil from the land, or for a tenant in common to take it, for which he is liable to his co-tenant. *Williamson v. Jones*, 27 S. E. 411, 413, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Cosgriff v. Dewey*, 58 N. E. 1, 164 N. Y. 1, 79 Am. St. Rep. 620.

It is waste, under Code, c. 92, § 2, for a tenant in common to remove the coal from the premises. *Oecil v. Clark*, 39 S. E. 202, 206, 49 W. Va. 459.

The common-law doctrine as to waste, defined to be the "spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in simple or fee tail," is not strictly followed in this country, and the right to interfere with the tenants of the Baltimore perpetual leases of ground in the management of their property only exists under circumstances which would justify the exercise of the preventive jurisdiction of a court of equity. *Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343.

The act of 1833 defines the words "waste and destruction," as applied to mines, to mean "quarrying and mining, and all such other acts as will do lasting injury to the premises." *Irwin v. Covode*, 24 Pa. 162, 168.

The cutting of timber on demised premises, beyond what is necessary for the use and improvement of such premises, is

"waste." *Mooers v. Wait* (N. Y.) 3 Wend. 104, 107, 20 Am. Dec. 667.

The conversion of a meadow into arable land is not waste in law unless it is such in fact, and it is for the jury whether such act has deterred the value of the property as a whole. *King v. Miller*, 99 N. C. 583, 594, 6 S. E. 660, 666.

The conversion of land from one species to another is waste in England; as, to turn arable land into pasture or meadow, or meadow into arable, or arable into woodland, are all of them waste. In this state the question of waste depends upon the fact whether the injury to the land works a permanent or present injury to the freehold. Surely, then, the turning of arable land, not into woodland, but to the uses of a highway, to be trampled upon and cut up by the feet of horses and the wheels of vehicles, would be waste much more serious and injurious to the freehold than turning it into woodland or to a different species of husbandry. *Dills v. Hampton*, 92 N. C. 565, 570.

The cutting of timber may be waste, although necessary to the profitable enjoyment of the land. It may be waste, although the land is valuable for timber only. *Proffitt v. Henderson*, 29 Mo. 325, 327.

The use of the wood for the common purposes of an estate, as for a furnace, is not waste. *Den v. Kinney*, 5 N. J. Law (2 Southard) 552.

It is not waste in Vermont to cut down wood or timber so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So, to remove the dead and decaying trees, whether for the purpose of clearing the land or giving the green timber a better opportunity to come to maturity, is not waste. *Keeler v. Eastman*, 11 Vt. 293, 294.

Same—Trespass distinguished.

Waste and trespass are easily distinguishable. Briefly stated, waste is the permanent or lasting injury to the estate by one who has not an absolute or unqualified title thereto. Trespass is an injury to the estate, or the use thereof, by one who is a stranger to the title. *Price v. Ward*, 58 Pac. 849, 850, 25 Nev. 203, 46 L. R. A. 459.

Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass. *I White & T. Lead. Cas. Eq. 1011*. But the nature of the act is a tort in both cases—the same in both. *Williamson v. Jones*, 27 S. E. 411, 413, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Cecil v. Clark*, 39 S. E. 202, 206, 49 W. Va. 459.

In tariff acts.

See "Wool Waste."

The primary definition of "waste," given in Webster's Dictionary, is "that which is of no value; worthless remnant; refuse." The Century Dictionary defines it as "broken, spoiled, useless, or superfluous material; stuff that is left over, or that is unfitted or cannot readily be utilized for the purpose for which it was intended; overplus; useless or rejected material." As used in Act Oct. 1, 1890, par. 472, relating to the duties on waste, it does not include candle tar, a residuum or by-product in the manufacture of candles. *Standard Varnish Works v. United States* (U. S.) 59 Fed. 456, 457, 8 C. C. A. 178.

Waste is the refuse thrown off in the shearing or finishing of woolen cloths. *Lenig v. Maxwell* (U. S.) 15 Fed. Cas. 312, 313.

"Waste composed wholly or in part of wool," as used in Tariff Act Oct. 1, 1890, par. 388, includes waste pieces of cloth, composed in part of rubber, cotton, and wool. "Waste, not specially provided for," does not include waste pieces of cloth, composed in part of rubber, cotton, and wool. *United States v. Cummings* (U. S.) 65 Fed. 495, 496.

WASTE GROUND.

The term "waste ground" was used in a contract by a railroad company to pay so many dollars for waste ground, and it was held, in construing the contract, that parol evidence of residents of the neighborhood familiar with the technical terms used in the construction of railroads was admissible to show that waste ground meant earth or other material excavated from the bed of the road, and deposited on the ground. *Prather v. Ross*, 17 Ind. 495, 499.

WASTING OF ESTATE.

Rev. St. § 390, making the confirmed habit of drunkenness in the husband of not less than one year's duration, accompanied with a "wasting of his estate," a ground for divorce, should be deemed to mean, where the husband has no property, to apply to and embrace his health, time, and labor, all of which, for the purpose of supporting himself and family, are essentially his estate. *McKay v. McKay*, 57 Ky. (18 B. Mon.) 8, 9.

WATCH.

See "Anchor Watch"; "Suitable Watch." As wearing apparel, see "Wearing Apparel."

"To watch" means "to tend; to guard; to have in keeping." *Jeffries v. State*, 32 S. W. 1080, 1081, 61 Ark. 308.

A watch is neither a "jewel" nor an "ornament," as those words are used in a statute providing that innkeepers shall not be liable for the loss or theft by or from their guests of jewels or ornaments, unless said articles of property are deposited in a safe provided for that purpose. *Ramaley v. Leland*, 43 N. Y. 539, 542, 3 Am. Rep. 728; *Briggs v. Todd*, 59 N. Y. Supp. 23, 26, 28 Misc. Rep. 208; *Becker v. Warner*, 35 N. Y. Supp. 739, 741, 90 Hun, 187.

WATCH MATERIALS.

"Watch materials," as used in Rev. St. § 2504, Schedule M, providing for the rate of duty on watch materials, means articles which in themselves bear marks of their special adaptation for use in making watches. The fact that articles are used in the manufacture of watches has no relation to the condition of the article as imported. *Worthington v. Robbins*, 11 Sup. Ct. 581, 582, 139 U. S. 337, 35 L. Ed. 181.

WATCH TRIMMINGS.

Watch trimmings includes such articles of jewelry as are usually worn and sold in connection with watches, among which are chains, brooches or pins, keys, seals, pencils, lockets, rings, and charms; and the general definition of watch trimmings would be "ornaments worn in connection with watches." *Crosby v. Franklin Ins. Co.*, 71 Mass. (5 Gray) 504.

WATCHMAN.

A watchman is an officer in cities or towns, whose duty it is to watch during the night and take care of the property of the inhabitants. Webster's definition is "one who guards the streets of a city or building by night." *Singleton v. Eureka County*, 35 Pac. 833, 22 Nev. 91.

"Watchman," as used in a city ordinance requiring the presence of a "watchman" at street crossings of railroads, who should display at the cars in the daytime a red flag, and at night a red light, is one set to espy the approach of danger, and give an alarm or notice of it. Such a watchman's duty includes the exercise of ordinary care in warning persons on or near the street crossings of any approaching danger from passing trains. *Wilkins v. St. Louis, I. M. & S. Ry. Co.*, 13 S. W. 893, 896, 101 Mo. 93.

On insured premises.

"Watchman," as used in a fire insurance policy on a quartz mill, providing that a watchman should be employed by the owner to guard the premises during such time as the mill was idle, cannot be construed to include a person who, during several hours

of the day, is working in a mine 2,200 feet away from the mill, and during the night sleeps in a house 900 feet therefrom, and out of view of the premises by reason of a hill. A watchman, according to Webster, is a sentinel. A watchman of a building is one who takes care of it during the nighttime. *Wenzel v. Commercial Ins. Co.*, 7 Pac. 817, 67 Cal. 438.

Where an insurance policy declares a watchman to be a person kept in a mill or on the premises during the night, and at all times when the mill is not in operation or when the workmen are not present, the presence of a deputy sheriff and one of the trustees of the insured in the office of the mill, about two rods from it, on the night following a levy of the property, should not be construed to constitute the presence of a "watchman," within the meaning of that word as used in the policy. *First Nat. Bank of Ballston Spa v. Insurance Co. of North America*, 50 N. Y. 45, 48.

A policy of insurance insured the plaintiff "two thousand dollars on his machine shop, a watchman kept on the premises." Held, that the words "watchman kept on the premises" should be construed not to require a watchman to be kept there constantly, but only at such time as men of ordinary care and skill in like business keep a watchman on their premises. *Crocker v. People's Mut. Fire Ins. Co.*, 62 Mass. (8 Cush.) 79, 82.

WATCHMAN NIGHTS.

The words "watchman nights," in a statement in an application for a fire policy that there was a watchman nights, was construed to mean that there was a watchman in the insured mill every night. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 160, 86 Am. Dec. 362.

WATER.

See "Head of Water"; "Posted Waters."

All the water, see "All."

As land, see "Land."

As a mineral, see "Mineral."

As property, see "Property."

As real estate, see "Real Property."

Water is neither land nor tenement nor susceptible of absolute ownership. It is a movable thing, and must, of necessity, continue common by the law of nature. It admits only of a transient usufructuary property, and, if it escape for a moment, the right to it is gone forever, the qualified owner having no legal power of reclamation. It is not capable of being sued for by the name of "water," or by a calculation of its cubical or superficial measure; but the suit must be brought for the land which lies at the bot-

tom, covered with water. As water is not land, neither is it a tenement, because it is not of a permanent nature, nor the subject of absolute property. Water, being neither land nor tenement, and in no possible sense real estate, is not embraced by a covenant of general warranty. *Mitchell v. Warner*, 5 Conn. 497, 518.

"Water from the bedrock," as used in a contract for drilling a well, is equivalent to "bedrock water." *Book v. Newcastle Wire Nail Co.*, 25 Atl. 120, 121, 151 Pa. 499.

Laws 1892, p. 1000, c. 488, art. 9, as amended by Laws 1896, p. 264, c. 309, § 212, permits establishment of private parks for propagation or protection of fish or game by landowners on publication of intention, etc., provided that all "waters" previously stocked by the state, or which may afterwards be stocked at the expense of the state, shall be open to the public to fish therein as though the private park law had never existed. Held, that in common parlance the use of the term "waters," as applied to various lakes and streams on a tract of land, imports a designation of them in severalty, and the proper interpretation of the statute is that the stocking of streams and waters, the beds and adjacent lands of which are owned by an individual or corporation, in order to give the right to the public to fish therein, must be with the consent of the owner of one having a right of fishery therein; and that only the particular stream, lake, or pond thus stocked is so made public; and that such stocking does not open to the public streams to which they may be tributary; and that this stocking of such a stream by owners above or below does not have the effect of opening to the public that part of the stream situated on lands of an owner who has not consented to such dedication; and that the public is not permitted to follow the migrations of the fish, and take them in that part of the stream on private lands, without the owner's consent. *Rockefeller v. Lamora*, 83 N. Y. Supp. 289, 295, 85 App. Div. 254.

WATER COURSE.

See "Ancient Water Course"; "Artificial Water Course"; "Natural Water Course."

All the waters on the face of the earth may be divided into tide waters and inland waters. It is only to the latter that the term "water course" can be applied. Water courses are commonly denominated "rivers," "rivulets," or "brooks," according to their magnitude. It is only upon water courses that riparian rights exist. *Chancellor Walworth*, in *Child v. Starr* (N. Y.) 4 Hill, 375, said that a water course had ripam, but not littus. So, conversely, it may be said

that the tide water has littora but not ripas. *Chamberlain v. Hemingway*, 27 Atl. 239, 240, 63 Conn. 1, 22 L. R. A. 45, 88 Am. St. Rep. 330.

A "water course" is defined to be a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets. *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 37 Pac. 375, 376, 103 Cal. 461; *Sanguinetti v. Pock*, 69 Pac. 98, 100, 136 Cal. 466, 89 Am. St. Rep. 169.

The words "water course" are broader and more comprehensive than "river." In their most general sense, they mean a course or channel in which water flows. In their legal sense they consist of bed, banks, and water, a living stream confined to a channel, but not necessarily flowing all the time, for there are many water courses which are sometimes dry. *Shelby County Com'rs v. Castetter*, 83 N. E. 986, 987, 7 Ind. App. 309; *New York, C. & St. L. R. Co. v. Speelman*, 40 N. E. 541, 543, 12 Ind. App. 372; *Rice v. City of Evansville*, 9 N. E. 139, 142, 108 Ind. 7, 58 Am. Rep. 22; *Weis v. City of Madison*, 75 Ind. 241, 253, 39 Am. Rep. 135; *Parke County Com'rs v. Wagner*, 38 N. E. 171, 173, 138 Ind. 609; *Maxwell v. Shirts*, 61 N. E. 754, 755, 27 Ind. App. 529; *Hoyt v. City of Hudson*, 27 Wis. 656, 660, 9 Am. Rep. 473. The word "living" here means permanent or continuous. *New York, C. & St. L. R. Co. v. Speelman*, 40 N. E. 541, 543, 12 Ind. App. 372.

Where water has a definite course, as a spring or springs, and takes a definite channel, it is a water course. *Mitchell v. Bain*, 42 N. E. 230, 233, 142 Ind. 604; *Morrissey v. Chicago, B. & Q. R. Co.*, 56 N. W. 946, 950, 38 Neb. 406.

A fixed course over which surface water from adjoining land is uniformly discharged at a definite point is a "water course," within the rule prohibiting one from filling up a water course so as to impede the flow from the adjoining land, though the course has no well-defined banks and beds. *Ribordy v. Murray*, 52 N. E. 325, 327, 177 Ill. 134.

A water course consists of bed, banks, and water, yet the water need not flow continually. Justice Brewer is very accurate in saying: "For a water course there must be a channel, a bed to the stream, not merely lowland or depression in the prairie over which the water flows. It matters not what the width or depth may be, a water course implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream; and such flow must be necessary to prevent the flooding of a considerable tract of land." *Neal v. Ohio River*

R. Co., 34 S. E. 914, 915, 47 W. Va. 316 (citing *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241); *Chicago, K. & N. Ry. Co. v. Steck*, 33 Pac. 601, 602, 51 Kan. 737.

A water course consists of bed, banks, and water. Yet the water need not flow continually. There are many water courses which are sometimes dry. To maintain the right to a water course it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks and sides. *Chamberlain v. Hemingway*, 27 Atl. 239, 240, 63 Conn. 1, 22 L. R. A. 45, 38 Am. St. Rep. 330; *Porter v. Armstrong*, 39 S. E. 799, 801, 129 N. C. 101; *Hill v. Cincinnati, W. & M. R. Co.*, 10 N. E. 410, 109 Ind. 511; *Wels v. City of Madison*, 75 Ind. 241, 253, 39 Am. Rep. 135; *Tampa Waterworks Co. v. Cline*, 20 South. 780, 784, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262; *Simmons v. Winters*, 27 Pac. 7, 8, 21 Or. 35, 28 Am. St. Rep. 727; *Eulrich v. Richter*, 41 Wis. 318, 320; *Id.*, 37 Wis. 226, 229; *Barkley v. Wilcox*, 55 N. W. 77, 78, 88 Iowa, 47; *Case v. Hoffman*, 84 Wis. 438, 445, 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937; *Shields v. Arndt*, 4 N. J. Eq. (3 H. W. Green) 234, 235; *Jeffers v. Jeffers*, 107 N. Y. 660, 14 N. E. 316.

To constitute a water course there must be a channel, a bed to the stream, and not merely lowland or a depression in the prairie over which the water flows. A water course implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream. *Morrissey v. Chicago, B. & Q. R. Co.*, 56 N. W. 946, 952, 38 Neb. 406.

In general, in order to constitute a water course, the channel and banks formed by the flowing of the water must present to the eye the unmistakable evidences of the frequent action of running water. *Ventura Land & Power Co. v. Meiners*, 68 Pac. 818, 820, 136 Cal. 284, 89 Am. St. Rep. 128.

To constitute a water course, the size of a stream is not important; it may be very small. *Luther v. Winnisunmet Co.*, 63 Mass. (9 Cush.) 171, 174; *Mitchell v. Bain*, 42 N. E. 230, 233, 142 Ind. 604; *Town v. Missouri Pac. R. Co.*, 70 N. W. 402, 404, 50 Neb. 768; *Morrissey v. Chicago, B. & Q. R. Co.*, 56 N. W. 946, 950, 38 Neb. 406.

In this state a water course may exist under one of two conditions, viz.: (1) Where surface water, having no definite source, is supplied from falling rains and melting snows from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite and natural channel, and escapes through such channel regularly dur-

ing the spring months of every year and in seasons of heavy rains, and such has always been the case, so far as the memory of man runs, such accustomed channel through which the waters flow possesses the attributes of a natural water course. (2) Where the supply of water is not from mere surface drainage occasioned by falling rains and melting snow, but is definite and certain—as, for instance, from a spring—and such water flows in a well-defined channel, with banks cut through the turf and into the soil by the flowing of the water, such stream is a water course. The flow of the water need not be continuous, and the size of the stream is immaterial. *Missouri Pac. Ry. Co. v. Wren*, 62 Pac. 7, 8, 10 Kan. App. 408.

A spring of water on the surface is none the less a water course, although it is not equal in volume to a river. Small as it may be, if it has a clear and well-defined channel, and a regular flow in that channel, it cannot be diverted to the injury of the proprietors below. *Wheatley v. Baugh*, 25 Pa. (1 Casey) 528, 531, 64 Am. Dec. 721 (citing *Jack v. Martin* [N. Y.] 12 Wend. 311).

A lake fed by streams, which in times of flood find exit by rapid percolation through a bed of gravel, so that there is a sensible current towards the gravel bed, is a water course, and not merely surface water. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192, 194, 46 Am. Rep. 199.

Any depression or drain two feet below the surrounding land, and having a continuous outlet to a stream or river or brook, shall be deemed a water course. *Cobbey's Ann. St. Neb.* 1903, § 5544.

Artificial or natural.

A water course is a channel or canal for the conveyance of water, particularly for the drainage of land. It may be natural, as where it is made by the natural flow of water, caused by the general superficies of the surrounding land, from which the water is collected into one channel; or it may be artificial, as in the case of a ditch or other artificial means used to divert the water from its natural channel or to carry it from lowlands, through which it will not flow in consequence of the natural formation of the surface of the surrounding land. *Earl v. De Hart*, 12 N. J. Eq. (1 Beas.) 280, 72 Am. Dec. 395; *Chamberlain v. Hemingway*, 27 Atl. 239, 240, 63 Conn. 1, 22 L. R. A. 45, 38 Am. St. Rep. 330; *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 237, 249, 36 Am. Rep. 480; *Hawley v. Sheldon*, 64 Vt. 491, 493, 24 Atl. 717, 33 Am. St. Rep. 941.

Broadening of stream.

A "water course," in the legal sense of the term, does not necessarily consist merely of the stream as it flows within the banks

which form the channel in ordinary stages of water. When, in the times of ordinary high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader but still definable stream, it has still the character of a water course, and the law relating to water courses is applicable, rather than that relating to mere surface water. *Byrne v. Minneapolis & St. L. Ry. Co.*, 38 Minn. 212, 214, 36 N. W. 339, 8 Am. St. Rep. 668.

"Where, owing to the level character of the land, water spreads over a wide space without any apparent banks, yet usually flows in a continuous current and passes over the surface to the lands below, it still continues to be a 'water course.' *Gillett v. Johnson*, 30 Conn. 180; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 340; *Gould, Waters*, § 264, to the same effect. It is there laid down as an elementary principle that a stream does not cease to be a water course and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel. The same principle was also stated in *Shields v. Arndt*, 4 N. J. Eq. (3 H. W. Green) 245." *West v. Taylor*, 13 Pac. 665, 668, 16 Or. 165. See, also, *Blohowak v. Grochoski*, 96 N. W. 551, 553, 119 Wis. 189.

Ditch.

The bed is the characteristic which distinguishes the water course from mere surface drainage and from percolating water. Mere surface or percolating water does not become a water course by being gathered into a ditch and led away. Such surface currents as do not follow a designated and known channel are not governed by the rules restricting the use of water courses. *Case v. Hoffman*, 72 N. W. 390, 392, 100 Wis. 314, 44 L. R. A. 728.

A rule quite generally recognized is that mere surface drainage through a ditch extending across different tracts of land does not form a water course. By common law no rights can be claimed *jure naturæ* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others. *Grosjean v. Ludlow*, 92 N. W. 64, 65, 118 Iowa, 346 (citing *Gould, Waters*, § 263).

A pond of surface water on plaintiff's land after heavy rains discharged a part of its waters along a certain line over defendant's land, and by defendant's permission plaintiff dug a ditch along such line; but it did not appear that such line of discharge, before the digging of the ditch, had any fixed bed or bank, and the water did not usually flow therein. Held, that neither the original nor the artificial channel was a water course. *Fryer v. Warne*, 29 Wis. 511, 515.

Mill race.

"Water course," as used in Rev. St. 1881, §§ 2880, 2885, authorizing county commissioners to erect bridges over streams and water courses, includes a mill race through which a large quantity of water flows. *Shelby County Com'rs v. Blair*, 38 N. E. 216, 219, 8 Ind. App. 574.

Ravine or hollow.

A ravine, from the banks of which and into which the water flows from springs throughout the year, and which flows in its natural course through a party's land, is a water course. *Maxwell v. Shirts*, 61 N. E. 754, 755, 27 Ind. App. 529, 87 Am. St. Rep. 268.

A water course does not include water flowing in the holes or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such holes or ravines are not, in legal contemplation, water courses. *Hoyt v. City of Hudson*, 27 Wis. 656, 660, 9 Am. Rep. 473; *Eulrich v. Richter*, 37 Wis. 226, 229; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504, 514; *Lessard v. Stram*, 62 Wis. 112, 115, 22 N. W. 284, 285, 51 Am. Rep. 715; *Wagner v. Long Island R. Co.* (N. Y.) 2 Hun, 633, 636; *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 103 Cal. 466, 37 Pac. 875. Hence a depression or swale which varies in width from 75 feet to 80 feet, with a depth of 6 inches to 2½ feet, and which is cultivated when the stream is not running, is not a water course. *Sanguinetti v. Pock*, 69 Pac. 98, 100, 136 Cal. 466, 89 Am. St. Rep. 169. And in *Jones v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 253, 256, the Kansas City Court of Appeals held that certain swales or sloughs, which were filled in times of freshets by the overflow of a stream, were not water courses, so as to subject a railroad company to an action for damages caused by closing their outlet with a solid bank. *St. Louis, I. M. & S. Ry. Co. v. Schneider*, 30 Mo. App. 620, 623.

"Where surface water from rains and snow in a hilly country, by the natural formation of the ground, seeks its outlet through a gorge or ravine, and by its flow assumes a defined channel, such a one that, to a casual glance of the eye, bears the unmistakable sign of the frequent action of running water, and through which at regular seasons the water flows, and such has been immemorially the case, such a stream is a natural water course." *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241.

"In an undulating country there must always be valleys and depressions to which water from rains or snow will find its way from the hillsides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water

courses." *Barkley v. Wilcox*, 86 N. Y. 140, 143, 40 Am. Rep. 519.

"A water course is a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water." *Jeffers v. Jeffers*, 107 N. Y. 650, 14 N. E. 316. This definition demonstrates that water flowing over land supplied by rain and melting snow, although running through a natural depression, is nothing more than surface water. *Gray v. Schriber*, 58 Mo. App. 173, 177.

Surface waters.

A water course is a stream usually flowing in a particular direction in a definite channel, and discharging into some other stream or body of water. It need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. *Hoyt v. City of Hudson*, 27 Wis. 656, 660; *Case v. Hoffman*, 72 N. W. 390, 392, 100 Wis. 314, 44 L. R. A. 728; *Blohowak v. Grochoski*, 96 N. W. 551, 553, 119 Wis. 189; *Morrison v. Bucksport & B. R. Co.*, 67 Me. 353, 357; *Los Angeles Cemetery Ass'n v. City of Los Angeles*, 37 Pac. 375, 376, 103 Cal. 461; *Sanguinetti v. Pock*, 69 Pac. 98, 100, 136 Cal. 466, 89 Am. St. Rep. 169; *Luther v. Winnisimmet Co.*, 63 Mass. (9 Cush.) 171, 174; *Vernum v. Wheeler* (N. Y.) 35 Hun, 53, 54, 55; *Lawton v. South Bound R. Co.*, 39 S. E. 752, 753, 61 S. O. 548; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504, 514; *St. Louis, I. M. & S. Ry. Co. v. Schneider*, 30 Mo. App. 620, 623.

A water course is a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes; but the flow of water need not be continuous. *Town v. Missouri Pac. R. Co.*, 70 N. W. 402, 404, 50 Neb. 768; *Morrissey v. Chicago, B. & Q. R. Co.*, 56 N. W. 946, 950, 38 Neb. 406.

There is a broad distinction between a stream and a brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry. *Morrison v. Bucksport & B. R. Co.*, 67 Me. 353, 357; *Hill v. Cincinnati, W. & M. R. Co.*, 10 N. E. 410, 109 Ind. 511.

"A water course consists of bed, banks, and water, yet the water need not flow continually, and there are many water courses which are sometimes dry. There is, however, a distinction to be taken in law be-

tween a regular flowing stream of water, which in certain seasons is dried up, and those occasional bursts of water which in times of freshets or meltings of ice and snow descend from the hills and inundate the country." *Barnes v. Sabron*, 10 Nev. 217, 236 (quoting Angell, *Water Courses*, 34); *Schlichter v. Phillipy*, 67 Ind. 201, 205; *City of Bangor v. Lansil*, 51 Me. 521, 525; *Wagner v. Long Island R. Co.* (N. Y.) 2 Hun, 633, 636; *Lessard v. Stram*, 62 Wis. 112, 115, 22 N. W. 284, 285, 51 Am. Rep. 715 (citing *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473); *Wagner v. Long Island R. Co.* (N. Y.) 5 Thomp. & C. 163, 165.

A water course is a stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks. There is a broad distinction between a stream of water and those occasional outbursts of water which in times of freshets fill up the marshy places and run over and inundate the adjoining lands. A water course need not be shown to flow continuously. Its channel may sometimes be dry; but there must always be substantial indications of a stream, which is ordinarily and most frequently a moving body of water. A channel made by mere surface water resulting from rain and snow is not a water course, unless there is ordinarily and most frequently a moving body of water flowing through it. *Hill v. Cincinnati, W. & M. R. Co.*, 109 Ind. 511, 513, 10 N. E. 410.

To constitute a water course, the size of the stream is immaterial. It must be a stream in fact, as distinguished from mere surface drainage, occasioned by freshets or other extraordinary causes, where flow of water need not be constant. *Pyle v. Richards*, 22 N. W. 370, 371, 17 Neb. 180.

WATER CRAFT.

"Water craft," as used in 66 Ohio Laws, 125, providing for the incorporation of companies engaged in building and repairing steamboats and other water craft, includes a wharfbat. *Gaff v. Flesher*, 33 Ohio St. 107, 114.

The words "water craft" in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, mean any water craft, without regard whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

The words "water craft," as used in How. Ann. St. c. 285, § 2, providing that every water craft of above five tons' burden, used or intended to be used in navigating the water of the state, shall be subject to a lien thereon, etc., do not include steam dredges to be used solely for digging under water, and not for navigation, or the transportation even of the material which they bring up from the lake or river beds. *Bartlett v. Steam Dredge No. 14*, 107 Mich. 74, 64 N. W. 951, 61 Am. St. Rep. 314.

WATER FENCE.

Rev. St. c. 19, § 14, providing that, when a water fence, or fence running into the water, is necessary to be made, the same shall be done in equal shares by the boundary owners, contemplates a fence terminating at deep water, where it must be carried to such a distance into the water that the depth of water itself becomes a sufficient fence. It does not include a partition fence on land that is covered a part of the year with the waters of an artificial mill pond, but which is occupied and used as pasture or mowing land during another part of the year. *Lamb v. Hicks*, 52 Mass. (11 Metc.) 496, 508.

WATER MACHINERY.

"Water machinery," as used in Civ. Code, § 4764, providing that "if the nuisance complained of is a grist or saw mill, or other water machinery of valuable consideration, the same shall not be destroyed or abated except on affidavit of two or more freeholders," means such machinery as is operated by water power, and does not apply to a dam which was erected for purposes merely incidental to the operation of a manufacturing establishment, the machinery of which was propelled by steam. *Strong v. La Grange Mills*, 37 S. E. 117, 118, 112 Ga. 117.

WATER METER.

A meter is a contrivance to regulate the distribution of water by adjusting the quantity and price. *Red Star Line S. S. Co. v. Jersey City*, 45 N. J. Law (16 Vroom) 246, 249.

A water meter, however actuated, is not designed for exerting or transmitting power, but simply for measuring and registering fluid volume; and, as a matter of applied art, a water meter and a water motor are essentially different. *National Meter Co. v. Neptune Meter Co.* (U. S.) 122 Fed. 75, 78.

WATER ON EACH FLOOR.

A fire policy on a factory provided that there should be water on each floor, and

hose, and a watchman to be kept on the premises at night. Held, that the phrase "water on each floor," literally interpreted, would require that the floors were to be kept wet, but, accompanied by reference to the keeping of a watchman at night and the hose, it might fairly be construed to refer to some means of protection against fire. *New York Building & Packing Co. v. Washington Fire Ins. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 428, 433.

WATER POWER.

The water power to which a riparian owner is entitled consists of the fall in the stream when in its natural state as it passes through his land or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and surface where it leaves it. This natural power is as much the subject of property as is the land itself of which it is an incident. *McCalmont v. Whitaker* (Pa.) 3 Rawle, 84, 90, 23 Am. Dec. 102; *Rhodes v. Whitehead*, 27 Tex. 304, 309, 84 Am. Dec. 631.

"Water power," until applied to mills, is potential, not actual, in the sense that it is property subject to taxation. When applied to mills, it becomes a part of the property, thereby giving them value, the proper subject of taxation. It then becomes the main element of value, not as water, not as power, but as an integral part of the mills themselves. *Union Water Co. v. City of Auburn*, 37 Atl. 331, 333, 90 Me. 60, 37 L. R. A. 651, 60 Am. St. Rep. 240.

Water power or right in a reservoir of water is an interest in the land upon and by which it is created. *Amoskeag Mfg. Co. v. Town of Concord* (N. H.) 32 Atl. 151, 152.

A tannery erected on the banks of a stream, to be operated by steam, and which purchased the right to obtain water for its use from a mill pond thereon by means of a force pump and pipe, is not exempt from taxation under a town vote exempting improvements upon the water power on the stream by erections for manufacturing purposes. *Plaisted v. Inhabitants of Lincoln*, 62 Me. 91, 92.

WATER PRIVILEGES.

"Water privileges," as contained in a bond for a deed of land on a river, granting the same, together with all water privileges, indicated that the purchaser's right did not terminate at the water's edge, where there were no water privileges connected with the tract save those resulting from the river being a boundary. *Piper v. Connelly*, 108 Ill. 646, 652.

A devise of "all my water privileges," together with the mills connected therewith,

includes any interest in the dam or pond. *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. 1.

WATER RATE.

"A water rate is a tax or compensation for the furnishing of a supply of water." *McNeal Pipe & Foundry Co. v. Howland*, 16 S. E. 857, 860, 111 N. C. 615, 20 L. R. A. 743.

WATER RENT.

As tax, see "Tax—Taxation."

"Water rents," as used in Laws 1875, c. 181, § 13, empowering the water commissioners of municipal corporations to establish a scale of water rents against different classes of buildings, according to their dimensions, value, exposure to fire, etc., is not used in the sense of a return or compensation for the possession of some estate, but was synonymous with "water rates," and might be collected merely for protection against exposure to fire. *Dasey v. Skinner*, 11 N. Y. Supp. 821, 823, 57 Hun, 593.

WATER RIGHT.

A water right is the legal right to use water. The right to the use of running water is a corporeal right or hereditament, which follows or is embraced by the ownership of riparian soil; it is a corporeal right running with riparian land. *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Cary v. Daniels*, 49 Mass. (8 Metc.) 480, 41 Am. Dec. 532. A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and the water. *Smith v. Denniff*, 60 Pac. 398, 24 Mont. 20, 81 Am. St. Rep. 408.

"Water right," as used in a deed conveying "1½ water rights," was a right to the use of water flowing through the canal, each water right representing 1.44 cubic feet of water flowing under a weir per second. *La Junta & L. Canal Co. v. Hess*, 42 Pac. 50, 53, 6 Colo. App. 497.

The water rights contemplated in a contract providing for the sale of a farm with "water rights and appurtenances therewith connected," and declaring that the vendees may enter on the land and make alteration of their dams to enable them to use the water rights agreed to be granted, are not merely the right to the use of the water for domestic or farm purposes, but the water rights connected with the dams or to be used in connection therewith when the requisite alterations of them had been made, or, in other words, to the right to use the water for furnishing power. *Dyer v. Cranston Print Works (R. I.)* 41 Atl. 1014, 1015.

A water right is a freehold estate, within the meaning of Code 1887, p. 206, § 388,

providing that appeals from the district court to the Supreme Court shall be allowed in all cases involving a freehold. *Daum v. Conley*, 59 Pac. 753, 755, 27 Colo. 56 (citing *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280).

A water right is realty, not personal property. *Travelers' Ins. Co. v. Childs*, 54 Pac. 1020, 1021, 25 Colo. 360.

WATER SUPPLY.

See "Public Water Supply."

As city purpose, see "City Purpose."

As public use, see "Public Use."

Franchise for, as a monopoly, see "Monopoly."

WATER-TIGHT.

A contract to make a water-tight cellar is not complied with by making a cellar from which water must be drawn by a water ejector. *MacKnight Flintic Stone Co. v. City of New York*, 52 N. Y. Supp. 747, 749, 31 App. Div. 232.

WATER TRANSPORTATION.

A contract to deliver fertilizer to defendant, "water transportation permitting," etc., means not only that the water should be adequate, but that a boat or boats should ply the stream within the time contemplated for delivery capable of carrying the goods. *Raisin Fertilizer Co. v. J. J. Barrow, Jr., Co.*, 12 South. 388, 390, 97 Ala. 694.

WATERED STOCK.

"Watered stock" is stock which purports to be paid in full, but which in fact has not been fully paid for. *Lester v. Bemis Lumber Co.*, 74 S. W. 518, 520, 71 Ark. 379.

WATERING STOCK.

"Watering stock" is a term used to designate an increase of the nominal capital of the corporation, without any addition, or only a partial addition, to the actual capital. *Appeal of Wiltbank*, 64 Pa. (14 P. F. Smith) 256, 260, 3 Am. Rep. 585.

WATERS.

See "Coast Waters"; "Foreign Waters"; "Inland Waters"; "Internal Waters"; "Percolating Waters"; "Private Waters"; "Public Waters"; "Subsurface Waters"; "Surface Waters."

Boatable waters, see "Boatable."

Other waters, see "Other."

WATER'S EDGE.

By the term "water's edge," as used in decisions as to the extent of riparian own-

ers' rights, is meant low-water mark. State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow, 69 S. W. 374, 379, 169 Mo. 109.

WATERS OF A BROOK.

The rain water which, instead of soaking into the ground and forming reservoirs to supply the springs which feed a brook, runs off immediately and rapidly, is brook water, and properly styled "waters of the brook." State Board of Health v. City of Jersey City, 35 Atl. 835, 836, 55 N. J. Eq. (10 Dick.) 116.

An appropriation for public use of the "waters of a brook" is, unless otherwise limited, an appropriation of all its waters. New London Water Com'rs v. Perry, 37 Atl. 1059, 1062, 69 Conn. 461.

WATERS OF THE GULF.

The expression "waters of the Gulf," as used in Rev. St. arts. 721, 722, authorizing a corporation organized to construct channels in the "waters of the Gulf" along and across any of the bays on the coast, etc., is sufficiently broad in its meaning to embrace at least all bays, inlets, and streams on the Gulf coast to the extent to which they are subject to the ebb and flow of the tide. Crary v. Port Arthur Channel & Dock Co., 47 S. W. 967, 970, 92 Tex. 275.

WATERS OF THE STATE.

A vessel used in navigating the high seas for its principal occupation, and only sailing into the harbor of San Francisco, is not a vessel "used in navigating the waters of the state." Ray v. The Henry Harbeck, 1 Cal. 451; Tucker v. The Sacramento, 1 Cal. 403.

"Waters of the state," as used in Rev. St. § 1625, forbidding, under penalty, the erecting or maintaining of any seine, net, or trap in any "waters of the state," among other places, is expressly defined by section 1631 to mean all streams, lakes, ponds, sloughs, bayous, or other waters wholly or in part within the state, except the Missouri and Mississippi rivers, and all such parts as shall be within 50 feet of the mouth of any river, creek, branch, slough, bayou, or other water emptying into or connecting with such rivers within or on the boundary lines of the state. State v. Blount, 85 Mo. 543, 546.

The statute authorizing a lien in favor of persons furnishing materials or provisions for the use of vessels "used in navigating the waters of this state" should be construed to include only vessels used in interior navigation. Noble v. The St. Anthony, 12 Mo. 261, 263.

A statute giving an action for negligence against vessels "used in navigating

the waters of this state" includes a boat used on the Mississippi river from the northern to the southern boundary of the state. Swearingen v. The Lynx, 13 Mo. 519, 520.

Act April 10, 1850, authorizing the issuing of attachments against boats and vessels "used in navigating the waters of this state," should be construed to mean only vessels which are confined in their usual and substantial employment to interior navigation, and not to include a vessel which belonged to the port of New York, and was intended for the New York and China trade, had been in the harbor of San Francisco but a few days, and was never otherwise used in navigating the waters of the state than by sailing into the harbor of San Francisco from the ocean. The Sea Witch, 1 Cal. 162, 164.

Vessels used exclusively in "navigating the waters of the state" between ports of the state of Oregon and foreign ports are not within a statute giving a lien for repairs and boats or vessels used in "navigating the waters of the state." The Haytian Republic (U. S.) 65 Fed. 120, 122.

WATERS OF THE UNITED STATES.

All waters within the United States which are navigable for the purpose of commerce, or, in other words, waters whose navigation successfully aids commerce, are waters of the United States. The Daniel Ball (U. S.) 6 Fed. Cas. 1161, 1163.

WATERSTONE.

Goodrich, P. J., says: "I cannot find the word 'waterstone' in the Century Dictionary, while in the Standard Dictionary the following appears: 'Waterstones, n. (Geol.) A division of the Keuper in England.' The former authority defines 'cobblestone': A cobble or rounded stone; especially such a stone used in paving; and 'cobble': A stone rounded by the action of water, and of a size suitable for use in paving; and there is nothing more to indicate that the words 'cobblestone' and 'waterstone' are synonyms or interchangeable." The court refused to take judicial notice that waterstone was the same as cobblestone, in construing a railroad franchise requiring paving with waterstone. Doyle v. City of New York, 69 N. Y. Supp. 120, 122, 58 App. Div. 588.

WATERWAY.

The express provision of a New Jersey tax law defining "waterway," for taxation purposes, includes the towing path and the berme bank. State Board of Assessors v. Central R. Co., 4 Atl. 578, 579, 609, 48 N. J. Law (19 Vroom) 146.

The term "waterway," in an instruction, held to mean only a road or way taken

by surface waters accumulating in a draw. *Lincoln & B. H. R. Co. v. Sutherland*, 62 N. W. 859, 862, 44 Neb. 528.

WATERWORKS COMPANY.

The term "waterworks company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association or corporation, wherever organized or incorporated, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state. *Bates' Ann. St. Ohio 1904*, § 2780—17.

WAY.

See "By Way of"; "Cartway"; "County Ways"; "Fairway"; "Passageway"; "Private Way"; "Public Way"; "Right of Way"; "Road"; "Townway"; "Traveled Way"; "Under Way."

A "way," technically and strictly, is the passage over the lands of another. *Postal Telegraph Cable Co. v. Southern R. Co.* (U. S.) 90 Fed. 30, 32.

A way is the right of going over another man's ground. *Boyd v. Hand*, 65 Ga. 468, 470 (citing 2 Chit. Bl. 35).

"Way," in its legal technical sense, means nearly the same thing as right of way, or, in other words, the right of one person, of several persons, or of the community at large to pass over the land of another. *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 372, 93 Am. Dec. 409.

"A way is an incorporeal hereditament, and consists in the right of passing over another's ground. It may arise from grant, prescription, or necessity, and is either in gross—that is, attached to the person using it—or appurtenant or annexed to and passing with a conveyance of the estate; but it is never presumed to be in gross when it can be fairly construed to be appurtenant to the land." *Sanxay v. Hunger*, 42 Ind. 44, 48. See, also, *Chandler v. Goodridge*, 23 Me. (10 Shep.) 78, 82.

A way is a hereditament. A way, like all incorporeal hereditaments, lies only in grant, and not in livery. It is a right, the enjoyment of which requires no exclusive possession of the locus in quo. *Randolph v. Montfort*, 16 N. J. Law (1 Har.) 228, 227.

A "way," is defined to be a means of passage from some place to some other place. The term does not include a roadway which leads to no place or object to which a person has an interest or right to go. *Dennis v. Wilson*, 107 Mass. 591, 593.

A "way" implies a right of passage over another's land; as an "easement," it cannot exist without a servient as well as a dominant estate. *Abbott v. Jackson*, 84 Me. 449, 457, 24 Atl. 900.

As used in the chapter relating to the law of roads, the word "way" includes all kinds of public highways. *Rev. St. Me. 1883*, p. 260, c. 19, § 1.

Three classes of "ways" exist in South Carolina: First, highways, such as the great market and cross roads, kept in repair by public authority; second, "private paths," as they are termed in our acts of the Legislature, which are used for public purposes, diverging from or crossing the highways; and, third, private ways. *State v. Sartor* (S. C.) 2 Stroob. 60, 65.

Canal.

The term "way," as used in *Rev. St. § 3283*, authorizing a railroad, if it be necessary to the location of any part of its road, to occupy any public road, street, alley "way" or ground of any kind, should be construed as meaning something of the same nature and kind as a road or street, and not to include the public navigable canals of the state, or the banks thereof. *State v. Cincinnati Cent. Ry. Co.*, 37 Ohio St. 157, 175.

Footpath.

Paths marked out, graded, paved, repaired, and kept clear of snow by a town or city, crossing common ground used by the inhabitants as a place of public resort or recreation, and serving as one means of connection between public streets with which they connect to posts such as are usual at the entrance of walks designed for foot passengers, are not "ways open and dedicated to the public use" within *Gen. St. c. 43, § 82*, providing that "no way open and dedicated to the public use" which has not become the public way shall be chargeable to a city or town as a highway or townway, unless the same is laid out and established by such city or town in the manner prescribed by statute. *Oliver v. City of Worcester*, 102 Mass. 489, 495, 3 Am. Rep. 485.

Road distinguished.

The word "way" is more generic than the word "road," referring to many things besides roads. *Kister v. Reeser*, 98 Pa. 1, 4, 42 Am. Rep. 608.

The word "road" is not synonymous with "way." It is true that the term "way" is sometimes used in the same sense as "road." Sometimes we call a road, a street, a lane, etc., a "way," though this is perhaps an improper use of the term "way." *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 372, 93 Am. Dec. 409.

Strictly speaking, the words "road" and "way" are not synonymous, although in one case they have been so held. As a matter of fact, however, the words are often used interchangeably in general conversation. "A way" is an incorporeal hereditament, and imports *ex vi termini* the right of passing over the land of another along a particular line or route, and it may arise either from grant, necessity, or prescription. Washb. Easem. 256. Webster, as one of the definitions of a "road," says: "It is the ground appropriated for travel, forming a communication." Bouvier defines a "road" as "a passage through the country for the use of the people." Anderson, in his Dictionary, says: "A road is an open way or public passage ground appropriated for travel, and generally it includes highways, streets, and lanes." As a general proposition, the word "road" is applied to a highway, street, or lane, but the term is often applied to a private way or a pathway. The word "road" includes in some sort the sense of "way," although the latter word is more generic, and refers to many things besides roads. The grant of a way over one's land, nothing appearing in the grant to restrict it, will be understood to be a general way for all purposes. Newsom v. Newsom (Tenn.) 56 S. W. 29, 31.

Road synonymous.

"Road" is a legal term, strictly, synonymous with the term "way." It is an incorporeal hereditament; a servitude imposed upon corporeal property, and not a part of it. Wood v. Truckee Turnpike Co., 24 Cal. 474, 487; City and County of San Francisco v. Grote (Cal.) 47 Pac. 933, 939, 36 L. R. A. 502.

WAY APPURTENANT.

See "Appurtenance—Appurtenant."

WAY BY DEDICATION.

A "way by dedication" is created by the permission or gift of the owner, and upon the acceptance of such gift by the public authorities it becomes a way, and the owner cannot withdraw his dedication. Commonwealth v. Coupe, 128 Mass. 63, 65.

WAY BY PRESCRIPTION.

A "way by prescription" is established on evidence of user by the public, adverse and continuous, for a period of 20 years or more, *Schwerdtle v. Placer County*, 41 Pac. 443, 449, 108 Cal. 589; from which use arises a presumption of a reservation or grant and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists, *Commonwealth v. Coupe*, 128 Mass. 63, 65.

WAY EX VI TERMINI.

A "way *ex vi termini*" imports a right of passing in a particular line. The way must be kept in repair by the owner of the easement, and not by the owner of the land over which it passes. *Jones v. Percival*, 22 Mass. (5 Pick.) 485, 487, 16 Am. Dec. 415.

WAY-GOING CROP.

A way-going crop is the crop of grain sown by the tenant during the lease and coming to maturity after its expiration. *Stultz v. Dickey* (Pa.) 5 Bin. 285, 287, 6 Am. Dec. 411.

Where a tenant of agricultural lands sows in the fall a crop of grain which requires for its ripening a period greater than the unexpired term of his lease, the crop is called the "way-going crop," to which the tenant has a right in the absence of express agreement of the parties. *Ellison v. Dolbey* (Del.) 49 Atl. 178, 179, 3 Pennewill, 45.

WAY OF NECESSITY.

See "Necessary Way."

A "right of way from necessity" arises where one person sells lands to another which are inclosed on all sides by other lands. Here the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land. *Turnbull v. Rivers* (S. C.) 3 McCord, 131, 139, 15 Am. Dec. 622.

"Way of necessity" is a right of way; the privilege of going over another's land; a legal way, to use which one has a legal right, which may be enforced, and which may not be rightfully interfered with. *Cox v. Tipton*, 18 Mo. App. 450, 455.

A "way of necessity" is one implied where a person sells another land so surrounded by other lands as to be inaccessible except by passing over such grantor's land, and can only be raised out of land granted or reserved by the grantor, but not out of lands of a stranger. *Ellis v. Bassett*, 27 N. E. 344, 345, 128 Ind. 118, 25 Am. St. Rep. 421.

"A 'way of necessity' is founded upon an implied grant. When a person grants land to which there is no right of way except over his land, or retains land which is inaccessible except over the land which he conveys, a right of way is presumed to have been granted or reserved. But without a unity of ownership, there will be no way of necessity." *Quimby v. Straw*, 51 Atl. 656, 657, 71 N. H. 160.

A "way by necessity" is in fact acquired by grant, not by prescription, but as an incident to the thing described and granted. *Voorhees v. Burchard*, 55 N. Y. 98, 105.

A "way of necessity" arises "where the owner sells land to another which is wholly surrounded by the land of the grantor, or partly by the land of the grantor and partly by the land of a stranger." *Trump v. McDonnell*, 24 South. 353, 354, 120 Ala. 200; *Fairchild v. Stewart*, 89 N. W. 1075, 117 Iowa, 734. In such a case, if there be no other way to the land, the law presumes that it was the intention of the parties that the grantee should have access to it over the land of the grantor, and he has a way across such land in order to make it available. *Fairchild v. Stewart*, 89 N. W. 1075, 1076, 117 Iowa, 734.

The term "way of necessity" is used to designate the right which a man who owns land entirely surrounded by the land of another has to cross over the land of the latter in going to and from the land surrounded thereby. It is a mere easement, and not an interest in land; and therefore a statute enabling persons to secure such a right of way is not in violation of the constitutional provision prohibiting the taking of property without due compensation. *Snyder v. Warford*, 11 Mo. 513, 514, 49 Am. Dec. 94.

There cannot be said to be a way of necessity where there are other reasonably practical ways of ingress and egress. *Trump v. McDonnell*, 24 South. 353, 354, 120 Ala. 200.

A "way of necessity," when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words and where, by operation of law, it passes as incident to the grant. Thus, if a man sells land to another which is wholly surrounded by his own land, the purchaser is entitled to a right of way over the other's ground to arrive at his own land. The way is a necessary incident to the grant, and without which the grant would be useless. *Banks v. McLean County School Directors*, 62 N. E. 604, 605, 194 Ill. 247 (quoting 2 Bl. Comm. 35; note 3, Kent, Comm. 420).

The right of travelers along an obstructed highway to enter upon adjoining lands, whether inclosed or not, in the pursuit of their lawful business, is called a "way of necessity." *State v. Talley* (Del.) 33 Atl. 181, 183, 9 Houst. 417.

A way of necessity is derived from the law, and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant, as these existed at the time of the conveyance. *Botsford v. Wallace*, 37 Atl. 902, 905, 69 Conn. 263.

"It is said by Lord Mansfield in *Morris v. Edgington*, 3 Taunt. *31: 'It would not be a great stretch to call that a necessary way without which the most convenient and

reasonable mode of enjoying the premises could not be had.' We do not think that this is sustained to that extent by the later decisions. In *Lawton v. Rivers* (S. C.) 2 McCord, 445, 13 Am. Dec. 741, it is remarked: 'An inconvenience may be so great as to amount to that kind of necessity which the law requires.' In *Pettingill v. Porter*, 90 Mass. (8 Allen) 1, 85 Am. Dec. 671, it is held: 'That there is a way by necessity, where another cannot be got or made without unreasonable labor and expense; and that in determining the question the jury may consider the comparative value of the land and the probable cost of such ways, and that the word "necessary" cannot be limited to absolute physical necessity.' But yet the way must be necessary, and the facts of each case must determine whether it or any other easement thus claimed is necessary. It must be more than one of mere convenience (*Screven v. Gregorie* [S. C.] 8 Rich. Law, 158, 64 Am. Dec. 747), or one beneficial and convenient, and is only commensurate with the existence of the necessity upon which the implied grant of it is founded, and ceases when the necessity for it ceases. One owning a right to minerals in land can go upon the lands to mine the minerals only as necessary; but, if necessary, he is entitled to a convenient way. The necessity which is to govern is not fixed and unvarying. The right may be exercised in a manner suitable to the business to be carried on. It is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals. Ordinarily the mine owner cannot justify the use of the surface for the lengthened keeping of his ore, the long-continued deposit of the rubbish from the mine, or the erection of buildings for the storage of materials, the housing of animals, or the use of artisans." *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 552, 14 Am. Rep. 322.

WAY RESERVED.

A "way reserved," as used in a popular sense, is strictly an easement newly created, by way of a grant from the grantee in the deed, of the estate to the grantor. *Winston v. Johnson*, 45 N. W. 953, 959, 42 Minn. 398 (citing Washb. Easements, § 20; 2 Washb. Real Prop. [5th Ed.] 465); *Hagerty v. Lee*, 54 N. J. Law (25 Vroom) 580, 583, 25 Atl. 319, 320, 20 L. R. A. 631.

WAYFARER.

The term "wayfarer" is used to designate travelers. *Meacham v. Galloway*, 52 S. W. 859, 861, 102 Tenn. 415, 46 L. R. A. 319, 73 Am. St. Rep. 886.

Persons belonging to the army and navy who have no permanent residence they can call home are regarded as "travelers or wayfarers" when stopping at public inns or hotels, and to make them chargeable as mere boarders it must be shown that an explicit contract had been made which deprived them of the privileges and rights which their vocation confers upon them as passengers or travelers. *Hancock v. Rand*, 94 N. Y. 1, 6, 46 Am. Rep. 112.

WAYLAY.

Waylaying or otherwise, see "Otherwise."

WAYS, WORKS, OR MACHINERY.

St. 1887, c. 270, renders a master liable for injuries to a servant because of defects in the "ways, works or machinery connected with or used in the business of the employer." Held, that the phrase "ways, works or machinery connected with or used in the business of the employer" should not be taken literally, but understood to mean those ways, works, and machinery which are connected with or used in the business of the employer by his authority and subject to his control; and hence the statute does not make a railroad company liable for injuries sustained by an employé from a defective track of another company over which it had no control, but which it sometimes went on to get cars under a license. *Trask v. Old Colony R. Co.*, 31 N. E. 6, 7, 156 Mass. 298.

A building for a mill, while in process of erection, is not "ways, works, or machinery" connected with or used in the business, so as to render the owner liable for injuries to an employé from defects therein under a statute. *Beique v. Hosmer*, 48 N. E. 338, 169 Mass. 541.

A temporary derrick at a stoneyard, erected to move stones from cars to where stonecutters could use them, is a part of the "ways, works and machinery" connected with the yard, within the meaning of St. 1887, c. 270, § 1, authorizing an employé to recover for injuries sustained by reason of defects of the ways, works, and machinery of the employer. *McMahon v. McHale*, 54 N. E. 854, 855, 174 Mass. 320.

A cone shafting with six pulleys, and attached to the ceiling by hangers and screws, used in a manufacturing establishment, is included in the term "ways, works and machinery," as used in St. 1887, c. 270, rendering employers liable for injuries resulting from their failure to see that the "ways, works and machinery" were in proper condition. *Copithorne v. Hardy*, 53 N. E. 915, 916, 173 Mass. 400.

Code, § 2590, declares that a master shall be liable to a servant for injuries caused by

any defect of the "ways, works, machinery or plant" connected with or used in the business of a master. Held, that the term "ways, works, machinery and plant" included a projected supply pipe of a water tank located beside a highway, which was negligently allowed to project so far that it could and did hit a brakeman, by reason of which he was knocked off the train and killed. *East Tennessee, V. & G. R. Co. v. Thompson*, 10 South. 280, 281, 94 Ala. 636.

A pile of lumber in a yard of a lumber dealer is not "ways, works or machinery" within St. 1887, c. 270, § 1, authorizing an employé to recover for injuries caused by defective "ways, works or machinery," connected with or used in the business of the employer, which the employer negligently failed to remedy. *Campbell v. Dearborn*, 55 N. E. 1042, 175 Mass. 183.

Dynamite or exploder.

The death of an employé from the explosion of a dynamite cartridge, which remained undischarged after a blast in which other cartridges had exploded, does not result from a defect in the "ways, works or machinery" of an employer, within St. 1887, c. 270, § 1, giving a right of action to the widow or next of kin. *Welch v. Grace*, 46 N. E. 387, 389, 167 Mass. 590.

An exploder used to discharge dynamite blasts, and composed of a copper cap filled with a high explosive, which is instantly consumed in making the explosion, is not a part of the "ways, works or machinery" of a quarry, within the Massachusetts statute making employers liable for injuries resulting from defects in the "ways, works or machinery," etc. *Shea v. Wellington*, 40 N. E. 173, 175, 163 Mass. 364.

Staging or scaffold.

A temporary staging erected by a building contractor on the land of a third person, and used by the masons in their work on the building, is not a part of the contractor's "ways or works," within the meaning of St. 1887, c. 270, § 1, cl. 1, which renders a master liable for injuries to a servant caused by a defect in the "ways or works" used in his business. *Burns v. Washburn*, 36 N. E. 199, 160 Mass. 457.

A temporary staging built by the employés themselves for their use while slating a roof was not a part of the employer's "ways, works or machinery," a defect in which, under St. 1887, c. 270, § 1, cl. 1, makes the employer liable for an injury resulting to an employé when the defect is owing to the employer's negligence. *Reynolds v. Barnard*, 46 N. E. 703, 704, 168 Mass. 226.

"Ways, works or machinery," within the meaning of St. 1887, c. 270, making an employer liable for injuries caused by defects

in "ways, works or machinery," does not include a scaffold, so as to render an employer liable for the presence of a stone thereon. *Carroll v. Willcutt*, 89 N. E. 1016, 163 Mass. 221.

A temporary staging made of a ladder with boards laid on it and held up by ropes, which is put together by the workmen when needed, does not come within the definition of "ways, works or machinery," the defective condition of which renders the employers liable for an injury resulting to the workmen when due to negligence, under Laws 1887, c. 270, § 1. *Adasken v. Gilbert*, 43 N. E. 199, 200, 165 Mass. 443.

WE.

The word "we," as used in a constable's return, certifying the name of a juror, stating, "'We' have appointed," etc., means the town of which the constable was an inhabitant. *Fellow's Case*, 5 Me. (5 Greenl.) 333, 334.

In construing a letter in which the writer stated that he had purchased certain property, and that he candidly believes that "we will be able to realize from our half of it \$15,000.00," it was said that "the employment of the pronoun 'we' and the pronominal adjective 'our' is referred to as a recognition by the writer that the person addressed was interested with him in the property, counsel arguing that 'these words, being in the plural form, could not possibly refer to any but the writer of the letter and the plaintiff to whom it was written.' But the inference deduced by counsel is not by any means necessary or exclusive. In the first place, the assumption that the writer would not have used the words 'we' and 'our' in the connection in which they are employed, unless some one was interested with him in the stock spoken of, has but the barest probability to rest upon. Although incorrect, it is not infrequently the case that the plural pronoun is used for the first person singular, and so with the pronominal adjective 'our.'" *Mitchell v. O'Neale*, 4 Nev. 504, 517.

The words "we waive" (demand and notice on a note) held equivalent to the words "we severally waive," where the contract of each was several upon his indorsement. *Farmer v. Rand*, 14 Me. 225, 227.

As individual act.

The words "we promise," in the body of a note signed by only one person, did not make it less binding on such sole promisor. *Whitmore v. Nickerson*, 125 Mass. 496, 498, 28 Am. Rep. 257.

The word "we," in a declaration of homestead, signed by a husband and wife, which states that "we" do now actually reside on the land, and "we" do hereby claim

the same as a homestead, is to be construed in connection with Code Civ. Proc. § 17, providing that the singular number includes the plural and the plural the singular, as the personal declaration of each of the parties. *Simonson v. Burr*, 54 Pac. 87, 88, 121 Cal. 582.

As joint obligation.

Where a contract signed by several recites that the "undersigned" propose that if the other party to the contract will do a certain thing "we will undertake" to do a certain thing, the undertaking on the part of the signers is a joint one. *New Haven & N. Co. v. Hayden*, 119 Mass. 361, 364.

The words "we promise to pay" create a joint obligation only. *City of New Orleans v. Ripley*, 5 La. 120, 122, 35 Am. Dec. 175.

A promissory note written, "we promise to pay," etc., and simply signed by two or more mortgagors, is a joint note. *Barnett v. Juday*, 38 Ind. 86.

The use of the words "we bind ourselves and each of us," in a bond signed by several persons, operates to render the bond a joint and several obligation. *Carter v. Carter* (Conn.) 2 Day, 442, 2 Am. Dec. 113.

The phrase "we bind ourselves," when used by persons acting as agents and who disclose their principal, is to be construed as used in a representative character only, and as not binding the agents personally. *Salmon v. Serapis* (U. S.) 37 Fed. 436, 440.

Where a bond recited that A., B., C., D., E., and F. were held and bound in the sum of \$700 to be paid to G. or his heirs, executors, or administrators or assigns, which payment to be good "we bind ourselves, our heirs, executors and administrators severally by these presents," the quoted phrase meant that the bond was a several one, and not joint and several. *Brinkerhoof v. Doremus*, 10 N. J. Law (5 Halst.) 119, 121.

Personal or corporate liability implied.

The expression, "We, the trustees," in a note signed by the trustees of a corporation, did not leave it doubtful on the face of the instrument as to who was bound, but it was equivalent to saying, "we, the corporation." The word "we" may not improperly be used to denote a corporation aggregate. *Newmarket Sav. Bank v. Gillet*, 100 Ill. 254, 262, 39 Am. Rep. 39; *Scanlan v. Keith*, 102 Ill. 634, 645, 40 Am. Rep. 624.

The use of the words "I or we," in a note as follows, "Sixty days after date, I or we promise to pay," etc., and signed by a corporation per its officers, does not change the legal import of the instrument so as to make it the note of the officers. For, though there is no personal pronoun which is properly adapted to use by a corporation in mak-

ing a note, the word "we" is frequently used by a corporation. *Williams v. Harris*, 64 N. E. 988, 990, 198 Ill. 501.

"We," as used in a letter written by an agent of a corporation in which he refers to a proposed business transaction, and states that "we have just been able to issue the stock, and that we will change its form if necessary," etc., will be understood to mean the company. *Anthony v. American Glucose Co.*, 41 N. E. 23, 25, 146 N. Y. 407.

WEAK.

"The words 'strong' and 'weak' are relative terms, both having reference to the medium of the class to which they are applied, one being above, and the other below it." *People v. Orilley* (N. Y.) 20 Barb. 248, 248.

WEAKNESS.

In an instruction in an action to recover damages for negligence in the construction of a retaining wall and roadway above the plaintiff, whereby his fruit trees were injured and his land covered with a large amount of rock and other debris by the sliding down of the same, that it would be an excuse for the defendant, in the construction of its works, if it so constructed them as that no "weakness or defects" therein contributed with the act of God to produce the result complained of, the words "weakness or defects" do not mean any weakness or defect, however slight or fanciful or speculative, or which have in the least degree caused the injury, but means weakness or defects therein from negligence or a want of ordinary care on the part of the defendant in the construction of the wall, and it does not mean or include weakness or defects in the wall which might arise or exist while ordinary care and diligence had been observed. *Hummell v. Seventh St. Terrace Co.*, 26 Pac. 277, 279, 20 Or. 401.

Of mind.

"Weakness of mind is the opposite of strength of mind; it is not the opposite of unsoundness. Thus, a weak mind may be a sound mind." In re *Black's Estate* (Cal.) 1 Myr. Prob. 24, 27.

WEALTH.

The word "wealth," as used in Code, § 4587, providing that any person who by falsely representing his "wealth" obtains a credit shall be deemed guilty of swindling, does not import a great fortune or vast possessions, as is frequently implied from its ordinary use, but its real meaning is the possession or ownership of such means or

property as would reasonably entitle one to expect and receive the credit he seeks to obtain. Indeed, this word is at last a mere relative term. Among millionaires a man worth \$100,000 is poor indeed, while in some localities a man worth \$5,000 over and above all his liabilities would be considered a very wealthy citizen. *Branham v. State*, 96 Ga. 307, 22 S. E. 957.

WEAPON.

See "Concealed Weapons"; "Cruel Weapon"; "Dangerous Weapon"; "Deadly Weapon"; "Lethal Weapon"; "Offensive Weapon"; "Sharp Dangerous Weapon."

Carrying concealed weapons, see "Carry."

Weapon likely to produce death, see "Likely."

"A 'weapon' is an instrument of offensive or defensive combat; something to fight with." *Harris v. Cameron*, 51 N. W. 437, 438, 81 Wis. 239, 29 Am. St. Rep. 891.

Webster defines a "weapon" as "an instrument of offensive or defensive combat; anything used or designed to be used in destroying, defeating, or injuring an enemy, as a gun or sword." The term "weapon" itself indicates that it is for the offense or defense of a person, and that it cannot be extended to include mere ordinary instruments not used for any such purpose. *State v. Page*, 91 N. W. 313, 314, 15 S. D. 613.

Air gun.

An air gun is not a gun or weapon in the ordinary signification of the words, but is initiative only of a real gun, to give it dignity to a boy to play soldier with. *Harris v. Cameron*, 51 N. W. 437, 438, 81 Wis. 239, 29 Am. St. Rep. 891 (citing Webster Dict.).

Ax.

An ax is a mechanical tool rather than a weapon to be used in combat, and the mere fact that one of three men carries an ax to a sawmill which they enter cannot be supposed to excite terror. *Pike v. Witt*, 104 Mass. 595, 597.

Cord.

A weapon is anything used or intended to be used in destroying or annoying the enemy. A cord is often used as an instrument by robbers to kill or disable their victims, and when so used is properly called a "weapon." *State v. Calhoun*, 34 N. W. 194, 196, 72 Iowa, 432, 2 Am. St. Rep. 252.

Knife.

A knife is a weapon likely to produce grievous bodily harm, within the meaning of

the statute authorizing an indictment for an assault therewith. *State v. Henn*, 40 N. W. 572, 573, 39 Minn. 476.

A pocketknife is a means that could be used as an offense or defense, and hence is a "weapon." *State v. McCann*, 72 Pac. 137, 139, 43 Or. 155.

Pistol.

The term "weapon," in a statute prohibiting the carrying of concealed weapons or firearms, includes a pistol which is defective, but which may be discharged while holding it in the hand by striking the hammer with a knife or other small instrument. *Redus v. State*, 2 South. 713, 82 Ala. 53.

A person who carries concealed about his person all the pieces of a pistol, which could be readily put together so as to make an effective weapon, though, at the time he carried them concealed, the pieces were separate and incapable of use as a firearm until put together, is guilty of carrying concealed weapons. *Hutchinson v. State*, 62 Ala. 3, 4, 34 Am. Rep. 1.

"Weapons," within the meaning of the statute prohibiting the carrying of concealed weapons, includes a broken and insufficient pistol, even though it be carried for the purpose and intent of having it repaired. *Crawford v. State*, 21 S. E. 992, 94 Ga. 772.

A pistol is carried as a "weapon" when it is carried for the purpose of having it convenient for use in fight. *Lemmons v. State*, 20 S. W. 404, 405, 56 Ark. 559.

Gantt's Dig. § 1517, making it a misdemeanor to wear any pistol "concealed" as a weapon, requires that in order to constitute the offense the implement must be carried about the person to be always accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol is not loaded or is unfit for use, such fact would rebut the presumption that it was carried as a weapon; but if it is worn concealed, it may be presumed that it was loaded and worn as a weapon. *Carr v. State*, 34 Ark. 448, 36 Am. Rep. 15.

Razor.

A razor is an instrument or implement pertaining to the toilet or shop. It has a well-known and specified use to which it is ordinarily applied. It is not known, nor usually sold in the market, as a weapon. *State v. Neison*, 38 La. Ann. 942, 946, 58 Am. Rep. 202.

"A razor is an article of common domestic use, and while no one could be held guilty of the offense of carrying a dangerous and deadly weapon concealed about his person simply because he so carried a razor, yet, if surrounding circumstances would tend to show that he carried it as a weapon of

defense, he might become liable to the charge, because a razor when thus used is notoriously a weapon dangerous to life." *State v. Larkin*, 24 Mo. App. 410, 412.

WEAPON OF SELF-DEFENSE.

The term "weapons of self-defense," which under certain conditions may be carried for the purpose of self-defense, does not include brass knuckles, which are usually an instrument of the assassin, and the index of a murderous heart. *Bell v. State*, 8 South. 133, 89 Ala. 61.

WEAR.

Under Gantt's Dig. § 1517, making it a misdemeanor to "wear" any pistol concealed as a weapon, the pistol, in order to be worn, must be placed about the person, and carried around in some way to be at all times accessible. If it is merely, and in good faith, being transported to be repaired or given to another, or for purposes of trade or any other object, save to be used in a fight, it cannot be said to be worn. *Carr v. State*, 34 Ark. 448, 450, 36 Am. Rep. 15.

Of the creek.

A deed conveying land described as containing a certain number of acres, less the "wear of the creek," means the gradual and imperceptible changes in the banks of the creek by which the soil is taken from one side of the stream and deposited on the other, and does not include a sudden and violent change in the course of the stream by floods whereby a considerable portion of the land is severed from the main body. *Hening v. Bennett*, 18 N. Y. Supp. 645, 646, 63 Hun, 592.

WEAR AND TEAR.

See "Natural Wear and Tear"; "Ordinary Wear and Tear"; "Reasonable Wear and Tear."

WEAR OUT.

A threat by deceased that he intended to "wear out" the defendant was not a threat against his life. *Dow v. State*, 20 S. W. 583, 31 Tex. Cr. R. 273.

WEARING APPAREL.

See "Necessary Wearing Apparel."

"Wearing apparel" usually means clothing and garments protecting the person from exposure. *Neasham v. McNair*, 72 N. W. 773, 774, 103 Iowa, 695, 38 L. R. A. 847, 64 Am. St. Rep. 202; *Towns v. Pratt*, 33 N. H. 345, 346, 349, 66 Am. Dec. 728.

The ordinary meaning of "wearing apparel" is, vesture, garments, dress; that

which is worn by or appropriated to the person. *Gooch v. Gooch*, 33 Me. 535; *McClung v. Stewart*, 8 Pac. 447, 12 Or. 431, 53 Am. Rep. 374.

The words "wearing apparel," as used in statutes exempting from execution all wearing apparel of the debtor and his family, "are to be construed according to the common and approved usage of the language, as referring to garments or clothing, generally designed for wear of the debtor and his family." *Rothschild v. Boelter*, 18 Minn. 361, 362 (Gil. 331, 332).

"Wearing apparel," as used in Rev. St. § 2505, exempting from duty "wearing apparel" in actual use, means such apparel owned by the passenger as is in a condition to be worn at once without further manufacture, brought with him as a passenger, and intended for the use of himself or family who accompanied him as passengers; not for sale or purchase, or imported for other persons, or to be given away; suitable for the season of the year which was immediately approaching; not exceeding in quantity or value what the passenger was in the habit of ordinarily providing for himself and his family, even though the articles have not been actually worn. *Astor v. Merritt*, 4 Sup. Ct. 413, 415, 111 U. S. 202, 26 L. Ed. 401.

As used in a will in which the testator gave all his "goods, wearing apparel," of what nature and kind soever, the words "wearing apparel" are not to be confined to wearing apparel only, but the expression was to be construed the same as goods "and" wearing apparel, and therefore the expression meant wearing apparel, ornaments of the person, household goods, and furniture, but no other part of the personal estate. *Crickton v. Symes*, 3 Ark. 61, 62.

Though an article may unquestionably be a part of the wearing apparel of a man or woman which may be regarded as ornamental, or as serving some use in addition to that of ordinary vesture or clothing, yet if the chief and distinguishing characteristic of the article be to serve as an ornament or as a mechanism, or any other purpose than that of clothing or part of the clothing for the body or some portion of the body, it can hardly be regarded as coming within the meaning of wearing apparel in the plain or ordinary and usual sense. In *Gooch v. Gooch*, 33 Me. 535, the court said that the ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriate to the person. In *Sawyer's Heirs v. Sawyer*, 28 Vt. 249, under a statute providing that a widow should be allowed the wearing apparel of her husband, the Legislature was construed to intend that the term should be used in the more restricted sense, and be confined to its popu-

lar meaning and include only such articles as could be properly termed the "clothing" of the husband, in contradistinction to his ornaments; and the court held that the watch or watch key or watch chain and seals and the finger ring and sword and sword belt were not parts of the wearing apparel of the deceased husband, but that his epaulets and his scarf pin were to be so considered. *Coffinberry v. Madden*, 66 N. E. 64, 65, 30 Ind. App. 360, 96 Am. St. Rep. 349.

Bags.

Bags used to hold vegetables and to take them to market are not exempt from execution as articles of wearing apparel, notwithstanding the fact that, when seized, the owner was taking the vegetables therein to market to exchange them for articles of necessity for his family. *Shaw v. Davis*, 55 Barb. 389, 400.

Cloth.

A statute exempting from attachment the debtor's necessary "wearing apparel" should be construed to include cloth for a coat, which had been cut out but not made up. "Apparel" means dress, clothing, vestments, garments, but is not restricted only to those which are in a fit state to be worn or used as such. Cloth which has assumed the form and shape to fit it to the body of a particular person may be regarded as a vestment or apparel, although not in a condition at that time to be worn. *Ordway v. Wilbur*, 16 Me. (4 Shep.) 263, 264, 33 Am. Dec. 663.

Rev. St. c. 97, § 22, exempting from execution the "wearing apparel" of a debtor, is to be literally construed, and means not only apparel actually in the form of clothing, but extends to cloth and trimmings which have been put into the hands of a tailor to be made into clothes. *Richardson v. Buswell*, 51 Mass. (10 Metc.) 506, 507, 43 Am. Dec. 450.

"Wearing apparel," as used in Act Cong. July 30, 1846, subjecting wearing apparel to a duty, was used for the purpose of describing a class of articles, "not as known in trade or commerce by any particular appellation, but by the actual use for which they were designed and to which they were adapted, taken in connection with the fact that they were to be made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer." *Mallard v. Lawrence* (U. S.) 16 Fed. Cas. 500, 501.

Cotton.

Under a statute providing that no waiver of exemptions can be effectual to render wearing apparel, household and kitchen furniture, and provisions subject to execution.

it is held that cotton belongs to none of these classes, though produced by labor performed under sustenance afforded by exempt provision, and that it does not take the place of the provisions consumed in its production, and is not exempt. *Butler v. Shiver*, 4 S. E. 115, 79 Ga. 172.

Goods for sale.

A fire policy on the stock of a grocer, wearing apparel, and household furniture does not cover linen sheets, etc., not laid in for the use of the family, but smuggled into the country for clandestine sale. *Clary v. Protection Ins. Co.* (Ohio) *Wright*, 227, 229.

The term "wearing apparel and clothing," in a statute exempting such property of a debtor and his family from execution, means the wearing apparel and clothing worn and used or to be used by the debtor and his family, and does not include clothing purchased by a firm of which the debtor is a member, and held by said firm for sale. *In re Lentz* (U. S.) 97 Fed. 486, 487.

Hats.

"Wearing apparel," as used in *Tariff Act Oct. 1, 1890*, includes wool-knit hats invoiced as "red fez caps." *Wanamaker v. Cooper* (U. S.) 69 Fed. 465, 466.

Jewelry, watch, etc.

As ordinarily used, the term "wearing apparel" is hardly comprehensive enough to include jewelry. Nevertheless jewelry may fairly be called apparel, and it is worn on the person. If one chooses to classify jewelry as one variety of wearing apparel, it cannot be held that he is making an improper and indefensible use of the English language. *One Pearl Chain v. United States* (U. S.) 123 Fed. 371, 377, 378, 59 C. C. A. 499.

The "wearing apparel" of deceased and of his wife, which by *Comp. St. c. 50, § 1*, goes to the wife, includes all the articles of apparel and ornament of the wife; most, if not all, of those things which at the common law go to make up her paraphernalia. It includes a bosom pin, but excludes a watch and its chain, key and seals, or finger ring. The word also includes his epaulets, but does not include the sword and sword belt of an officer of the United States navy. *Sawyer v. Sawyer*, 28 Vt. 249, 254.

"Wearing apparel," as understood in its ordinary signification, means clothing, garments worn to protect the person from exposure, and not articles used for ornament merely. In its original signification the word "apparel" may have a more extensive meaning, including not merely a vesture or habilliment for covering the person, but all ornaments and decorations worn with the vesture. In an exemption, therefore, under a

statute exempting wearing apparel necessary for the debtor and his family, the word "necessary" is not to be understood in its most rigid sense, implying something indispensable, but is equivalent to "convenient and comfortable." It does not include a breastpin. *Towns v. Pratt*, 33 N. H. 346, 349, 66 Am. Dec. 726.

As used in exemption laws, "wearing apparel" has its popular sense, and includes all the articles of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance and to protection against exposure to the changes of weather, and also what is reasonably proper and customary in the way of ornament. *Sellers v. Bell* (U. S.) 94 Fed. 801, 811, 36 C. C. A. 502.

Within the exemption of the United States bankruptcy act, "wearing apparel" does not include articles of jewelry belonging to the bankrupt. *In re Kasson* (U. S.) 14 Fed. Cas. 138.

"Apparel," as used in *Code Or. c. 297, subd. 1, § 2*, exempting necessary wearing apparel, means the vesture and necessary garments, and does not relate to articles which may be worn for convenience and ornament. *Stewart v. McClung*, 8 Pac. 447, 12 Or. 431, 53 Am. Rep. 374.

A watch which the testator has been in the habit of carrying with his person does not pass by a bequest of his "wearing apparel." Ornaments may be so connected and used with the wearing apparel as to belong to it. There are implements, such as pencils and penknives, carried about the person but not connected with the wearing apparel. These are not to be considered as clothing. A watch may not properly be called an implement, for it is used merely to look at. Neither is it used as clothing or vesture. In its use it more nearly resembles the pencil or penknife. *Gooch v. Gooch*, 33 Me. 535.

"Wearing apparel" includes a gold watch, and when not carried about the person, but in a trunk while traveling, is an article of baggage. *McCormick v. Hudson River R. Co.* (N. Y.) 4 E. D. Smith, 181, 182.

"Wearing apparel," as used in a statute exempting from sale the wearing apparel of an insolvent debtor, should not be construed to allow him to have as many as two watches exempt from sale, it being doubtful whether he is entitled to have even one. *Smith v. Rogers*, 16 Ga. 479, 480.

"Wearing apparel" usually means clothing and garments protecting the person from exposure, and not articles of ornament mere-

ly. Originally it included not only the vesture, but all the ornaments and decorations worn with it, and would include a diamond shirt stud, where the purchaser was a person of large fortune and luxurious habits. *Neasham v. McNair*, 72 N. W. 773, 774, 103 Iowa, 695, 88 L. R. A. 847, 64 Am. St. Rep. 202.

In the case of *In re Steele*, Fed. Cas. No. 13,346, it was said that the definition of the word "apparel" as given by lexicographers is not confined to clothing, and that the idea of ornamentation seems to be a rather prominent element in the word, and that it is not improper to say that a man "wears" a watch and "wears" a cane. As used in Rev. St. Tex. art. 2397, exempting from execution all "wearing apparel" of the debtor, it includes a diamond stud worth \$250, habitually worn by the debtor, during several years past, in the front of his shirt, and for the purpose of fastening the shirt together. *In re Smith* (U. S.) 96 Fed. 832, 834, 835.

"Wearing apparel" is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. *Brown v. Edmonds*, 66 N. W. 310, 8 S. D. 271, 59 Am. St. Rep. 762.

Lace aprons.

Lace aprons are dutiable as "articles of wearing apparel" under Tariff Act Oct. 1, 1890, c. 1244, par. 349, 26 Stat. 592, and not as "articles made wholly or in part of lace" under paragraph 373. *In re Boyd* (U. S.) 55 Fed. 599, 5 O. C. A. 223.

Overcoat.

"Wearing apparel" exempt from attachment must be that necessary to meet the varying changes of the climate and the customary habits and ordinary necessities of the mass of the people, and the clothing suitable for days of labor might not be such as the common sentiment of the community would deem necessary for use on days set apart for religious worship. An outside or great coat at all seasons of the year, and, in addition to every day decent wearing apparel, a full suit suitable to wear abroad or to meeting, is included. *Peverly v. Sayles*, 10 N. H. 358, 357.

Shawls.

"Wearing apparel," as used in Tariff Act 1846, imposing a duty on wearing apparel of every description, must be construed in the popular and received import of the words, and includes shawls, whether worsted and cotton shawls, silk and worsted shawls, barage shawls, merino shawls, silk shawls, and mousseline de laine shawls. *Maillard v. Lawrence*, 57 U. S. (16 How.) 251, 260, 14 L. Ed. 925.

Shoes.

Shoes are not included in the term "wearing apparel of every description," in the tariff act, for in reading it with the context, which is wearing apparel made up or manufactured wholly or in part by a tailor, seamstress, or manufacturer, the phrase should be construed to refer only to the work of manufacturers of clothes similar to tailors or seamstresses; and hence, as a shoemaker is not in any respect similar to a tailor or seamstress, shoes were not to be included. *Swayne v. Hager* (U. S.) 37 Fed. 780, 782.

Underclothing.

In tariff legislation "wearing apparel" means not merely outer clothing as indicated by the definitions of some dictionaries, but means all articles usually worn, dress in general, and includes underclothing. *Arnold Constable & Co. v. United States*, 13 Sup. Ct. 406, 407, 147 U. S. 494, 37 L. Ed. 253.

Veils.

"Wearing apparel," as used in Tariff Act Oct. 1, 1890, c. 1244, par. 413, 26 Stat. 598, relating to the duties on "wearing apparel," includes silk veils or vellings in the piece, with borders upon them, and a distinctly marked line between the borders designating where they are to be cut off. *Oppenheimer v. United States* (U. S.) 61 Fed. 283, 284; *Id.* (U. S.) 66 Fed. 52, 53. See, also, *In re Spielman* (U. S.) 66 Fed. 724, 725.

WEATHER.

See "Bad Weather."

WEATHER WORKING DAYS.

"Weather working days," as used in a charter party which provides that 18 "weather working days" should be allowed shippers in which to deliver cargo alongside of the vessel, means days when the weather will reasonably permit the carrying on of the work contemplated. *The India* (U. S.) 49 Fed. 76, 78, 1 C. C. A. 174.

WEB PRESS.

A "web-perfecting press" is a press which feeds itself with a long, continuous roll of paper, perfects or prints such paper on both sides by passing it between two sets of form and impression cylinders, and, by transverse cuts, severs the web into sheets. In a multi-roll web-perfecting press two or more such webs are fed into its separate adjoining printing mechanisms, and are simultaneously perfected. The separate webs are then brought into conjoint register, and thereafter transversely cut into sheets. *Goss*

Printing-Press Co. v. Scott (U. S.) 108 Fed. 253, 254, 47 C. C. A. 302.

A printing press is said to be a "web press" when it receives and prints upon a continuous web or roll of paper as it is unwound, and not upon cut sheets. Duplex Printing-Press Co. v. Campbell Printing-Press & M. Co. (U. S.) 69 Fed. 250, 253, 16 C. C. A. 220.

WEEK.

As seven days merely.

"Week," as often used, refers to a period of seven days ending Saturday night at 12 o'clock; but there are many exceptions to such a meaning. When a person declares his intention to perform some act within one week, he means within a period of seven days. When we speak of things that transpire within a week, we mean within seven days. *Evans v. Job*, 8 Nev. 322, 324.

"Week" is defined to be a period of seven consecutive days, so that where an ordinance was published for fourteen consecutive days it complied with a statute providing that it shall be published for at least two weeks. *El. M. Derby & Co. v. City of Modesto*, 38 Pac. 901, 902, 104 Cal. 515 (citing *Savings & Loan Soc. v. Thompson*, 32 Cal. 347, 351; *Misch v. Mayhew*, 51 Cal. 516; *Hagenmeyer v. Board of Equalization*, 82 Cal. 217, 23 Pac. 14).

"Week," as used in Code, § 3647, requiring notices of sheriffs' sales of land to be published weekly for four "weeks," means a period consisting of seven days, and the statutory requirement is not met by a publication for a shorter period of time than 28 days. *Bird v. Burgsteiner*, 28 S. E. 219, 221, 100 Ga. 486.

Act Pa. March 29, 1832, § 19, requiring administrators to give certain notice to claimants "for six successive weeks" by publication, required that the publication be at least once in every seven days, and the statute was not complied with where eleven days were allowed to elapse between the first and second notices. *Appeal of Stoeber (Pa.)* 3 Watts & S. 154, 156.

A "week" consists of seven consecutive days. *Pol. Code Cal. 1903*, § 3258.

Whenever, in any act or statute of the state of North Dakota providing for the publication of notices, the phrase "successive weeks" is used, the word "weeks" shall be construed to mean calendar weeks, and the publication upon any day in such week shall be sufficient publication for that week; provided, that at least five days shall intervene between such publications, and all publications heretofore or hereafter made in accordance with the provisions of this sec-

tion shall be deemed legal and valid. *Rev. Codes N. D. 1899*, § 5143.

As from Sunday to Sunday.

Worcester defines a "week" as a period of seven days, particularly the period of seven days commencing with Sunday; Webster as "a period of seven days, usually reckoned from one Sabbath or Sunday to the next." *In re Tyson*, 22 Pac. 810, 812, 13 Colo. 482, 6 L. R. A. 472.

A "week" is seven days of time, commencing immediately after 12 o'clock on the night between Saturday and Sunday, and ending at 12 o'clock seven days, of 24 hours each, thereafter. The first day is called Sunday, and the seventh Saturday. *Steinle v. Bell* (N. Y.) 12 Abb. Prac. (N. S.) 171, 175 (citing 2 Bouv. Law Dict. 647); *In re Tyson*, 22 Pac. 810, 812, 13 Colo. 482, 6 L. R. A. 472.

A "week" is a definite period of time, commencing on Sunday and ending on Saturday. *Ronkendorff v. Taylor*, 29 U. S. (4 Pet.) 349, 361, 7 L. Ed. 882.

A "week" is universally defined as a period of time commencing with Sunday and ending with Saturday night, and also as a period of seven days' duration without reference to the time such period commences. *Raunn v. Leach*, 53 Minn. 84, 87, 54 N. W. 1058.

A "week" is a definite period of time, commencing on Sunday and ending on Saturday. *Leach v. Burr*, 23 Sup. Ct. 393, 188 U. S. 510, 47 L. Ed. 567.

Gen. Laws, § 729, provided that on sentencing one to death the judge should designate the "week of time" within which the sentence must be executed. Held, that a week of time was a calendar week, beginning Saturday at midnight. *In re Tyson*, 22 Pac. 810, 812, 13 Colo. 482, 6 L. R. A. 472.

The word "week," in its most accurate sense, means seven consecutive days beginning with Sunday, but it is also appropriately used to mean seven consecutive days beginning with any day. It was held under Const. art. 15, § 2, declaring that proposed constitutional amendments shall be published weekly in some newspaper within each county of the state for four consecutive weeks next preceding the general election, that publication once in each of the four consecutive weeks next preceding the week in which the election occurred complied with the statute, though the first publication was less than 28 days before the day of election. *Russell v. Croy*, 63 S. W. 849, 852, 164 Mo. 69.

A "week" is a definite period of time, beginning on Sunday and ending on Saturday. Where property was advertised for the purpose of a tax sale on Tuesday, Decem-

ber 17th, Tuesday, December 24th, Tuesday, December 31st, Tuesday, January 7th, and Saturday, January 18th, such advertisement was a sufficient compliance with the statutory requirement that the advertisement be made once a week for 80 days. In re City of New Orleans, 27 South. 592, 594, 52 La. Ann. 1073.

A Massachusetts statute requiring a certain notice to be published for "two weeks successively" is sufficiently complied with by the publication in a newspaper on Tuesday and Saturday only of each of two successive weeks. *Brewer v. City of Springfield*, 97 Mass. 152, 154.

A "week," in its legal signification, means a period of time, commencing on Sunday morning and ending on Saturday night. By common consent, and in computing time throughout Christendom, Sunday is recognized as the first day of the week, and hence a publication of summons, required by law to commence the first "week" in October, is complied with by a publication on Saturday after the first Sunday in the month, though the Saturday previous was also in October. *Medland v. Linton*, 82 N. W. 866, 869, 60 Neb. 249.

WEEK TO WEEK.

See "Tenant from Week to Week."

WEEKLY NEWSPAPER.

The expression "weekly newspaper" unerringly conveys the idea of a paper issued once a week. *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 300, 66 N. W. 453.

WEEK'S WORK.

A "week's work" under a contract for work at a fixed price per week means work for the period of a week, and not for six periods of eight hours each, though the act of 1867 provides that eight hours of labor performed in any one day by any one person shall be deemed a lawful day's work, so that a party who under such contract worked 16 hours a day cannot recover for two weeks' work in the period of one week. *Luske v. Hotchkiss*, 37 Conn. 219, 220, 9 Am. Rep. 314.

WEIGHAGE.

"Weighage" is the duty or toll imposed by English law to be paid for weighing merchandise, as for weighing wool at the king's beam, or for weighing other *avoirdupois* goods. *Hoffman v. Jersey City*, 84 N. J. Law (5 Vroom) 172, 176 (citing 2 Chitty, Com. Law 16; 2 Bouv. Law Dict. 628).

WEIGHT.

See "British Weight"; "Long Weight"; "Miner's Weight."

WEIGHT AND CONTENTS UNKNOWN.

The words "weight and contents unknown," added with pen and ink at the bottom of a bill of lading, exclude any inference that the owner is bound by a memorandum on the margin of the bill giving the weight, as the addition of the words at the bottom with a pen clearly indicate an intent on the part of the carrier not to be bound by any supposed ascertainment of the weight at the time by the shipper. *The Andover* (U. S.) 1 Fed. Cas. 855.

WEIGHT OF EVIDENCE.

Burden of proof distinguished, see "Burden of Proof."

The "weight of evidence" is not a question of mathematics, but depends on its effect in inducing belief. It often happens that one witness standing uncorroborated may tell a story so natural and reasonable in its character, and in a manner so sincere and honest, as to command belief, although several witnesses of equal apparent respectability may contradict him. The question for the jury is not on which side are the witnesses most numerous, but what testimony do they believe. *Braunschweiler v. Waits*, 86 Atl. 155, 156, 179 Pa. 47.

"Weight of proof" is a phrase meaning a greater amount of creditable evidence. It is synonymous with "preponderance of proof," and is sufficient to authorize a verdict in a civil case in favor of the party producing such proof. *Haskins v. Haskins*, 75 Mass. (9 Gray) 390, 393.

"Preponderance" is something more than 'weight'; it is a superiority of weight outweighed. The words are not synonymous, but substantially differ. There is generally a weight of evidence on each side in case of uttered facts. But juries cannot properly act upon the weight of the evidence in favor of one having the onus, unless it overbalance in some degree the weight upon the other, in their opinion." Thus, it is erroneous in an instruction to use the term "weight of evidence" for "preponderance of evidence." *Shinn v. Tucker*, 37 Ark. 580-588.

The word "effect," as used in an instruction relative to determining what weight or effect the jury would give the testimony of each witness, etc., is held to mean precisely the same thing as "weight," and hence not to be confusing. *Jessen v. Donahue* (Neb.) 96 N. W. 639, 640.

WEIR.

A "weir" is understood to be formed by a fence of sticks or twigs erected upon flats covered with water and remaining during the whole year, although used for taking fish only during the fishing season. *Treat v. Chipman*, 35 Me. 34, 38.

A "weir" is a dam across a river. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 55, 10 Am. Dec. 353.

WELFARE.

See "General Welfare"; "Public Welfare."

"The good and welfare of this commonwealth, for which reasonable orders, laws, statutes, and ordinances may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than public use and public service. The former expresses the ultimate purpose or result sought to be obtained by all forms of legislative power over property; the latter implies a direct relation between the primary object of appropriation and the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the commonwealth. The essential point is that it affects them as a community, and not merely as individuals." The rebuilding, by private property owners in a city, of buildings destroyed by general fires, is not a public use or public service for which the city may issue bonds. *Lowell v. City of Boston*, 111 Mass. 454, 470, 15 Am. Rep. 39.

WELL

See "Artesian Well"; "Driven Well"; "Oil Well."

As defined by Worcester, a "well" is a deep, narrow pit dug in the earth, and usually walled, for the purpose of obtaining a supply of water. *Andrews v. Cross* (U. S.) 8 Fed. 269, 275.

Bouvier's Law Dictionary defines a "well" as a hole dug in the ground in order to obtain water. A contract to dig a well does not imply that water other than surface water shall be obtained. *Littrell v. Wilcox*, 27 Pac. 394, 396, 11 Mont. 77.

Places where a person has reached water by orifices in the ground, and where the water did not flow to the surface, are "wells," and not springs. *Magoon v. Harris*, 46 Vt. 264, 271.

A well consists of a pit sunk in the earth until a water-bearing stratum of earth is

reached, from which the water therein will flow into the pit and a supply of water be thus obtained. Two forms of wells have long been known—one the ordinary domestic well, and the other the artesian well. In the ordinary well the well pit is sunk to the water-bearing stratum of earth, from which the water will, by reason of the natural forces operating upon it as it lies on the earth, ooze or fall from the earth into the bottom of the pit, as a reservoir, in sufficient quantities for the ordinary purpose of domestic use. In the artesian well the well pit is sunk in the earth until a water-bearing stratum is reached, where the water lies under the pressure of such a head as, when struck by the well pit, will come into the pit so rapidly that a stream of water is produced flowing by the force of its own current from the earth into and from the well pit to the surrounding surface. These two forms are not different in their method of operation. Both rely upon the natural forces as they are found operating upon the water in the water-bearing stratum reached by the well pit, which has uniformly been made by loosening the earth or rock and removing it upward and out upon the surface either by means of a spade or a drill, or auger and a sand bucket. In this state of the art of obtaining a supply of water from the earth, a new form of well appeared, now known as a "driven well." This well embodies an idea not present in any other form, namely, that the water in the water-bearing stratum of the earth may be, by the application of artificial power, forced to flow from the earth into the well pit with increased rapidity, so that a well pit only a few inches in diameter, sunk to a moderate depth, will afford an abundant supply of water, and constitute a practical and productive well. The characteristic difference between the driven well and other forms consists in the practical application of this new idea. In previous forms the rapidity with which the water flows from the earth into the well pit is dependent upon the natural forces as they happen to be found operating upon the water lying in the water-bearing stratum to which the well is sunk. The driven well adds artificial power so applied as to cause a great increase in the rapidity with which the water in the earth will flow from the earth into the well pit. The foundation of this new form of well is the discovery that if a pipe with an opening at the lower end be driven into the earth, extending down, air-tight, until it reaches the water, and have the pump attached air-tight to its upper end, and a vacuum be created in the pipe so fitted and connected with the water in the earth, water will flow abundantly from the earth into the pipe. The novelty consists in making a well pit to consist of an air-tight tube with a pump at the top, connected tightly with the earth. This is accomplished by driving into the earth a tube

to be used, at the top, as the pump, and at the same time as the pit of the well. This manner of inserting the tube renders it possible, by means of a pump attached to the tube, to create a vacuum in the pit of the well, and at the same time in the water-bearing stratum of the earth. It was held that the driven well was patentable, not as a machine, but as a new process. *Andrews v. Carman* (U. S.) 1 Fed. Cas. 868, 869.

Soil used and water.

"In *Johnson v. Rayner*, 72 Mass. (6 Gray) 107, the court says the term 'well' is used to designate an artificial excavation and erection in and upon land which necessarily, from its nature and mode of use, includes and comprehends the substantial occupation and beneficial enjoyment of the whole premises on which it is situated. The term aptly designates the soil covered by and used with it." *Ocean Causeway of Lawrence v. Gilbert*, 66 N. Y. Supp. 401, 404, 54 App. Div. 118.

A "well," as a general term of description in a deed, designates the portion of land under and occupied by the excavation and its surrounding retaining walls, and by any structure or appliance built upon the land to facilitate its use, and also the water actually at any time in the excavation. *Davis v. Spaulding*, 32 N. E. 650, 651, 157 Mass. 431, 19 L. R. A. 102.

A "well," as used in a deed conveying two-thirds of a "well" on certain described premises, includes, *ex vi termini*, not only the orifice which reached down to the water, but the whole opening into the earth before it was stoned, and the stone laid into the well, and the water therein. This must be regarded as the thing intended to be conveyed, and not the water only, which only imports the right to use the water, and by which term nothing passes but the easement or right to take the water. A well imports the land in which it is dug and erected. *Mixer v. Reed*, 25 Vt. 254, 257.

Spring distinguished.

See "Spring."

WELL.

See "Work Well."

A covenant in a lease to repair, uphold, and support, or to well and sufficiently repair, imposes on the covenantor the duty of rebuilding or restoring premises destroyed or injured by the elements. *Armstrong v. Maybee*, 48 Pac. 737, 738, 17 Wash. 24, 61 Am. St. Rep. 898.

WELL ACQUAINTED.

A statement of a witness, called to prove the handwriting of a subscribing witness to

a deed, that he was well acquainted with him, is equivalent to the declaration that he personally knew him. *Delaunay v. Burnett*, 9 Ill. (4 Gilm.) 454, 489.

The expression "well acquainted," as used in the testimony of a witness that he was well acquainted with another person, construed to mean a mutual acquaintance between the witness and such party. *United States v. Jones* (U. S.) 23 Fed. Cas. 638.

WELL AND FAITHFULLY.

A bond conditioned that a bank clerk should well and faithfully perform the duties assigned constituted a security for his honesty, and not for his competency. *Union Bank v. Clossey* (N. Y.) 11 Johns. 182.

A contract of an apprenticeship whereby the apprentice agrees "well and faithfully to serve" his master does not require that the apprentice should follow his master into a foreign jurisdiction to work. *Vickere v. Pierce*, 12 Me. (3 Fairf.) 315.

The inability of an apprentice to work, caused by sickness, without his fault, is no breach of his father's covenant in the indenture of apprenticeship that he should "well and faithfully serve and give and devote his whole time and labor to his master," sickness not being within the words of the covenant. *Caden v. Farwell*, 98 Mass. 137, 139.

WELL AND TRULY.

In a bond the condition that an officer should "well and truly, faithfully, firmly and impartially, execute and perform" the duties of his office, is equivalent to faithful performance. As used in a bond conditioned for the faithful performance of his duties by an officer, the words "well, truly, and impartially" are simply redundant. They are comprised in their legal signification in the word "faithfully." *City of Hoboken v. Evans*, 31 N. J. Law (2 Vroom) 342, 343.

A condition in a bond that the principal obligor shall "well and truly execute the duties of cashier" of a bank is not a mere stipulation for honesty, but also includes reasonable skill and diligence in the performance of the duties of such office. *Minor v. Mechanics' Bank of Alexandria*, 26 U. S. (1 Pet.) 46, 69, 7 L. Ed. 47.

WELL AND TRULY ADMINISTER.

The words "well and truly administered according to law," as used in an administrator's bond, impose on such administrator only the liability to dispose of the estate legally and properly in behalf of creditors, and create no liability in favor of the dis-

tributees of the residue. *Barbour v. Robertson's Heirs*, 11 Ky. (1 Litt.) 93, 95.

The phrase "well and truly administer," in an administrator's bond, requires a faithful administration of the estate of the intestate in applying the goods, chattels, and credits of the deceased to the payment of his debts. A conversion of the effects of the intestate to the private use of the administrator, leaving the debts unpaid, is a breach of the condition of the bond. *People v. Dunlap* (N. Y.) 13 Johns. 437, 441.

A condition in an administrator's bond that he shall well and truly administer the estate requires the payment of a debt against the estate, and hence, after its determination by the court or commissioners, an action lies on the bond for the administrator's failure to pay it. *Coney v. Williams*, 9 Mass. 114, 117.

WELL-BURNT HARD BRICK.

The words "well-burnt hard brick," as used in a contract for mason work, were plain and unambiguous, and could not be construed to mean a mixture of hard and soft brick. *Robertson v. King*, 8 N. W. 665, 666, 55 Iowa, 725.

WELL-CONDITIONED.

The words "well-conditioned," in a bill of lading reciting the receipt of freight in good order and well-conditioned, have reference to the external condition of the package, and do not refer to or warrant the internal quality or condition thereof. *The California* (U. S.) 4 Fed. Cas. 1058, 1059.

WELL KNEW.

In an instruction that a plaintiff "well knew" the fact that a certain sidewalk was in a dangerous and unsafe condition, the words "well knew" mean no more than "fully knew." *Barnes v. Town of Marcus*, 65 N. W. 984, 986, 96 Iowa, 675.

WELL-KNOWN MEMBER.

The term "well-known member of a political party," within the meaning of Act Cong. June 30, 1879, providing that a jury commissioner appointed by the judge shall be a "well-known member" of the principal political party in the district opposed to that which the clerk may belong, applies to one who has always advocated the principles and voted the state and national tickets of the Democratic party, although at one time he organized a Democratic movement in his county in opposition to that part of his party then in power, nominated a legislative ticket, and was himself elected thereon by the aid

of Republican votes, acting, while in the Legislature, with the Democrats, and proclaiming himself a Democrat. On who is a well-known Democrat is a well-known member of the Democratic party, no matter how much he may differ in many important things from other well-known members of that party. *United States v. Paxton* (U. S.) 40 Fed. 136, 137.

WELL PACKED.

The term "well packed," in a contract for the purchase of glass to be shipped to the purchaser well packed, "means so securely packed as to bear transportation by the proposed route without injury." A box of glass which is sound when shipped, but a portion of which reaches its destination in a broken condition, has not borne transportation without injury. The nature of the article is such as to render it almost of necessity liable to some injury during shipment, and persons dealing with it must be supposed to take into consideration its peculiar properties, and to contract with a view to the ordinary injuries to which it is subject. It cannot, then, be laid down as a matter of law that a box of glass which was injured in shipment was not well packed. Such a rule would make the shipper a warrantor of the condition of the article at the time of its arrival. *King v. Nelson*, 36 Iowa, 509, 512.

WELL SATISFIED.

Where one covenanted that, in case the title to a lot of land conveyed to him should prove good and sufficient in law against all other claims, he would pay the grantor three months after he should be "well satisfied" that the title was undisputed and good, law would determine for the grantee when he ought to be satisfied; and the agreement means that, until he showed some lawful claim or title to countervail that which he derived from the grantor, the intendment of the law is that his title was complete, and he was bound to pay. *Folliard v. Wallace* (N. Y.) 2 Johns. 395, 403.

WELL SETTLED.

A rule of action may be said to be "well settled" when it has the sanction of established usage, or the recorded judgment of the tribunals of justice, and does not conflict with some other rule of equal or paramount authority. *People v. City of Brooklyn* (N. Y.) 9 Barb. 535, 555.

WELL-TIMBERED LAND.

A forest of standing trees, if they can be appropriated to building, is called "well-timbered land," but loses that designation if swept to the earth by a tornado. *United*

States v. Schuler (U. S.) 27 Fed. Cas. 978, 982.

WELSH MORTGAGE.

A "Welsh mortgage" is one in which the mortgagee enters at once and takes the rents instead of interest, and is by agreement or distinct understanding to have no remedy for the principal (1 Pow. Mortg. 374, note; Patch, Mortg. 22, 29; *Lawley v. Hooper*, 3 Atk. 280), but he agrees merely to reconvey on its payment (Coop. 189). *Bentley v. Phelps* (U. S.) 3 Fed. Cas. 244, 250.

A *vivum vadium* or Welsh mortgage was a species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of his land, and it was so called because neither the money nor the land was lost, and were not left in dead pledge. There was a living pledge, for the profits earned were constantly paying off the debt. But the distinguishing characteristics of such an instrument were that there was no proviso that the conveyance was to be void on payment of the debt, and there was no covenant, express or implied, for such payment. *O'Neill v. Gray* (N. Y.) 39 Hun, 566, 568.

WEREGILD.

Among the customs of the ancient Saxons, the "weregild" (wergildus) was the price of homicide paid for killing a man, the *pretium redemptionis* of the offender, as the "werelada" was when the price was not paid, but the accused denied his guilt and purged himself by the oaths of compurgators. The notion of compensation ran through the whole criminal law of the Anglo-Saxons, who allowed a sum of money as a recompense for every kind of crime. *Wise v. Teerpenning*, 8 N. Y. Leg. Obs. 153, 156.

WEST.

A contract to not engage in certain business in all the territory of the state of New York "west of" the city of Albany means west of a meridian line drawn from north to south through the city of Albany, and does not refer merely to that portion of the state which in common parlance, and according to the ordinary acceptance of the term in matters of business, would be embraced by the phrase. *Lawrence v. Kidder* (N. Y.) 10 Barb. 641, 652.

In describing courses, the words "north," "south," "east," and "west," mean true courses, and refer to the true meridian, unless otherwise declared. Pol. Code Cal. 1903, § 3903; Pol. Code Mont. 1895, § 4103.

WEST END.

The expression "west end of the lot," as used in an advertisement for the sale of certain property, the description of which was as follows: "Beginning at the northeast corner of said square, running thence south 44 feet; thence west to the 'west end of the lot'; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the place of beginning"—the lot being irregularly shaped, and the northwest corner being the farthest west of any point in the lot, means, construed with the rest of this description, the west line of the lot. *Mackall v. Richards*, 5 Sup. Ct. 170, 173, 112 U. S. 369, 28 L. Ed. 737.

WEST HALF.

The words "west half," as applied to lots and parcels of land, have, both in ordinary conversations and in deeds, sometimes a very precise and exact meaning, but sometimes they are used very loosely and indefinitely. As used in a mortgage in which the mortgaged premises were described as the "west half of a city lot," the mortgagor and another owning the lot in common, and having agreed to divide the lot so as to give each a half, is to be construed as meaning the "half" occupied by the mortgagor, though it does not conform to the part which would be ordinarily understood as the "west half." *Schmitz v. Schmitz*, 19 Wis. 207, 211, 88 Am. Dec. 681.

WEST LINE.

The term "west line of railroad," when used in a deed of lands to describe a boundary beginning on the west line of a certain railroad and southeast corner of land west of said railroad, thence south on the west line of said railroad, will be construed as showing the boundary to be on the west line of the railroad and not in the center thereof. Public roads and highways, and also railroads, are regarded as having three lines—the center line, which is usually the line surveyed when the road is laid out, and on each side of which the road is laid out, and the two side lines, at equal distances from the center line, and between which lies the territory covered by the road. When, in a conveyance of real estate adjoining a highway, such highway is referred to as constituting a boundary, the center line will be held to be the boundary so referred to, unless the language used in so referring to it shows clearly that a side line instead of the center was intended. If it be doubtful which is intended, the law, from considerations of public policy, will resolve the doubt in favor of the center. *Maynard v. Weeks*, 41 Vt. 617, 619.

WESTERLY.

In construing a notice of location of a mining claim, there is no rule of necessity, such as exists in the construction of deeds, which requires that the terms "easterly" and "westerly," used without qualifying language, shall denote east and west, in the sense in which "easterly" is used by the miner and prospector. The term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. A notice of location, therefore, which gives the course of a location as running westerly so many feet, and easterly so many feet, from a discovery shaft or point of discovery until the boundaries are definitely located by the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of such claim from the west center end thereof through the point of discovery to the east center end, such line would lie at some point between east 45 degrees north and east 45 degrees south from the point of discovery. *Wiltsee v. King of Arizona Min. & Mill. Co. (Ariz.)* 60 Pac. 896, 898.

The words "northerly," "southerly," "easterly," and "westerly," mean due north, due south, due east, or due west, unless controlled by other words or by lines, monuments, or natural objects. *Pol. Code Cal. 1903, § 8904; Pol. Code Mont. 1895, § 4104.*

WESTERN BARGES.

As used in the waterman's act forbidding any person not a freeman to navigate any wherry, lighter, or craft within certain limits, excepting that all flat-bottomed boats and barges navigated from the town of Kingston, in the county of Surrey, or any place or places beyond the said town, shall be deemed "western barges" and may be navigated within the prohibited limits, the words "western barges" were not intended to except all flat-bottomed barges of the build commonly known as a "western barge," but merely meant to except such build of boats navigated from the town of Kingston to any place beyond. *Reg. v. Tibble, 30 Eng. Law & Eq. 372, 374.*

WESTERN OCEAN.

The term "Western Ocean," in the Warwick patent to Connecticut, of 1631, granting all the land from certain points to the Western Ocean and to the South Sea, meant the Atlantic Ocean, as is shown from the fact that a grant to Sir Henry Roswell and others, dated four years earlier than the Warwick patent, employed the words "from the Atlantic and Western Sea and Ocean on the

east part, to the South Sea on the west part." *Keyser v. Coe (U. S.) 14 Fed. Cas. 442, 443.*

WESTWARDLY.

Courses in a grant indicated by the term "westwardly" run due west. *Seaman v. Hogeboom (N. Y.) 21 Barb. 398, 404.*

WETHER.

A wether is a castrated male sheep. *State v. Royster, 65 N. C. 539.*

A wether is a castrated ram, at least one year old. In an indictment it may be called a "sheep." *Rex v. Birket, 4 Car. & P. 216.*

WHALING VOYAGE.

A policy of marine insurance on a "whaling voyage" covers not only a voyage for whales, but the taking of sea elephants as well. *Child v. Sun Mutual Ins. Co., 5 N. Y. Super. Ct. (3 Sandf.) 26, 44.*

WHARF.

See "Private Wharf"; "Public Wharf." As fixture, see "Fixture."

A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence water of sufficient depth to float vessels is an essential part of every wharf. A wharf cannot be defined or conceived except in connection with adjacent navigable water. *Langdon v. City of New York, 93 N. Y. 129, 151.* See, also, *Prior v. Swartz, 62 Conn. 132, 138, 25 Atl. 398, 399, 18 L. R. A. 668, 36 Am. St. Rep. 333.*

A wharf is a space of ground, artificially prepared, for the reception of merchandise from a ship or vessel, so as to promote the convenient loading or discharge of such vessel. *City of Dubuque v. Stout, 32 Iowa, 47, 49 (citing Bouv. Law Dict.).*

A wharf is a sort of quay constructed of wood or stone on the margin of a roadside or harbor, alongside of which ships or lighters are brought for the sake of being conveniently loaded or unloaded, and is not necessarily a nuisance. Where the water is shallow near the shore, neither passengers nor goods, without their aid, could be conveyed to or from the land or sea without great trouble and inconvenience, delay, and expense. They are indispensable to commerce, and no city or town, in the present advanced state of commerce, having navigable facilities, could be without them. *Gelger v. Filor, 8 Fla. 325, 332.*

A wharf is intended to afford conveniences for the landing of vessels, the loading and unloading of their cargoes, and to supply a place on which wares discharged from vessels or awaiting shipment may be laid or deposited; and it would seem that structures or appliances of any kind, intended to facilitate the handling and preservation of merchandise arriving at the wharf, erected under municipal control, would be lawful and within the purpose for which wharf property was acquired or dedicated. *Illinois & St. Louis R. & Canal Co. v. St. Louis*, 2 Fed. Cas. 1199, 1203 (cited in *Reighard v. Flinn* [Pa.] 44 Atl. 1080, 1081).

A landing may be public in the sense that it is open to all comers, but wharfage is demandable by some one, and, in order to conclusively indicate that the public is to have a proprietary right, something more than calling the structure a "wharf" is essential. It is a wharf, whether in public or private control, and its delineation and name on a map have no effect whatever in determining its character. *Palen v. City of Ocean City*, 46 Atl. 774, 775, 64 N. J. Law, 669.

A wharf is for the use of the steamship company. It is not a place for the storage of merchandise until it is entirely convenient for the consignees to remove the goods. *Smith v. Britain S. S. Co. (U. S.)* 123 Fed. 176, 178.

Bridge.

The statute of 1850, giving mechanics and others liens on buildings and wharves, is to be literally construed, and hence does not give a lien on a bridge. *Burt v. Washington*, 3 Cal. 246.

Floats or pier wharf.

A deed of a lot of land, with the wharf thereon, described the land by metes and bounds, and stated that a part of the granted premises was held under a certain statute, and referred to a certain deed on record as to the grantor's title. The statute authorized the grantor to extend his wharf to the harbor commissioner's line, and there was a solid wharf, part of which had a water front, within the metes and bounds, extending to the commissioner's line, and outside of this line and of the metes and bounds was a pier wharf, which extended from a part of the solid wharf, and was used in connection with it. Held, that the pier wharf did not pass by the deed, under the phrase "with the wharf thereon." *Wood v. West Boston & Cragie Bridges Com'rs*, 122 Mass. 394, 399.

A wharf is a structure erected on a shore below high-water mark, and sometimes extending into the channel for laying vessels alongside to load or unload, and on which

stores are often erected for the reception of cargoes. To a structure of this description, and built for such purpose, floats necessary for the use of such wharf, and usually occupied with it, may pass as appurtenant. *Doane v. Broad St. Ass'n*, 6 Mass. 332, 334.

Highway.

A wharf is sometimes built on the land on the water's edge, and is sometimes built in the water to the channel of a river or other part, and is a space for the deposit of goods, in order conveniently to load and unload vessels. To those ends, drays, carts, and other vehicles of burden go on them to carry or take away merchandise, and the merchants go also to look to their property and conduct their business; and a public wharf is, for this purpose, open to all persons, and in that sense it is like a public street, but the same cannot be considered a highway. *State v. Cowan*, 29 N. C. 239, 249.

Landing.

A piece of land on the margin of a large basin, and adjoining the private yard of a timber merchant, consisting of natural ground not faced with brick or timber, and where the ground below the water gradually sloped to the bottom of the basin, on which ground the timber merchant landed his timber, where it was marked and measured by the revenue officers, was not a "wharf," within the meaning of the act of Parliament relating to the rating of property for the relief of the poor. *Rex v. The Proprietors of the Regent's Canal*, 6 Barn. & C. 720.

Market overt.

A wharf is not a market overt. *Wilkinson v. King*, 2 Campb. 335, 336.

Site alone.

"Wharves," as used in Act 1848, authorizing a township to repair or rebuild wharves by means of a tax, is not limited to an actually existing artificial structure. It may indicate a locality as well as a structure. Any locality is a wharf which is known as a site designed for such structure, or upon which site a structure has existed, and so marked the location as having once been or to be used for a landing place. *Bacon v. Mulford*, 41 N. J. Law (12 Vroom) 59, 63.

Street distinguished.

A wharf differs in many material respects from a street. The latter is primarily intended for the purpose of passage or travel, and any erection in it without legislative authority is a nuisance; but a wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels or awaiting shipment may be laid or deposited. *Illinois*

& St. L. R. & Cana. Co. v. St. Louis (U. S.)
12 Fed. Cas. 1199, 1203.

WHARFAGE.

Contract for, as maritime contract, see
"Maritime Contract."

Wharfage is a charge or rent for the temporary use of a wharf. *Ouachita & M. R. P. Co. v. Aiken*, 7 Sup. Ct. 907, 910, 121 U. S. 444, 30 L. Ed. 976; *The Idlewild*, 64 Fed. 603, 605, 12 C. C. A. 198; *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 2 Sup. Ct. 732, 738, 107 U. S. 691, 27 L. Ed. 584; *Sweeney v. Otis*, 37 La. Ann. 520, 621.

Wharfage is the fee paid for tying vessels to a wharf, or for loading goods on a wharf or shipping them therefrom. *Langdon v. City of New York*, 93 N. Y. 129, 151.

Wharfage is money due or money actually paid for the privilege of landing goods upon or loading a vessel, while moored, from a wharf. *The Gem* (U. S.) 10 Fed. Cas. 161, 162.

Wharfage or keyage is a toll or duty for the pitching or lodging of goods upon a wharf, or pay for taking goods into a boat and from thence. *Kusenbergs v. Browne*, 42 Pa. (6 Wright) 173, 179.

The definition of wharfage is not to be confined to the charge for landing at a wharf. The term "wharfage" is generally applied to a charge for landing the goods, whether upon an artificial erection or a natural landing. *City of Sacramento v. The New World*, 4 Cal. 41, 44.

Wharfage, within the meaning of the statute giving a lien on vessels for wharfage, does not include the use by a steamboat of a private wharfboat placed at the St. Louis levee, and therefore such use cannot be the basis of a lien upon the steamboat. *Bersie v. The Shenandoah*, 21 Mo. 18, 19.

Dockage and moorage.

Wharfage is a charge against merchandise for the use of wharves. The assessment by state harbor commissioners of rates of dockage, or charges for the privilege of mooring to docks, is not a violation of St. 1880, p. 11, providing that no wharfage shall be collected on commerce within the state. *People v. Roberts*, 28 Pac. 680, 691, 92 Cal. 659.

Moorage is a sum due, by law or usage, for mooring or fastening of ships to trees or posts at the shore or to a wharf. Wharfage is a toll or duty for the pitching or lodging of goods upon a wharf. Those two kinds of shore duties, as thus designated in the English books, which are evidently distinct in their nature, the one as a charge for the accommodation of ships, the other as a

toll for the use of a landing place for goods, are in our country generally, and certainly in the port of Baltimore, spoken of under the one common denomination of "wharfage"—the wharfage due from a vessel, and the wharfage payable on merchandise; and this, perhaps, has arisen from the fact of no duty being demanded of ships which have been moored to the shore where there was no wharf. *The Wharf Case* (Md.) 3 Bland 361, 373.

Duty on tonnage distinguished.

See, also, "Tonnage Duty."

A wharfage fee, though graduated by the tonnage of the vessel, is not necessarily a duty on tonnage; but, if fixed merely for the privilege of landing at a wharf, it is in no sense a tax. *City of Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196, 213.

The license fee exacted by St. Louis City Ordinance No. 232, from vessels engaged in transporting freight upon the Mississippi river from Illinois to Missouri, and unloading the same into vessels moored at the improved wharf of the city of St. Louis, such fee not being exacted as compensation for the use of the city's wharf, but for the privilege of towing boats or other water crafts into or out of the harbor of the city, or from one place to another within said harbor, is not a wharfage charge, such as a state or municipality may lawfully exact from vessels licensed for coasting trade and engaged in interstate commerce, but is an interference with such commerce. In *Keokuk Northern Line Packet Co. v. City of Keokuk*, 95 U. S. 80, 24 L. Ed. 377, the court says: "If the charge is clearly a duty, a tax, or burden, which, in its essence, is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed by authority of the state, and measured by the capacity of the vessel, it is embraced by the prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage of vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of the sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character." In *Parkersburg & Ohio River Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584, the court distinguishes between a duty on tonnage and a charge for wharfage, saying the one is imposed by the government; the other, by the owner of the wharf or landing. The

one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use. *City of St. Louis v. Consolidated Coal Co. (Mo.)* 59 S. W. 103, 105, 51 L. R. A. 850, 81 Am. St. Rep. 310.

As franchise.

See "Franchise."

Nature of use.

Wharfage involves exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its business and the extent of its cargo. *Horn v. People*, 28 Mich. 221, 224.

"Wharfage," as used in a resolution of a board of town auditors fixing the rate of wharfage for the town dock, should be construed in the ordinary sense of that term, and does not apply where a vessel enjoyed none of the ordinary benefits or uses of the wharf for the purposes of commerce and navigation, but lay aground at a distance from it, attached to it by one or two, only, of several lines. Wharfage is defined in the *Encyclopedia of Commerce* and *Webster's Dictionary* as the fee paid for loading goods on a wharf, or for shipping them off; but it also may clearly include the use of a wharf while lying alongside for protection. The term "wharf" is usually applied only to vessels afloat and enjoying some substantial benefits, either of protection or safety, or in the loading or unloading of cargo. *Town of Pebbam v. The B. F. Woolsey (U. S.)* 16 Fed. 418, 419.

Where a vessel discharging cargo at one wharf overlapped the adjoining wharf for the distance of 20 feet, the vessel enjoyed the beneficial use of such adjoining wharf, although not made fast to it, and for such use the libellant was entitled to "wharfage," though the primary definition of the word is "compensation paid for loading goods on a wharf or shipping them off." *The William H. Brinsfield (D. C.)* 39 Fed. 215, 219.

The right to the use of a wharf for the purpose of weighing the cargo is part of the wharfage. *Carsanago v. Wheeler (U. S.)* 16 Fed. 248, 251.

WHARFBOAT.

As a Boat, see "Boat."

WHARFINGER.

A wharfinger is one who for hire receives merchandise for his wharf, either for the purpose of forwarding, or for delivering to the consignee on such wharf. A wharfinger is impliedly bound to use care

for the safety of property in his custody, and must see that the wharf is reasonably safe. *Chapman v. State*, 38 Pac. 457, 458, 104 Cal. 690, 43 Am. St. Rep. 158.

A "wharfinger" is one who keeps a wharf for receiving goods for hire. His responsibility begins when the goods are delivered at or on the wharf, and he has either expressly or by implication so received them. *Rodgers v. Stophel*, 32 Pa. (8 Casey) 111, 113, 72 Am. Dec. 775.

WHARFINGER'S RECEIPT.

A wharfinger's receipt for particular property may be used in commercial transactions as the representative of and a substitute for property which has been deposited with him, and the delivery of the property described in such receipt may be effected by the delivery of the receipt; but the delivery of a so-called "wharfinger's receipt," which represents nothing in his possession, is not a symbolic delivery of anything, and consequently could not form a good basis for a pledge of such property, though subsequently the property was delivered to the wharfinger. *Commercial Bank of Jacksonville v. Flowers*, 42 S. E. 474, 116 Ga. 219.

WHAT.

What is left, see "Left."

WHAT I MAY DIE POSSESSED OF.

The words "what I may die possessed of," in a will, are sufficient to describe all property of whatever description, and will pass real estate. *Barnes v. Patch*, 8 Ves. 604, 607.

WHAT REMAINS.

As giving power of disposal, see "Residual."

"What remains," as used in a will requiring the residuary legatee to give as directed or sell what remains, means what is left undisposed of by the other clauses of her will, and is synonymous with "residue." *Wyman v. Woodbury*, 33 N. Y. Supp. 217, 220, 86 Hun. 277.

"What remains," used in a will, will carry the whole residue, comprising everything not disposed of. The words are equivalent to the Latin word "residuum." *Crook v. Devandes*, 11 Ves. 330, 331.

WHATEVER.

Real property was devised to a trustee to permit A. to take the income for life, with remainder to such persons as A. by his last will should appoint, and, in default of ap-

pointment, to A.'s children. A. by his last will devised "all the rest and residue of my estate, whatever and wherever," but his will did not mention the power nor the trust property, and A. had real estate in his own right not specifically disposed of. Held, that the words "wherever and whatever" did not mean the trust property. *Bilderback v. Boyce*, 14 S. C. 528, 542.

WHATEVER CAUSE.

A drover's pass, providing that persons riding free, to take charge of stock shipped, should do so at their own risk of personal injury, "from whatever cause," cannot be construed to mean from gross negligence or a want of ordinary care. The carrier is liable for what would be regarded as fault or misconduct on its part, and is bound to observe reasonable care and caution, employ persons of reasonable care and skill, and the best vehicles for the use and adapted to the nature of the service required. *Smith v. New York Central R. R. Co.* (N. Y.) 29 Barb. 132, 138, affirmed 24 N. Y. 222, 246.

WHATEVER REMAINS.

A testatrix whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave £200 to each of her executors for their trouble, and bequeathed "whatever remains of money" to the five children of E. D. Held, that the words "whatever remains of money" referred to the testatrix's general residuary personal estate. *Dowson v. Gascoin*, 2 Keen, Ch. 15, 18.

WHATSOEVER.

The word "whatsoever" has a very broad and comprehensive meaning. Among other definitions given to the word by Webster are "one thing or another" and "anything that may be," etc., sufficiently broad to cover both real and personal property; anything, in fact, in the way of property. Where a will, after providing for the payment of debts, gave testator's farm, which was all the real estate he then had, and all his personal property, "whatsoever I may die possessed of," the word "whatsoever" was held broad enough to cover both real and personal property. *Schuck v. Shook*, 10 N. Y. Supp. 935, 936.

Where a lease required the lessee to pay all assessments whatsoever levied or charged on the leased property, the word "whatsoever" did not affect the significance of the word "assessments," so as to increase its meaning to include general taxes not ordinarily within the meaning of such word. *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. 249, 254.

WHEAT STEMS.

Bleached wheat stems or wheat heads are entitled to admission free of duty, under Tariff Act 1897, par. 566, Act July 24, 1897, c. 11, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1864], including textile grasses or fibrous vegetable substances not dressed or manufactured in any manner. *Bayersdorfer & Co. v. United States* (U. S.) 122 Fed. 968.

WHEELED VEHICLE.

"Wheeled vehicle," as used in Act May 18, 1871, providing for the erection of a bridge, fixing the rates or tolls for every "carriage, wagon, buggy, or other wheeled vehicle of whatever description," does not apply to a street car. In the general sense of the term, a street car is a wheeled vehicle, the same as an ordinary railroad car is a vehicle; but both are vehicles of a somewhat extraordinary character in this respect; that they can only be used as a means of conveyance or transportation upon a permanent, continuous, and connected track. *Monongahela Bridge Co. v. Pittsburg & B. T. R. R. Co.*, 8 Atl. 233, 236, 114 Pa. 478.

WHEN.

An instruction to disregard the testimony of a witness "when it is successfully proven that his reputation or general moral character is bad" is equivalent to "if it be successfully proven." *State v. Haberle*, 33 N. W. 461, 462, 72 Iowa, 140.

The word "when," in Act 1811, to amend the thirty-first section of the judiciary act of 1779, which contains the passage that, when an execution against the body of any defendant shall have been served, the party on whom the same shall have been served shall be released, provided, etc., is used in the sense of "if" or "whenever," and not as restricting the exercise of the right given to the very point of time at which the arrest takes place. *Hening v. Nelson*, 20 Ga. 583, 584.

"When," as used in a statute providing that, when any notary public shall protest certain instruments, he shall make and certify, on oath, a full and true record of what shall have been done, which certificate shall be admissible as evidence, does not mean "at the time" or "at which time." The word "when" is generally employed as equivalent to the word "if" in legislative enactments. *Grimball v. Marshall*, 11 Miss. (3 Smedes & M.) 359, 364.

"When," as used in Pub. St. c. 44, § 1, providing that it shall be the duty of the court to appoint commissioners when letters testamentary or of administration shall be granted, means no more than "in case" or "if." The court is not required to make the

appointment at the same time when letters are granted. *Wilkinson v. Winne's Estate*, 15 Minn. 159, 166 (Gil. 123).

The word "when," as used in transfer tax law, providing that such tax shall be imposed when any such person or corporation as specified becomes beneficially entitled to any property by any such transfer, whether made before or after the passage of this act, clearly refers to future, and not to past, events. In *re Birdsall's Estate*, 49 N. Y. Supp. 450, 463, 22 Misc. Rep. 180.

The word "when," as used in the statute authorizing a motion for a new trial upon the minutes of the court, and providing that when such motion is heard and decided upon the minutes of the court, and an appeal is taken from the decision, the case or exceptions must be settled in the usual form, relates to the facts of the motion and its determination, and has the meaning the word "provided," or the words "in case," would have had, if used in the same connection. *Van Brunt & Wilkins Mfg. Co. v. Kinney*, 51 Minn. 337, 339, 53 N. W. 643, 644.

As after.

"When," as used in a contract providing that, when money is paid, the second party and her husband should release and discharge the party of the first part from all claims, dues, and demands which they or either of them might have against him, should be construed in the sense ascribed to it by lexicographers, as "at any time after." *Kirts v. Peck*, 21 N. E. 130, 131, 113 N. Y. 222.

Webster's Dictionary gives one of the definitions of the word "when" to be "after the time that"; and it has that meaning in Rev. Civ. St. art. 541, as amended by Act April 13, 1891, providing that when any town or city shall reincorporate under a certain statute, upon a majority vote of the legal voters, all property of the old corporation shall be vested in the new. *City of Quanah v. White*, 28 S. W. 1065, 1067, 88 Tex. 14.

As at the time of.

"The ordinary meaning of the adverb 'when' is 'at the time that.'" *City of St. Louis v. Withaus*, 3 S. W. 395, 397, 90 Mo. 646 (quoting Webst. Dict.).

In Act June 17, 1887, authorizing the filing of mechanics' liens on leaseholds, and providing that, when the materials are furnished or labor performed by others than the original contractor, they shall notify the owners or reputed owners of their intention to file a lien, the word "when" is equivalent to the words "at the time," and, after the work is done, a notice of an intention to file a lien comes too late. *Strawick v. Munhall*, 21 Atl. 151, 139 Pa. 163.

"When," as used in the contract for the sale of land, obligating the vendee to give

his note for a certain sum when the deed is delivered, is not to be construed as requiring the delivery of the deed before execution of the note, but the two acts are contemporaneous, and the vendee is not entitled to specific performance without first tendering the note. *Ware v. Lippincott* (N. J.) 10 Atl. 404, 405.

A city charter providing that the mayor may by proclamation call special sessions of the Assembly, and shall specially state to them, "when assembled," the objects for which they have been convened, and their actions shall be confined to such objects, is to be construed to mean "at the time of assemblage." *City of St. Louis v. Withaus*, 3 S. W. 395, 397, 90 Mo. 646.

As word of condition.

"When," standing by itself and applied to legacies, is a word of condition. *Johnson v. Baker*, 7 N. C. 318, 321, 9 Am. Dec. 605.

The word "when," like "at," "if," "provided," etc., in a testamentary gift of personalty, is a word of condition, denoting, unless qualified by the context, the time when the gift is to take effect in substance; so that, if the legatee die before the period specified, the legacy is lapsed. *Sellers' Ex'r v. Reed*, 13 S. E. 754, 755, 88 Va. 377.

"When," as used respecting gifts of personal estate by will, is a word of condition, and imports that the time when the legatee is to receive the bounty is of the essence of the donation, unless there be some other expression to explain it or some provision in the context to control it. *Guyther v. Taylor*, 38 N. C. 323, 326.

As importing condition precedent.

A contract which provides that the money is to be paid when some particular thing is done means that the doing of such thing is a condition precedent. *Adams v. Williams* (Pa.) 2 Watts & S. 227, 228.

The condition of a bond providing that the obligor was to do a thing "when thereto requested" means that he was not obliged to perform the act unless the request was made. *Jones v. Cooper* (Vt.) 2 Alkns. 54, 58.

As used in a legacy going to daughters, equally to be divided between them when they shall arrive at 24 years of age, and giving all the residue to another, the word "when" denoted the period of payment, and was not to be deemed as a condition precedent on which the legacy was to vest, but merely postponed the payment thereof. *May v. Wood*, 3 Brown's Ch. 471, 474.

As creating a contingency.

"When," as used in the grant of a remainder, did not import a contingency or make anything necessary to precede the vest-

ing of a remainder. *Middleton's Heirs v. Middleton's Devisees* (Ky.) 43 S. W. 677 (citing *Williams v. Williams*, 91 Ky. 554, 555, 16 S. W. 361; *Williamson v. Williamson*, 57 Ky. [18 B. Mon.] 329).

A will declaring that a certain legacy shall be paid to a legatee "when or if" he attains 21 vests the legacy at the death of the testator, and such legacy is not contingent upon the legatee attaining 21. *Lister v. Bradley*, 1 Hare, 10, 14.

"When," as used in a will giving one a legacy when he arrives at a certain age, means that the legacy is contingent. *Colt v. Hubbard*, 33 Conn. 281, 286; *Post v. Herbert's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 540, 543.

The words "when," and "whenever," referring to the time at which property is to be divided, will not be allowed to make a devise to children contingent, for these words and their synonyms almost always appear when a vested remainder is created. *Manderson v. Lukens*, 23 Pa. (11 Harris) 31, 62 Am. Dec. 312. "When" and "upon," referring to the time of performing an act, are substantially synonymous. *Womrath v. McCormick*, 51 Pa. (1 P. F. Smith) 504, 507 (citing *Adams v. Williams* [Pa.] 2 Watts & S. 227).

It is the general rule that a legacy to a person "when" or "as" he shall attain to a given age, is *prima facie* contingent; but circumstances, even though but slight, in the context, may be sufficient to show that the attainment of the specified age was not intended as a condition, but only to fix the time of payment, in which case it will be held to be a vested legacy. An exception to the general rule of construction above stated is that, where the postponement is for the benefit of the estate, the legacy vests at the death of the testator, notwithstanding the direction is to pay "when" or "as" the legatee attains to a specified age. *Fisher v. Johnson*, 38 N. J. Eq. (11 Stew.) 46, 66.

The expressions, "I give and bequeath to A. B. at the age of twenty-one," or "if he arrives at twenty-one," or "provided he lives to be twenty-one," or "in case of his arriving at twenty-one," or "when he arrives at the age of twenty-one," have all been held to be contingent legacies. *Gifford v. Thorn*, 9 N. J. Eq. (1 Stockt.) 702, 704, 729.

As if.

The word "when" means "at that time"; but this is not the only meaning of the word, it being often used for "if" or "in case." *United States v. Willings*, 8 U. S. (4 Cranch) 48, 54, 2 L. Ed. 548.

Defendant executed the following instrument: "I, the undersigned, herewith promise to pay to the widow G. on her wedding day, when she shall become my wife,

the sum of One Thousand Dollars." The parties separated soon after the marriage, and the wife brought an action to recover the amount claimed to be due under the instrument. It was held that the word "when," as used in the instrument, was not used in the sense of "if," so as to express the consideration of the promise, but merely expressed the time when the payment should be made. Therefore the consideration for the promise was not sufficiently expressed in the agreement. *Siemers v. Siemers*, 85 Minn. 104, 106, 67 N. W. 802, 60 Am. St. Rep. 430.

As relating to time of vesting or enjoyment of estate.

When used in a devise of a remainder, limited upon a particular state and terminable on an event which may necessarily happen, the word "when" will be construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting. *Canfield v. Fallon*, 57 N. Y. Supp. 149, 154 (citing *Moore v. Lyons* [N. Y.] 25 Wend. 119, 144; *Sheridan v. House*, *43 N. Y. [4 Keyes] 569; *Livingston v. Greene*, 52 N. Y. 118, 123; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Haug v. Schumacher*, 64 N. Y. Supp. 310, 313; *Hersee v. Simpson*, 48 N. E. 890, 891, 154 N. Y. 496; *Frame v. Stewart* (Pa.) 5 Watts, 433, 436. See, also, *Boreston's Case*, 3 Coke, 19, 21 (followed by *Holcroft's Case*, *Moore*, 486); *Middleton's Heirs v. Middleton's Devisees* (Ky.) 43 S. W. 677; *Williamson v. Williamson*, 57 Ky. (18 B. Mon.) 329, 375; *Williams v. Williams*, 91 Ky. 554, 555, 16 S. W. 361.

As used in a will leaving certain property to testator's children when they should respectively attain their ages of 21 years, or day or days of marriage, the word "when" did not denote merely the time at which the gifts were to take effect in possession, but the time when the gifts were to take effect in substance. It is the same, speaking of an uncertain event, whether you say "when" or "if" it shall happen. In the civil law the words "cum" and "si," as referred to this subject, are precisely equivalent. The word "when," not standing by itself, but coupled with other expressions or circumstances that have a reference to the time at which the possession of the thing is to take place, has been held by the civil law not to have so absolute a sense that it cannot be controlled. *Hanson v. Graham*, 6 Ves. Jr. 239, 243.

"The cases are common which hold that adverbs of time, such as 'when,' 'then,' 'after,' 'from and after,' etc., in the devise of a remainder limited upon a life estate, are to be construed merely as relating to the time of the enjoyment of the estate, and not to the time of its vesting in interest, and that the law favors such a construction of a will as will avoid the disinheritance of remain-

dermen who may happen to die before the determination of the precedent estates. In *Connolly v. O'Brien*, 60 N. E. 20, 166 N. Y. 406, the Court of Appeals carried this doctrine so far as to hold that where testator gave his property to his widow during her life, and to such of his children that 'may then be alive,' the adverb was intended by him to refer to the time of his own death and not to that of his widow, and that consequently a daughter who survived him, but died before the widow, took a vested share." *Ackerman v. Ackerman*, 71 N. Y. Supp. 780, 781, 63 App. Div. 370.

Where a will provided that testator gave and bequeathed unto his son J., when he arrived at the age of 21 years, a certain tract of land, to hold to him, his heirs and assigns, forever, and thereafter the testator bequeathed to his wife the use of the land until J. should become of age, the use of the word "when" did not limit the quality of the estate devised, but merely the time when J. was to be entitled to possession thereof, and hence the devise vested in him an absolute fee on the testator's death. *Kerlin's Lessee v. Bull* (Pa.) 1 Dall. 175, 177, 1 L. Ed. 88.

A devise to two children "when they shall attain the age of twenty-one years" means that the devise is vested, but the possession or enjoyment thereof is postponed until the devisees attain such age. *Branstrom v. Wilkinson*, 7 Ves. 422.

The word "when," like the words "at" and "if," applied to legacies of personalty, makes the gift contingent; but the superaddition of the words that the legacies are "equally to be divided among the beneficiaries" shows that the word "when" is used to designate the time of enjoyment of the legacy, and not to prevent its vesting. *Sims v. Smith*, 59 N. C. 347, 349.

The words "if" and "when," in a will, are ordinarily words of condition or of conditional limitation. It is equally clear that their meaning may be controlled by provisions in the will which show an intention that the legacy shall be vested. Thus, a will giving each of testator's children a pecuniary legacy when the youngest child arrives at the age of 12 years, and providing that the whole estate shall be enjoyed by testator's family in common until that time, creates a vested legacy. *Sutton v. West*, 77 N. C. 429, 431.

"When recovered," as used in a will by which legacies were to be paid out of the money due on a mortgage "when the same shall be recovered," did not suspend or postpone the right of the legatees to the interest. *Wood v. Penoyre*, 13 Ves. 325, 337.

As at which time.

"When" means "at which time." *Williams v. Washington Life Ins. Co.*, 81 Iowa, 541, 544 (quoting *Bouv. Law Dict.*).

As where.

"When," as used in Gen. St. 1889, par. 1259, providing that, when any railroad runs through improved or fenced land, the railroad company shall make proper cattle guards on such road when they enter and when they leave, has the meaning of "whenever," regardless of whether the land is fenced when the road is built, and is not equivalent to "where." *Atchison, T. & S. F. R. Co. v. Billings*, 52 Pac. 61, 63, 7 Kan. App. 399.

As whenever.

As used in Laws 1886, c. 335, authorizing the city of Brooklyn to buy certain waterworks when and at such price as may be agreed on, and providing that, if the parties were unable to agree on a price, the power to acquire said property by eminent domain was delegated to the city, and the officers thereof, within two years thereafter, might acquire such property, the word "when" relates to a point of time in the progress of a simple negotiation, and not in the sense of an unlimited future. It does not have the effect of the word "whenever." It contemplates a possible agreement as to price in the course of the only authorized negotiation of the one permitted effort to buy, and, "when" that occurs, the authority to purchase arises; but, if the single negotiation contemplated ends in a disagreement, the city may condemn, but must exercise the right within two years or not at all. *Zeigler v. Chapin*, 27 N. E. 471, 473, 126 N. Y. 342.

As as soon as.

In an action against a railroad for negligence it was said: "The language of the finding is not that 'when' he had passed the car, and his horses had gone to within 10 feet of the main track, he looked, and then pulled on his lines. The sense of the language of the finding is that 'as soon as' he had passed he looked, or 'just after the moment' of passing he looked, or he passed the car at the time he looked." The quoted words are definitions of the word "when," given by the *Century Dictionary*, and sustained by *Webster's International Dictionary* (Ed. 1893). When he had passed the car and looked, and when he had pulled upon the lines and endeavored to stop the horses, it was then that the horses were 10 feet from defendant's main track. *Pittsburgh, C. & St. L. Ry. Co. v. Burton*, 38 N. E. 594, 139 Ind. 357.

Upon synonymous.

"When" and "upon," referring to the time of performing an act, are substantially synonymous. *Womrath v. McCormick*, 51 Pa. 504, 507 (citing *Adams v. Williams* [Pa.] 2 Watts & S. 227).

WHEN ABLE.

A promise by a debtor to pay "when able" amounts to a promise to pay on condition, the burden of proof of the fulfillment of which is on the creditor. *Cole v. Saxby*, 3 Esp. 159, 160; *Penn v. Bennet*, 4 Camp. 205; *Besford v. Saunders*, 2 H. Bl. 116; *Walt v. Morris* (N. Y.) 6 Wend. 394, 396; *Cartledge v. West* (N. Y.) 2 Denio, 377, 378; *Everson v. Carpenter* (N. Y.) 17 Wend. 419, 420; *Wakeman v. Sherman*, 9 N. Y. 85, 92; *Proctor v. Sears*, 86 Mass. (4 Allen) 95; *Chandler v. Glover*, 32 Pa. (8 Casey) 509; *Davies v. Smith*, 4 Esp. 36; *Bush v. Barnard* (N. Y.) 8 Johns. 407; *Salinas v. Wright*, 11 Tex. 572, 575 (citing *Mitchell v. Clay*, 8 Tex. 445); *Thompson v. Lay*, 21 Mass. (4 Pick.) 47, 49.

A promise to pay "when able," "as soon as possible," "when I can," "as soon as he could," construed not to render a promise conditional; such phrases being held too uncertain to constitute a condition. *Horner v. Starkey*, 27 Ill. 13, 14; *Norton v. Shephard*, 48 Conn. 141, 142, 40 Am. Rep. 157; *Cummings v. Gassett*, 19 Vt. 308, 310; *First Congregational Soc. v. Miller*, 15 N. H. 520, 522.

A new promise to pay a debt barred by the statute of limitations, "when able," was a conditional promise, and, the debtor having a right to impose conditions on his promise, the debt being barred, and he being under no legal obligation to pay the same, the creditor could not recover thereon in the absence of proof of the debtor's ability to pay, which was a question of fact. *Richardson v. Bricker*, 1 Pac. 433, 434, 7 Colo. 58, 49 Am. Rep. 344.

Where an insolvent or bankrupt, after his discharge, agrees to pay one of his debts, existing prior to the discharge, "when able," there is not an absolute, but a conditional, promise. *Scouton v. Elslord* (N. Y.) 7 Johns. 86, 37.

WHEN CONVENIENT.

See "Convenience—Convenient."

WHEN IN FUNDS.

When a bill of exchange or order for money is accepted to be paid "when in funds," the import of that condition is "when the acceptor is in possession of cash which the drawer has a present right to demand and receive." It would not apply to the wages for the daily labor of the drawer, due from the acceptor to him after the acceptance, such wages being necessary for the support of himself and family. In *Campbell v. Pettengill*, 7 Me. (7 Greenl.) 126, 20 Am. Dec. 349, the question came directly up, and the court determined that the phrase "when in funds" means when the acceptor has in his hands money of the drawer suf-

ficient to pay the bill. *Wintermute v. Post*, 24 N. J. Law (4 Zab.) 420, 423.

WHEN MANUFACTURED.

An authority to an agent to make sales of sherry "when manufactured" authorizes the agent to sell manufactured sherry only, and not to make sales of sherry to be manufactured. *Merriam v. De Turk*, 6 Pac. 424, 66 Cal. 549.

WHEN WANTED.

A note payable "when wanted" is payable on demand. *Goodwin v. Hazzard*, 1 Ind. 514, 515.

WHENEVER.

"Whenever" is often used as equivalent to "as soon as," but it is also often used where the time intended by it is and will be, until its arrival, or for some uncertain period at least, indeterminate. The word was construed in the latter meaning in a will directing a distribution of certain property whenever the younger child of testator's daughter should have reached the age of 21 years. *Robinson v. Greene*, 14 R. I. 181, 188.

Laws 1890, c. 37, art. 3, § 5, declaring that the mayor shall have power to remove any officer appointed by him whenever he shall be of the opinion that the interests of the city demand it, confers on the mayor an absolute power, which vests in him without limitation or qualification, and gives him the right to remove any person appointed by him at will; the last clause of the section not being in the nature of a proviso or a condition precedent to such removal, but merely requiring that the mayor shall make the report to the city council for the purpose, evidently, of apprising the council and the citizens generally of the reasons which influenced him in his action. The mayor's failure to make such report, however, does not affect his action in making the removal. *State v. Williams*, 60 N. W. 410, 412, 6 S. D. 119.

The word "whenever" is an adverb of time rather than place, and its indication is future rather than past. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9, 61.

As at any time.

As used in Gen. St. c. 80, § 73, enacting that, whenever service of process cannot be made on any person liable as sheriff by reason of the removal of such person, an action of debt or sci. fa. may be brought, the word "whenever" covers all the time during which the liability of the sheriff would exist, and looks directly to the act of making service of the process. If, at any time during the existence of such liability, process cannot be served by reason

of the removal of the sheriff, then the action against the sureties may be had. *Hine v. Pomeroy*, 40 Vt. 103, 107.

As used in Act Jan. 28, 1885, as amended by Act Feb. 12, 1885, § 1, providing that whenever any city or town incorporated under the general municipal corporation act should be indebted in a certain sum and defaulted in the payment of its interest, its charter should be repealed, and the incorporation thereof dissolved, "whenever" means "at whatever time," and does not apply only to cities which were, at its approval, indebted in the sum mentioned. *Ex parte Wells*, 21 Fla. 280, 301.

"Whenever," as used in Pol. Code, § 437, providing that whenever any person has received moneys belonging to or held in trust for the state, and fails to render an account thereof and to make settlement with the comptroller within the time prescribed by law, the comptroller must state an account with such person, charging 25 per cent. damages and interest, simply means the same as "if"; i. e., in those cases in which parties receiving money do not account, etc. It does not mean at whatever time moneys have been received. *People v. Melone*, 15 Pac. 294, 296, 13 Cal. 574.

The term "whenever it appears that the justice has no jurisdiction thereof," as used in Code, c. 50, § 66, providing that an action shall be dismissed at plaintiff's cost in such case, obviously means if it appears at any time during the trial, by the evidence or otherwise, the action shall be dismissed. *Mountain City Mill Co. v. Southern*, 34 S. E. 782, 783, 46 W. Va. 754.

As importing contingency.

"Whenever," as used in a will providing that, whenever the death or marriage of testator's widow should take place, the property should be equally divided among his children, cannot make the devise to the children contingent, for that word or its synonyms almost always appear where a vested remainder is created. *Manderson v. Lukens*, 23 Pa. (11 Harris) 31, 33, 62 Am. Dec. 312.

As in all cases.

Rev. St. c. 26, § 19, providing that "whenever," at the time and place appointed for the trial of any civil suit before a justice, such justice should be unable to attend, any other justice might continue the cause, means in all cases which should need the intervention of another justice. *Whitcomb v. Rood*, 20 Vt. 49, 53.

WHERE.

The word "where" is defined as meaning "at which or what place." *Cook v. Kelsey*, 19 N. Y. 412, 414.

Adverbs of time, as "where," "thereafter," "from," etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest. *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869, 874.

WHERE SITUATED.

The law providing that all other personal property, including shares in national banks, shall be taxed "where situated," and being silent as to the definition of these words, by implication adopts the ordinary rule that personal property in the nature of bank shares follows the situs of the owner. *Smith v. Webb*, 11 Minn. 500, 514 (Gil. 378, 390).

WHEREAS.

The word "whereas" is defined to mean "the thing being so that"; "considering that things are so." *Dean v. Clark*, 80 Hun. 80, 83, 30 N. Y. Supp. 45, 47.

The word "whereas," as used in an indictment for perjury averring that "whereas, in truth and in fact, * * * he * * * was down to S.'s corral," is not used in the sense of being a mere recital, but is used as a positive averment. *People v. Ennis*, 70 Pac. 84, 86, 137 Cal. 263.

WHEREFORE.

The word "wherefore" is defined as meaning "for which reason"; and an averment in a plea, "Wherefore the defendants say that said premium note was and is void," is held not to render the plea argumentative. *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526, 531.

WHEREON.

A contract for the construction of a bridge, providing that the company for whom the bridge was to be built should have a lien upon such machines, implements, and materials as should for the time being be in or upon the "lands or grounds whereon said bridge was to be built," as a security for the completion of the works, includes all places in which the building of the bridge, in a popular sense, is being carried on, if such places were in the possession of the person for whom the bridge was to be built, so that they might be considered as having a possession of the articles there placed. *Hawthorn v. Newcastle upon Tyne & North Shields R. Co.*, 3 Adol. & E. 733, 738.

WHERESOEVER.

In a will by which the testator devised and bequeathed "all my estate and effects

whatsoever and wheresoever," the word "wheresoever" pointed to locality, and was peculiarly applicable to real estate. *Stokes v. Salomons*, 4 Eng. Law & Eq. 133, 137.

WHEREUPON.

"Whereupon" does not necessarily imply immediate, instantaneous action, but it does imply action in consequence of and without change in the facts antecedently stated as the moving cause, and "after which," "upon which," "in consequence of which," the subsequent fact took place; and where a record stated that the jury had retired to consider their verdict, and they returned into court with the same, and presented it, finding the prisoner guilty, "whereupon the prisoner moved to set aside the verdict," the record will be deemed to show that the prisoner was actually present in court at the time. *Gilligan v. Commonwealth*, 37 S. E. 962, 964, 99 Va. 816.

"Whereupon" is not a word expressing a definite time, but as contained in a docket entry stating that the jury returned a verdict, "whereupon the court rendered judgment," means that the judgment was rendered on the verdict without an adjournment. *State v. Van Ellis*, 32 N. W. 32, 33, 69 Wis. 19.

"Whereupon," as the term is used in a justice's transcript, as follows: "The plaintiff appeared according to notice, and the defendant did not appear until after 4 o'clock, whereupon I gave judgment in favor of the plaintiff," etc.—means that upon the defendant's appearance he gave judgment, etc. *Bartow v. Smyth*, 14 N. J. Law (2 J. S. Green) 286, 288.

WHEREVER.

In Act March 13, 1815, declaring that on due proof that process had been served personally on a party, wherever found, or that a copy had been given to him or her 15 days before the return of the same, a divorce might be decreed, the words "wherever found" could not be construed so as to give the court extraterritorial power, without its jurisdiction over a person, citizen, or resident of another state. *Appeal of Ralston*, 93 Pa. 133, 136.

A bond requiring the appearance of defendant "wherever the King shall then be in England," is to be construed to mean "Westminster." *Jones v. Stordy*, 9 East, 55, 56.

WHERRY.

A wherry is a craft plying for hire for the carrying of passengers. *Reg. v. Reed*, 28 Eng. Law & Eq. 133, 135.

A wherry is a boat plying for hire and carrying passengers or goods, and does not include a steam tug used for towing boats. *Reed v. Ingham*, 26 Eng. Law & Eq. 164, 167.

WHETHER.

The word "whether" neither in common parlance nor in legal phraseology has ever had the force of a *videlicet*. The word "whether" in the act of March 25, 1831—an act authorizing a tax on personal property, and describing the property made taxable by its provisions as "all ground rents, moneys at interest, and all debts due from solvent debtors, whether by promissory notes (except bank notes), penal or single bill, bond, mortgage, judgment, stocks," etc.—requires some correlative, generally the word "or." "It may be true that in construing penal acts an enumeration after the word 'whether' might be held as exclusive; as, if a statute making horse stealing a felony punished with death had been worded 'all horses, mares, or colts, whether black or white,' the court, in *favorem vitæ*, would perhaps adjudge that stealing a bay horse would not come under the statute, but in construing a statute enacting that 'horses of all descriptions, whether black or white, should be taxed six cents a head,' I think a judge would be considered capriciously astute who would say that the Legislature meant to tax only black and white horses. Money payable under articles of agreement, and bearing interest, held taxable for school purposes under the above act." *Voegtly v. Third Ward School Directors*, 1 Pa. (1 Barr) 330, 331, 332.

WHICH.

See "At Which Time."

The word "which" gives writers a good deal of trouble, and its usage is varying, as a consultation of any standard work on grammar will show. It is often equivalent to "and it" or "that," used restrictively; but such usage is said not to be generally observed by modern writers in this country, and the rule is given that "which" is to be used in preference to "that" or "and it" whenever it introduces a new fact about the antecedent. *State of Tennessee v. Bank of Commerce* (U. S.) 53 Fed. 735, 743.

In determining whether a clause beginning with the word "which" related to one or more antecedents in a contract, it was said that the word "which" often has more than one antecedent, and that therefore there would be no reason for limiting the clause beginning with the word "which" to one of the antecedents. *Lowrey v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 68 Fed. 854, 872.

Tariff Act 1875, providing that certain specified silk articles and ready-made clothing of silk, or "of which silk is the component material" of chief value, only applies to ready-made clothing "of which silk is the component material" of chief value, and does not authorize such duty on the other articles designated as being composed of silk. *Wilson v. Spalding* (U. S.) 19 Fed. 413, 415.

The words "which I hold," in the bequest of "all my 250 shares of capital stock which I hold in the Union Bank of Pennsylvania," certainly indicates the stock as constituting a part of the corpus of the estate with as much precision as would the words "standing in my name," which made the bequest specific in *Sleech v. Thornton*, 2 Ves. 561, or the words "all the stock which I have in the three per cents.," which was allowed to have the same effect in *Humphreys v. Humphreys*, 2 Cox, 184, and it is even more specific than the words in *Drinkwater v. Falconer*, "to be paid out of my dividends of 400 pounds in the joint stock of South Sea annuities, now standing in the company's books in my name," which were held to be sufficiently so, though the stock was described as a fund for payment, because the residue was given in nearly the same terms, and charged with the preceding bequest. *Blackstone v. Blackstone* (Pa.) 3 Watts, 335, 338, 27 Am. Dec. 359.

Act April 8, 1875 (Revision, p. 1166), providing that no certificate of sale or tax title shall be set aside, etc., by reason of any variance between the date of the notice required by law and the actual publication thereof, provided that notice shall have been or shall be actually given for the specified number of days prior to such proceedings for public sale, is prospective only. The stress, in the opinion below, laid upon the grammatical construction of the words "which shall have been," as used in the act, was here criticised and remarked upon as an effort to escape from a possible or probable retroactive meaning under rules of accurate composition, which do not necessarily control in the interpretation of statutes. But it is not enough that words used in an act may be given a retrospect, without doing violence to their meaning, or that such a course may coincide with their common understanding. *Citizens' Gas Light Co. v. Alden*, 44 N. J. Law (15 Vroom) 648, 653.

WHILE.

See "Once in a While."

"While" is defined either as a conjunction or as an adverbial modifier—as "during the time that," "as long as"; so that, as used in Const. art. 5, § 3, providing that for the purpose of voting no person shall be deemed to have gained or lost a residence

while kept at any asylum at public expense, means that no residence shall be gained during the time that, or as long as, a person is kept at an asylum. *Lawrence v. Leidigh*, 50 Pac. 600, 602, 58 Kan. 594, 62 Am. St. Rep. 631 (citing *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444; *Wolcott v. Holcomb*, 97 Mich. 361, 363, 56 N. W. 837, 838, 23 L. R. A. 215).

A policy of insurance which insured a hophouse from the 15th of August to the 15th of October, "while drying hops," should be construed to limit the contract of insurance to the destruction of the building while being used for drying hops, and, if destroyed while not so used, the insured could not recover for the loss. *Langworthy v. Oswego & O. Ins. Co.*, 85 N. Y. 632, 633.

WHILE CONTAINED IN.

The words "while contained in," in a fire policy on certain described chattels while contained in a certain dwelling house, may be held to confine the operation of the policy to such times as the articles are contained in a house answering the description; but we see no reason why they should do more than suspend the insurance while the articles are not contained in such house. *Ring v. Phoenix Assur. Co.*, 14 N. E. 525, 528, 145 Mass. 426.

WHILE FRESH IN HIS RECOLLECTION.

The statement that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing "while fresh in his recollection," has apparently a very unsettled meaning. In *Wood v. Cooper*, 1 Carr. & K. 646, a witness was allowed to look at his examination before commissioners in bankruptcy, signed by him, given within a fortnight of the time of the happening of certain occurrences, and when the facts were fresh in his memory. So, in *State v. Colwell*, 3 R. I. 132, a witness was allowed to refer to a memorandum made a day or two after a previous trial, when an interval of about eight days had elapsed from the time when the occurrences transpired concerning which the witness gave testimony. In *Billingslea v. State*, 85 Ala. 323, 5 South. 137, it was held proper to allow a witness to refresh his recollection by resort to the minutes of statements made to a grand jury within a week after the occurrence about which he was being interrogated. In *Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 555, it was held that a witness who, five months after the occurrence of certain facts, and at the request of a party interested, made a statement in writing and swore to it, could not be allowed to testify to his belief in its correctness. *Putnam v. United States*, 16 Sup. Ct. 923, 927, 162 U. S. 687, 40 L. Ed. 1118.

WHILE VIOLATING LAW.

The expression "while violating the law," used in an accident insurance policy exempting the insurer from liability if the disability was incurred while violating the law, was evidently intended to comprehend acts that would avoid the risk if done at any time. They must be in the nature of contributing causes, and not mere conditions of the accident. In an action to recover on an accident policy by one injured on Sunday in attempting to get pigeons in the cupola of his barn, it is no defense that labor is prohibited by Code 1873, § 4072, on Sunday. *Matthes v. Imperial Acc. Ass'n*, 81 N. W. 484, 485, 110 Iowa, 222.

The expression "while or in consequence of violating any law," as used in an accident policy, providing that the contract of insurance shall not cover an injury received while or in consequence of violating any law, does not prohibit the insured from riding on his bicycle on Sunday to attend the funeral of his friend, when he was injured when returning by another road, four miles longer than the direct road to his home, notwithstanding the provisions of Rev. St. c. 124, § 20, relating to the Lord's Day. *Eaton v. Atlas Acc. Ins. Co.*, 38 Atl. 1048, 1049, 89 Me. 570.

WHILST.

Whilst actually on duty, see "Actually on Duty."

In a lease in which a pump was not a specific subject of the demise, but which contained a covenant by the lessor that during the term he would permit plaintiff to have free ingress through the gate in the yard, and the use of a pump in the yard whilst the same should remain there, paying half the expenses of keeping it in repair, the use of the word "whilst" reserved to the lessor the power of removing the pump at his pleasure. *Rhodes v. Bullard*, 7 East, 116, 119.

WHISKY.

See "Straight Whiskies."

Whisky is a spirit distilled from grain. *Briffitt v. State*, 16 N. W. 39, 40, 58 Wis. 39, 46 Am. Rep. 621; *Watson v. State*, 55 Ala. 158, 160; *State v. Williamson*, 21 Mo. 496, 498.

Whisky is a spirit distilled from grain; generally from barley, maize, wheat, rye, or from potatoes. It is a spirituous liquor. *Freese v. State*, 2 South. 1, 4, 23 Fla. 267.

The use of the term "whisky," in an indictment charging defendant with selling intoxicating liquors, to wit, one quart of whis-

ky, is sufficient to show the sale of fermented or distilled liquor, within the meaning of the statute prohibiting the sale of such liquor. *State v. Williamson*, 21 Mo. 496, 498; *Caldwell v. State*, 30 South. 814, 815, 43 Fla. 545.

The courts judicially know that whisky is a spirituous liquor, so that a complaint charging defendant with selling whisky to an Indian is sufficient under a statute making it a crime to sell spirituous liquors to an Indian. *State v. Murphy*, 48 Pac. 628, 629, 23 Nev. 390.

As a drug.

See "Drug."

As an intoxicating liquor.

Whisky is intoxicating liquor. "That whisky will intoxicate is as well known as that fire will burn or water will drown." *Eagan v. State*, 53 Ind. 162, 163 (citing *Carmon v. State*, 18 Ind. 450, 451).

Whisky is alcohol mingled with water and other elements, of which alcohol alone is intoxicating. The words "mixed liquor, a part of which is intoxicating," did not properly describe any well-known kind of intoxicating liquor, but they are not inconsistent with the general words "intoxicating liquor," and include "whisky." *Commonwealth v. Morgan*, 21 N. E. 369, 149 Mass. 314.

As long as the laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors per se, simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350.

Courts and juries will take knowledge of the fact that whisky and brandy are intoxicating liquors. It needs no evidence to support a fact so well known. *State v. Lewis*, 90 N. W. 318, 86 Minn. 174.

Judicial notice will be taken that whisky is an intoxicating liquor, and therefore an indictment for the unlawful sale of spirituous liquor commonly called "whisky" is sufficient, without an averment that the whisky sold was an intoxicating liquor. *Schlicht v. State*, 56 Ind. 173-176.

As a spirituous liquor.

"Whisky" is judicially known to be a spirituous liquor. *Pedigo v. Commonwealth (Ky.)* 70 S. W. 659.

WHISKY COCKTAIL.

A whisky cocktail is only a mode of preparing whisky as a beverage. Evidence of

the sale of a "whisky cocktail" under an indictment for selling "whisky" is not a variance. *Galloway v. State*, 5 S. W. 248, 248, 23 Tex. App. 398.

WHISTLING.

"Whistling," as applied to a horse, is a noise made in respiration while trotting or cantering, and though at first it does not indicate any defect in pace or endurance, yet it is apt to increase, and indicate such defects. *King-King v. Cave* (cited in 29 Alb. Law J. 25).

WHITE.

Ballots upon paper tinged with blue, which has ruled lines not placed there as marks to distinguish the ballots, are upon "white paper," within the meaning of Act 1849, p. 74, § 15, providing that no ballot shall be received or counted unless the same is written or printed upon white paper without any marks thereon intended to distinguish one ballot from another. *People v. Kilduff*, 15 Ill. 492, 501, 60 Am. Dec. 769.

Act Oct. 1, 1890, c. 1244, par. 419, 28 Stat. 590, relating to the duties on "tissue paper, white or colored," includes tissue having certain colors in stripes and plaids printed or stamped thereon, and not of one uniform color. *Kraft v. United States* (U. S.) 61 Fed. 398.

WHITE HARD ENAMEL.

White hard enamel is an article of commerce which is used for various purposes, including the making of faces or surfaces of watch dials, scale columns, and thermometers, faces or surfaces of steam-gauge dials, and for other purposes where a smooth or enameled surface is desired. *Worthington v. Robbins*, 11 Sup. Ct. 581, 582, 139 U. S. 337, 35 L. Ed. 181.

WHITE LEAD.

"White lead is manufactured as follows: Small earthen pots are partially filled with vinegar or acetic acid. Pig lead of commerce, cast into round, perforated plates, technically called "buckles," are placed in the pots above the acid, and not in contact with it. The pots thus filled are placed in a chamber upon a layer of spent tanbark. Alternate layers of pots and tanbark are filled up to the roof of the chamber. Air is introduced into the chamber through flues and natural crevices. The tanbark contains moisture, becomes heated, and evolves carbonic acid. By chemical action the lead is oxidized by the oxygen of the air, and then, in combination with the carbonic acid, be-

comes a carbonate of the oxide of lead." *Meyer v. Arthur*, 91 U. S. 570, 571, 23 L. Ed. 455.

WHITE PERSON.

"White person," as used in the naturalization laws, means a person of the Caucasian race. In *re Camille* (U. S.) 6 Fed. 256, 257; In *re Ah Yup* (U. S.) 1 Fed. Cas. 223; In *re Kanaka Nian*, 21 Pac. 993, 6 Utah, 259, 4 L. R. A. 726.

"White person," as used in the Constitution and statutes, "has a distinct signification, which ex vi termini excludes black, yellow, and all other colors." It is used, "in its generic sense, as including the Caucasian race, and necessarily excluding all others." *People v. Hall*, 4 Cal. 399, 404.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the actual complexion might be. *Du Val v. Johnson*, 39 Ark. 182, 192.

In sustaining a bequest "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut," the court said: "They must be white. It is as difficult to declare of a person that he has color as that he has none. For many years, by the Constitution of this state, only white men were permitted to vote. If the word has in the general mind a meaning so sharply defined that it can be put to a use so practical and important, we think it may well support a charitable bequest." *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 493, 3 Atl. 557, 559, 55 Am. Rep. 152.

The term "negro," as used in the article prohibiting the intermarriage of white persons and negroes, includes also a person of mixed blood descended from negro ancestry from the third generation, inclusive, although one ancestor of each generation may have been a white person. All persons not included in the definition of negro shall be deemed a white person. *Pen. Code Tex.* 1895, art. 347.

Chinese or Japanese.

"White person," as used in Rev. St. p. 1, relative to naturalization, and providing that the act shall apply to white persons and aliens of African nativity, means a person of the Caucasian race, and should not be construed to include Chinese, or other members of the Mongolian race. In *re Ah Yup* (U. S.) 1 Fed. Cas. 223.

The word "white," as used in the United States naturalization laws, applies to the race commonly referred to as the "Caucasian race." A native of Japan is not a "white

person," within the meaning of the naturalization laws. In *re Takuji Yamashita*, 70 Pac. 482, 483, 30 Wash. 234, 59 L. R. A. 671; In *re Saito* (U. S.) 62 Fed. 126.

The word "white" has a distinct signification, which *ex vi termini* excludes black, yellow, and all other colors. Under Civ. Prac. Act, § 394, providing that no Indian or negro shall be allowed to testify as a witness in any action in which a white person is a party, and Cr. Act, § 14, providing that no black or mulatto person or Indian shall be allowed to give evidence in favor of or against a white man, Chinese and all other peoples not white are included in the prohibition from being witnesses against whites. *People v. Hall*, 4 Cal. 399, 404.

Indian.

A person of half white and half Indian blood is not a "white person," within the meaning of this phrase as used in the naturalization laws. In *re Camille* (U. S.) 6 Fed. 256, 257.

A person the offspring of a white man and a half-breed Indian woman, being nearer white than Indian, is considered as white, so as to be entitled to the right of franchise guaranteed by the Constitution to free white citizens. *Jeffries v. Ankeny*, 11 Ohio, 372, 375.

Hawaiian.

"White person," as used in Rev. St. § 2169 [U. S. Comp. St. 1901, p. 1333], providing that only white persons or Africans may become citizens, etc., includes only individuals of the Caucasian race, notwithstanding Act May 6, 1882, c. 126, 22 Stat. 61, § 14, declares that no court shall naturalize Chinese. In *re Kanaka Nian*, 21 Pac. 993, 6 Utah, 259, 4 L. R. A. 726.

Within the import of a statute prohibiting the marriage of a white person with any negro, etc., a person having but one-sixteenth or one-eighth of colored blood, is a white person. *Bailey v. Fiske*, 34 Me. 77.

Mixed negro blood.

The children of a white mother and a father three-fourths white, having more than one-half white blood, are "white," within the meaning of 29 Ohio Laws, 422, providing that, while a teacher is employed out of the common school fund, the school shall be free to all "white children." The term describes blood, not complexion, which would be an unsafe guide. *Williams v. School Directors of Dist. No. 6* (Ohio) *Wright*, 578, 579.

"White children," within the meaning of the statute giving white children school rights, includes children of negro, Indian, or white blood, but of more than one-half white blood. *Lane v. Baker*, 12 Ohio, 237, 243.

A person nearer white than black is considered white, so as to be competent as a witness in a criminal prosecution against a quadroon. *Gray v. State*, 4 Ohio (4 Ham.) 353, 354.

All persons in whom white blood so far preponderates that they have less than one-fourth of African blood are within the meaning of the Constitution, limiting the elective franchise to "white male citizens." *People v. Dean*, 14 Mich. 406, 414.

The term "white citizen," in Const. 1851, art. 5, § 1, providing that every white male citizen of the United States at the age of 21 years, etc., shall be entitled to vote at all elections, includes persons having a mixture of African blood, but a preponderance of white blood, or being more black than white. *Anderson v. Millikin*, 9 Ohio St. 568, 570; *Monroe v. Collins*, 17 Ohio St. 665, 685.

A person having one-fourth of African blood is not a white person, but a mulatto or negro. *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 385, 386.

In Louisiana, and by the Code Noir of France for her colonies, the descendant of a white and a quadroon, or a person having one-eighth part of negro blood, is accounted a white. The rule does not exist as a matter of law in South Carolina, but it may be of use to juries in their decisions, not as a rule of law, but as being founded on experience and conformity to fact. *State v. Davis* (S. C.) 2 Bailey, 558, 560.

Negro.

"White person," as used in Rev. St. §§ 2154, 2155, providing that whenever the property of a friendly Indian is taken in the Indian country by a white person he shall be entitled, as damages, to a sum equal to twice the value of the property taken, etc., should not be construed to mean "not an Indian," but to mean what the words ordinarily import, and to exclude a negro. *United States v. Perryman*, 100 U. S. 235, 238, 25 L. Ed. 645.

WHITING.

Whiting is chalk which has been dried, and afterwards levigated and again dried; and chalk, as we all know, is a soft mineral substance consisting almost entirely of carbonate of lime. *United States v. Tiffany* (U. S.) 117 Fed. 367.

WHO.

The word "who," in a statute providing for a board of review composed of certain persons, who shall be appointed by the judge of the circuit court, "who shall each be paid," etc., may be said to perform dual functions, serving as a pronoun and also as

a conjunction, and is equivalent to the words "and they." *Seller v. State*, 67 N. E. 448, 449, 160 Ind. 605.

WHOEVER.

Burns' Ann. St. 1894, § 2194 (Horner's Ann. St. 1897, § 2098), providing that whoever shall sell, barter, or give away intoxicants on a certain day shall be punished, etc., applies to dealers only, and not to one giving liquor to a friend as an act of hospitality in his private rooms. *Austin v. State*, 53 N. E. 481, 22 Ind. App. 221.

Artificial persons.

"Whoever," as used in Rev. St. 1881, § 2204, as amended by Acts 1883, providing penalties for whoever, with intent to defraud another, designedly, by color of any false writing or pretense, obtains from any person any money or thing of value, refers to a person or persons, and should be construed to include a city as an artificial person. *State v. Bruner*, 35 N. E. 22, 24, 135 Ind. 419.

In construing Rev. St. c. 30, § 12, providing that whoever kills or destroys or has in possession certain game at a certain time of the year shall forfeit, etc., the court say that the statute may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. *Bennett v. American Exp. Co.*, 22 Atl. 159, 160, 83 Me. 236, 13 L. R. A. 33, 23 Am. St. Rep. 774.

In the act relating to cruelty to animals, the words "owner," "person," and "whoever" shall be held to include corporations as well as individuals. *Comp. Laws Mich.* 1897, § 11,748; *Rev. St. Utah* 1898, § 4459.

Males and females.

The general terms "whoever," "any person," "any one," and the relative pronouns "he" and "they," as used in the Penal Code, include females as well as males, unless there is some express declaration to the contrary. *Pen. Code Tex.* 1893, art. 21.

Public officers.

Gen. St. c. 3, § 7, cl. 8, providing that "whoever" brings into and leaves any poor and indigent person in any place in the state wherein such pauper is not lawfully settled shall forfeit a certain sum, should be construed to include public officers as well as private persons. *Inhabitants of Palmer v. Wakefield*, 102 Mass. 214, 215.

WHOLE.

See "In the Whole."

The words "whole of the property she brought me," in a bequest to testator's wife,

is plainly indicative of an intention to separate the thing bequeathed from the general property of the testator, and renders the bequest specific. The phrase clearly means all the property acquired by her in marriage. *Warren v. Wigfall* (S. C.) 8 Desaus. 47, 49.

A will devising the "whole of my lands" to certain persons includes land acquired by the testator after the publication of his will, when no intention to the contrary appears. *Edwards v. Warren*, 90 N. C. 604, 606.

WHOLE CAPITAL.

"Whole," as used in a statute providing that corporations should be subject to an annual tax at a certain rate on each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, was used by the Legislature for the purpose of excluding all doubt about the taxability of the various classes into which the stock might be divided, and with no reference to the character of the investments in which the capital might be employed. *Commonwealth v. Lehigh Coal & Navigation Co.*, 29 Atl. 664, 666, 162 Pa. 603.

Sess. Laws 1866, c. 761, § 1, declares that the stockholders of any bank shall be assessed and taxed on the value of their shares of stock therein, but not at a greater rate than is assessed on other money or capital, and that in making such assessment there shall be deducted from the value of such shares such sum as is in proportion to such value as is the assessed value of the real estate of the bank to the whole amount of the capital stock of said bank. Held, that the phrase "whole amount of the capital stock" referred to its value, and not to the nominal amount of capital. *People v. Taxes and Assessments Com'rs*, 69 N. Y. 91, 94.

WHOLE COST.

St. Louis City Charter 1870, art. 8, § 18, providing that the city engineer shall indorse on every ordinance requiring public work to be done the "whole cost" of each street or other object respectively, and that every contract shall contain a clause that the aggregate payments thereon shall be limited by the amount of the specific appropriation for such work, does not relate to the engineer's estimate, but means the amount which is to be paid out of the city treasury for the work, distinct from the amount to be paid by adjoining property holders. *Selbert v. Cavender*, 8 Mo. App. 421, 424.

WHOLE DAY.

The term "whole day," as used in the common statement that on dishonor of a bill of exchange the holder is entitled to one whole day to prepare his notice, is not to be understood in its absolutely literal sense, but

the holder is required to give notice during business hours of the day following that on which the bill is dishonored. *Chick v. Pillsbury*, 24 Ma. (11 Shep.) 458, 478, 41 Am. Dec. 394.

WHOLE ESTATE.

A will defining the residuary estate as testator's "whole estate" includes income as well as capital, and is equally broad with the term "all my estate," as used in creating a general trust; the words "all" and "whole" being both descriptive of the word "estate," and equally broad and comprehensive in their import. *Equitable Guarantee & Trust Co. v. Rogers*, 44 Atl. 789, 792, 7 Del. Ch. 398.

A will directing the disposition of the "whole of my estate" may be construed to include testator's real and personal estate. *Carr v. Jeannerett* (S. C.) 2 McCord, 66, 69.

WHOLE INCOME.

In a will providing that before any application of the net income from testator's estate should be made to the parties mentioned in his will, the executors and trustees should pay from the whole income of the estate any mortgage on the property, or any legal incumbrance on any part of the estate, the term "whole income" means that which is commonly called "gross income." *Beeton v. Simpson*, 21 Atl. 34, 48 N. J. Eq. (3 Dick.) 17.

WHOLE LINE OF ROAD.

Act April 19, 1873, which prohibits railroad companies from demanding and receiving for the transportation of local freight over 50 per cent. of the rate charged for the transportation of the same description of freight "over the whole line of its road," means freight which is taken on at one terminus and discharged at the other, and not the rate for freight brought from or carried to a point beyond the terminus of the road. It is the correlative of "local freight," by which is meant freight shipped from either terminus to a way station, or vice versa, or from one station to another—that is, over a part of the road only. *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559, 579.

WHOLE PIECE OR TRACT.

Comp. Laws 1885, c. 80, § 630, authorizing a mechanic's lien on the "whole piece or tract" of land upon which the building or improvement is situated, confined the lien to the particular piece or tract of land upon which the building is located or improvement made; and, where the buildings are on separate tracts or lots, the liens cannot all be

claimed in one statement. *North & South Lumber Co. v. Hegwer*, 42 Pac. 888, 390, 1 Kan. App. 623.

WHOLE QUANTITY.

The words "whole quantity," as used in Rev. St. p. 476, § 2504, Schedule M, relating to duties on imported fruit, and making an allowance for loss on decay which exceeds 25 per cent. of the whole quantity, refer to merchandise shipped by one consignor from one place, and to the particular kind of fruit damaged, and not to the whole invoice, aggregating several varieties of fruit. *Phelps v. Merritt* (U. S.) 15 Fed. 788, 789.

WHOLE ROOM.

Where a lease of "the lower storeroom and cellar and warehouse in rear of building" provided that the premises should be used for a single purpose, and also for the erection of partitions in the storeroom, and declared that the whole room was to be in good order for the use of the lessor, the words "whole room" should be construed to mean the entire premises covered by the lease, and hence included the cellar. *Bentley v. Taylor*, 47 N. W. 58, 81 Iowa, 306.

WHOLE TRUTH.

Where a witness is sworn to tell the whole truth, it means to tell so much of the truth as may be competent evidence. He also takes the oath subject to the rule of law which allows him to decline to answer questions which will criminate himself. *Commonwealth v. Reid* (Pa.) 1 Leg. Gaz. R. 182.

WHOLE VALUE OF VESSEL.

"Whole value of the vessel," as used in Rev. St. § 4284, providing that whenever any loss is suffered by several owners of property on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each, they are to receive compensation from the ship only in proportion to their respective losses, means her value at the close of the voyage. If there be two or more losses during the voyage for which the shipowner is liable, and the vessel, after the accruing of the liabilities and during the same voyage, is lost herself, the clear meaning of the statute is that no one shall receive compensation for his whole loss. *Thommasen v. Whitwell* (U. S.) 12 Fed. 891, 901.

WHOLE WORLD.

The "whole world" to which a lis pendens is notice means all men in that jurisdiction or state where the property is which

is the subject of litigation. *Carr v. Lewis Coal Co.*, 8 S. W. 907-909, 96 Mo. 149, 9 Am. St. Rep. 323.

WHOLESALE.

"Wholesale," as used in Sess. Laws 1850, c. 139, § 5, permitting suits for liquor bills only in case the sale was one at wholesale, implies the selling in or by unbroken parcels, as by the barrel, pipe, or cask, etc., as distinguished from the term "retail," which implies the cutting up or dividing such pieces or parcels or casks into smaller quantities, and selling to customers in such manner. The sale of liquors, from time to time, in six or ten gallon kegs of different kinds, cannot be called selling by wholesale. *Gorsuth v. Butterfield*, 2 Wis. 237, 242.

A sale of ten gallons of whisky, drawn from a cask containing a much larger quantity, is not, according to the common and popular import of the term "wholesale," a sale at wholesale. The sale here involves the idea of breaking up and dividing and parceling out the goods which are held by the seller in large parcels or packages in which he has purchased, and excludes the idea of selling a thing whole and unbroken. *Tripp v. Hennessy*, 10 R. I. 129, 131.

Selling at "wholesale" shall be deemed to mean and include the sale of liquor in quantities of five gallons or more, or one dozen bottles or more, and soliciting orders therefor at any one time. *Comp. Laws Mich. 1897, § 4021.*

WHOLESALE DEALER.

A wholesale dealer is one whose business is the selling of goods in gross to retail dealers, and not by the small quantity or parcel to consumers thereof. *State v. Lowenbaugh*, 79 Tenn. (11 Lea) 13, 14; *Webb v. State*, 79 Tenn. (11 Lea) 662, 665.

A dealer is one who makes successive sales as a business; and one who sells a quantity of liquors in gross is not a wholesale liquor dealer. *Overall v. Bezeau*, 37 Mich. 506, 507.

Where retail liquor dealers organize themselves under the style of a protective union, and sign articles pledging themselves to purchase beer through the union of brewers in another state, by which means they save two dollars a barrel, and such purchases are made through the secretary and treasurer of the union, who is paid nothing for his services, the members being charged only with freight, storage, and the like, the retail dealers become "wholesale dealers," within the meaning of Rev. St. § 3242, providing a penalty for carrying on the business of wholesale liquor dealers without a license.

United States v. Kallstrom (U. S.) 30 Fed. 184.

A general grocery merchant, who keeps spirituous liquors as a part of his stock, which he sells at wholesale, is a "wholesale liquor dealer," and liable to pay, under the revenue act of 1881, the privilege tax imposed on wholesale liquor dealers, in addition to the tax on other merchants. *Kelly v. Dwyer*, 75 Tenn. (7 Lea) 180, 187.

Commission merchants.

Commission merchants who, at the request of foreign correspondents, occasionally purchase liquor in quantity, and take charge of shipping the same, and duly charge the costs and their commissions on their books to the account of such correspondents, or draw upon them for the full amount of the purchase price with costs and commissions, are "wholesale liquor dealers," within the meaning of Rev. St. § 3244, placing a penalty upon every person who carries on the business of a wholesale liquor dealer without having paid a certain special tax. *Quinn v. Dimond* (U. S.) 72 Fed. 993, 994, 19 C. C. A. 336.

Quantity sold.

A wholesale dealer in spirituous liquors is one who makes and sells to purchasers packages or quantities for the purposes of trade or being resold. The distinction between the "wholesale dealer" and the "retail dealer" does not depend upon the quantity sold by either. *State v. Tarver*, 79 Tenn. (11 Lea) 658, 660.

One who makes sales by the quart and upwards, not to be drunk on the premises when sold, was not a "wholesale dealer in liquor," within the meaning of the act of 1881 relating to taxes. *Webb v. Baird*, 79 Tenn. (11 Lea) 667, 668.

The term "wholesale liquor dealer" includes a person selling liquor in quantities of a quart or more, though such sales are merely to accommodate the seller's customers, and not for the purpose of profit. *Koopman v. State*, 61 Ala. 70.

Under the express provisions of Acts 1897, p. 253, a "wholesale dealer" in liquors, within the meaning of the term as used in such statute relating to the licensing of liquor dealers, includes any person who sells in quantities of five gallons or more; a retail dealer being one who sells to consumers in quantities less than five gallons at a time. *Daniels v. State*, 50 N. E. 74, 79, 150 Ind. 348.

Under Rev. St. § 3244, providing that every person who sells or offers for sale malt liquors in any quantities of more than five gallons at one time shall be regarded as a "wholesale dealer," any one who sells a quantity to exceed five gallons at one time,

whether the amount so sold is in one package or several, is a wholesale dealer. *United States v. Clare* (U. S.) 2 Fed. 55, 57.

"Wholesale dealers" of spirituous or intoxicating liquors and brewed malt and fermented liquors shall be held and deemed to mean and include all persons who sell or offer for sale such liquors and beverages in quantities of more than three gallons, or more than one dozen quart bottles, at any one time, to any person or persons. *Comp. Laws Mich. 1897, § 5380.*

Single sale.

"Wholesale liquor dealer," as defined in *Rev. St. § 3244*, providing that a wholesale liquor dealer, for the purpose of taxation, shall include every person who sells or offers for sale foreign or domestic distilled spirits or wines in quantities of not less than five gallons at the same time, implies that there must be a trade or business of selling, and hence a single sale is not sufficient to render a person a wholesale liquor dealer. *United States v. Feigelstock* (U. S.) 25 Fed. Cas. 1058, 1059.

WHOLESALE FACTORY PRICE.

A promissory note made payable in goods at the "wholesale factory prices" does not mean the cash price, but refers to some general rule known to manufacturers of such goods. *Avery v. Stewart*, 2 Conn. 69, 73, 7 Am. Dec. 240.

WHOLESALE PRICE.

The wholesale price is the price fixed on merchandise by one who buys in large quantities of the producers or manufacturers, and who sells the same to jobbers or retail dealers. *Fawcner v. Lew Smith Wall Paper Co.*, 55 N. W. 200, 201, 88 Iowa, 169, 45 Am. St. Rep. 230.

WHOLESALE STOCK.

Where plaintiffs were wholesale and retail druggists carrying on both the wholesale and retail business in the same building, with only a partition separating the wholesale from the retail department, and a policy was issued "on their wholesale stock of drugs, paints, dyestuffs, and other goods on hand for sale, not more hazardous while contained in the building," the word "wholesale," as used in the policy, was supplemented, and its meaning extended to "other goods on hand for sale," not simply as the wholesale stock, but all other goods contained in the building, and therefore the policy covered the entire stock. *Wilson Drug Co. v. Phoenix Assur. Co.*, 14 S. E. 790, 791, 110 N. C. 350.

WHOLESALE.

The word "wholesaler," as used in *Comp. Laws, § 5379*, providing that in all towns 8 Wds. & P.—42

ships, cities, and villages a tax of \$500 per annum shall be paid for the selling of liquors, is defined by section 5380 as one who sells liquor in quantities of more than three gallons or more than one dozen quart bottles at a time to any one person. *People v. Voorhis*, 91 N. W. 624-626, 131 Mich. 393.

WHOLLY.

In a whole or complete manner; entirely; completely; perfectly; to the exclusion of other things; totally; fully. *Webst. Dict.*

WHOLLY CONFIDING.

In a will where testator makes an absolute gift of property, "trusting and wholly confiding" that it will be used in a certain way, the language quoted is sufficient to raise a trust, where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 129.

WHOLLY DEPENDENT.

In a petition in an action for damages for death of deceased, alleging that plaintiff and children were wholly dependent on deceased, the words "wholly dependent" fairly imply that deceased was the person, and the only person, whose legal and moral duty it was, and on whom they relied, to furnish the necessities of life, and hence implies a loss or damage to plaintiff. *Kearney Electric Co. v. Laughlin*, 63 N. W. 941, 943, 45 Neb. 390.

WHOLLY DESTROYED.

See, also, "Total Destruction"; "Total Loss."

The words "wholly destroyed" have been placed in fire insurance policies in many of the states of the Union, and the construction appears to be uniform that, as applied to buildings, they mean totally destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some debris remains which may be useful or valuable for some purposes. *Havens v. Germania Fire Ins. Co.*, 27 S. W. 718, 723, 123 Mo. 403, 26 L. R. A. 107, 45 Am. St. Rep. 570 (citing *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77; *Seyk v. Millers' Ins. Co.*, 41 N. W. 443, 74 Wis. 67, 3 L. R. A. 523; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.* [U. S.] 31 Fed. 200; *Great Western Ins. Co. v. Fogarty*, 86 U. S. [19 Wall.] 640, 22 L. Ed. 216).

The words "wholly destroyed," within a statute relating to insurance, have necessarily a technical meaning, differing from the ordinary meaning of words in common usage. In common usage they denote a change of form or substance. We say wood is destroyed when transformed into ashes and cin-

ders. We may say a structure is destroyed when it is resolved into its component materials. A building is partly destroyed, within the statute, when any part of it is resolved into such component materials, but wholly destroyed when no part of it above ground remains intact or substantially uninjured, and no such part of it can be utilized as a remaining standing structure in effectually restoring the structure to its entirety. *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308, 316. See, also, *Ampleman v. North British Mercantile Co.*, 35 Mo. App. 317, 318.

The phrase "wholly destroyed," when applied to the subject of insurance, does not contemplate the entire annihilation or extinction of the property insured; neither does it require that any portion of the property remaining after loss shall have no value for any purpose whatever; but it does mean only the destruction of the property insured to such extent as to deprive it of the character in which it was insured. Although some portion of the building may remain after the fire, yet if such portion cannot be reasonably used to advantage in the reconstruction of the building, or will not, for some purpose, bring more money than sufficient to remove the ruins, such building is, in contemplation of law, wholly destroyed. *Liverpool & London & Globe Ins. Co. v. Heckman*, 67 Pac. 879, 881, 64 Kan. 388.

The words "wholly destroyed," as used in Rev. St. § 1943, providing that, when real property covered by insurance shall be wholly destroyed, the amount of the insurance written in the policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed, refers to the thing insured, and not solely to its value. And when a building has been so damaged as to lose its specific character as such, and it can no longer be called a building, then it is wholly destroyed. And when a structure has been destroyed so as to leave nothing but badly damaged stationary walls, it has been "wholly destroyed," within the meaning of the section. *Trustees of St. Clara Female Academy of Sinsinawa Mound v. Northwestern Nat. Ins. Co.*, 73 N. W. 767, 770, 98 Wis. 257, 67 Am. St. Rep. 805.

Where all the combustible material in a building was destroyed, though portions of the brick walls were left standing, yet they were useless as walls, the identity and specific character of the insured building were entirely destroyed, though there was not an absolute extinction of all the parts thereof, and it constituted an entire destruction of the building. *Seyk v. Millers' Nat. Ins. Co.*, 41 N. W. 443, 445, 74 Wis. 67, 3 L. R. A. 523; *Lindner v. St. Paul Fire & Marine Ins. Co.*, 67 N. W. 1125, 1127, 93 Wis. 526; *German Fire Ins. Co. v. Eddy*, 54 N.

W. 856, 857, 36 Neb. 461, 19 L. R. A. 707; *Trustees of St. Clara Female Academy of Sinsinawa Mound v. Northwestern Nat. Ins. Co.*, 73 N. W. 767, 770, 98 Wis. 257.

"Wholly destroyed," when applied to a building, if the building was constructed of brick or other incombustible material, from the nature of the case, when used in an insurance policy, do not refer to the debris from a building destroyed. The words, when applied to a building, mean totally destroyed as a building; that is, that the walls, though standing, are unsafe to use for the purpose of rebuilding, and must be torn down, and a new building erected throughout. *German Ins. Co. v. Eddy*, 36 Neb. 461, 466, 54 N. W. 856, 857, 19 L. R. A. 707.

The expression "wholly destroyed" is equivalent to "total loss," and "total loss," as applicable to a building, means not that the materials of which it is composed were all utterly destroyed or obliterated, but that the building, though some part of it may remain standing, has lost its identity and specific character as a building, and instead thereof has become a broken mass, or so far in that condition that it cannot be properly any longer designated as a building. When that has occurred there is a total destruction or loss. *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. of Mobile (U. S.)* 31 Fed. 200, 204; *Barnard v. National Fire Ins. Co.*, 38 Mo. App. 106, 117.

In an action on a fire policy it appeared that the building which had been insured was a frame structure, the rear wall of which was veneered with brick, and the evidence did not show that the material of which the building was composed was transformed into cinders, smoke, and ashes by the fire. There were some pieces of material and bricks and parts of the floors and walls that were not consumed, but after the fire the building insured did not exist as a building. Held, that a verdict that the property was "wholly destroyed," within the meaning of that phrase in the policy, was supported by the evidence, inasmuch as insurance on a building is an insurance on the building as such, and not on the materials of which it is composed. *Insurance Co. of North America v. Bachler*, 62 N. W. 911, 914, 44 Neb. 549.

This phrase "wholly destroyed," as employed in Laws 1874, c. 347, includes a case where no portion of the broken walls of a building remaining after a fire can be used in rebuilding the building, and the foundation is not sufficient to support a building of the weight and dimensions of the one burned, and the expense of removing the fragments of the old building will at least equal the value of all the material left after the fire. *Harriman v. Queen Ins. Co. of London and Liverpool*, 5 N. W. 12, 23, 49 Wis. 71.

WHOLLY DISABLED.

See, also, "Total Disability."

"Total disability" or "wholly disabled," as used in an accident insurance policy, does not mean absolute physical inability to transact any kind of business pertaining to the occupation of merchant. It is sufficient if his injuries were such that common care and prudence required him to desist from transacting any such business in order to effectuate a cure. Inability to transact some kinds or branches of business pertaining to his occupation as merchant would not constitute total disability, provided he was able to transact other kinds or branches of business pertaining to such occupation; but ability to occasionally perform some trivial or unimportant act connected with some kind of business pertaining to such occupation would not render his disability partial, instead of total, provided he was unable to substantially or to some material extent transact any kind of business pertaining to such occupation. The fact that he occasionally performed some act connected with his business as a merchant would not necessarily prove that he was not totally disabled within the meaning of the policy. The frequency and nature of these acts will ordinarily be for the consideration of the jury in determining whether he was totally disabled as above defined. *Lobdill v. Laboring Men's Mut. Aid Ass'n*, 71 N. W. 696, 69 Minn. 14, 38 L. R. A. 537, 65 Am. St. Rep. 542.

In *Hooper v. Accidental Death Ins. Co.*, 5 Hurl. & N. 546, it was held that though insured might continue to do something which he was in the habit of doing before the accident, nevertheless, as he was wholly incapacitated from following a very considerable part of his usual business, he was "wholly disabled" from following his usual business or occupation, within the meaning of the policy. *Monahan v. Supreme Lodge of Columbian Knights*, 92 N. W. 972, 974, 88 Minn. 224 (citing *McMahon v. Supreme Council, Order of Chosen Friends*, 54 Mo. App. 468; *Scales v. Association*, 48 Atl. 1084, 70 N. H. 490; *Hohn v. Interstate Casualty Co.*, 72 N. W. 1105, 115 Mich. 79).

In commenting on the words "wholly disabled him for transacting any and every kind of business pertaining to the occupation under which he is insured," in an accident insurance policy, the court said, if such words were to be construed literally, the defendant would be liable in no case, unless by the accident the insured should lose his life or his reason. It is certain that neither party intended such a risk, and it cannot be said, as a matter of law, that the plaintiff's disability, which consisted of the shoulder being injured by a fall, causing pain and depriving him of the use of the arm, was not

sufficient to entitle him to compensation, he being a shoe dealer, although he went to his store two or three times a week. *Thayer v. Standard Life & Accident Ins. Co.*, 41 Atl. 182, 183, 68 N. H. 577.

In construing the words "wholly disabled," occurring in an accident policy, an instruction which in effect told the jury that insured was totally disabled if he was prevented from performing any and every kind of duty which was materially essential to his occupation in a manner reasonably as effective as it would have been performed if he had not sustained the injury, was upheld. The occupation of plaintiff in the case was that of visiting yards and ranches and buying and selling cattle, and the injuries were alleged to affect plaintiff's mental powers. In discussing the question as to whether or not a purely mental affliction, not amounting to entire loss of reason, could render a person wholly disabled, the court said: "Plaintiff's occupation was that of visiting yards and ranches and buying and selling cattle—one in which sound memory and clear good judgment were essential. Now, if the injury to his mind was such as to prevent him from exercising good judgment and drawing correct mental conclusions in a manner reasonably as effective as he could have done if he had not received the injury, then I think he was 'wholly disabled,' within the meaning of the contract, because upon these qualities of the mind depends the successful performance of the duties of his occupation. If he could not perform these mental functions as well as he did before, but substantially or reasonably as well, the disability would be only partial, but if he could perform them, though not substantially or reasonably as effectively, who could say that he could perform them rightly and correctly at all?" *Fidelity & Casualty Co. v. Getzendauner*, 55 S. W. 179, 180, 93 Tex. 487.

The insured is "wholly disabled," within the meaning of an accident policy, where he is not able to prosecute his business, and where he is not able to do all the substantial acts necessary to be done in its prosecution. If the business requires him to do several acts and perform several kinds of labor, and he is able to do and perform one, he is as effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he will suffer loss of time in the business of his occupation. *Young v. Travelers' Ins. Co.*, 13 Atl. 896, 897, 80 Me. 244.

WHOLLY ENGAGED.

Where Laws 1880, c. 542, § 3, as amended by Laws 1889, c. 193, exempted from taxation corporations wholly engaged in carrying on manufacturing within the state, the

words "wholly engaged" will not be construed so that a manufacturing corporation ceased to come within the exemption by employing a portion of its capital in a business not within its chartered powers, but that, under such circumstances, such portion, and such portion only, is liable to taxation. *People v. Campbell*, 38 N. E. 990, 991, 144 N. Y. 166.

The expression "corporations wholly engaged in carrying on manufacture within the state" does not include a foreign manufacturing corporation, authorized by its charter to manufacture, buy, and sell or otherwise procure electric apparatus of all kinds, and engaged in the manufacture of such apparatus, and also in buying and selling the same, within the state. *People v. Campbell*, 40 N. E. 239, 145 N. Y. 587.

The phrase "wholly engaged in manufacturing" does not characterize a corporation authorized by its charter to print, publish, and sell books, stationery, etc., which devotes part of its capital to the business of buying and selling foreign books. *People v. Roberts*, 36 N. Y. Supp. 73, 74, 90 Hun, 533.

The phrase "wholly engaged in manufacturing within the state" characterizes a foreign corporation operating a manufacturing plant in which all its capital in the state is employed, even though it maintain offices in the state where samples of its product are kept, from which sales of goods manufactured in another state are made, since such part of the business is wholly exempt from taxation as interstate commerce. *People v. Roberts*, 51 N. Y. Supp. 487, 489, 29 App. Div. 535.

WHOM IT MAY CONCERN.

The technical phrase "for whom it may concern," in a marine insurance policy, operates to cover the interest of any person intended to be so covered by the person who effected the insurance. *The Sydney* (U. S.) 27 Fed. 119, 124; *Duncan v. China Mut. Ins. Co.*, 29 N. E. 76, 77, 129 N. Y. 237.

"Whom it may concern," in an insurance policy, are technical words, meaning not anybody and everybody who may chance to have an interest in the thing insured, but such person only as is in the contemplation of the contract. They suppose an agency, and look solely to the principal, in whose behalf and on whose account the agent acts. Such principal is the person in the contemplation of the contract, and is the one whom it alone concerns, and his existence may be proved by extrinsic evidence. No person can avail himself of a policy of insurance not containing the general clause "to whom it may concern," or one of similar import, but those named in the policy as the parties insured,

or on whose account it is expressed to be made; but a policy in the name of one with this general clause will cover the interest of any person for whose benefit it is intended when effected, and who either previously authorizes it or subsequently adopts it, subsequent adoption in such a case being equivalent to a prior order for the insurance. *Newson's Adm'r v. Douglass* (Md.) 7 Har. & J. 417, 450, 16 Am. Dec. 317.

A policy of fire insurance for the benefit of "whom it may concern" is comprehensive and broad enough to cover everything answering the description and intended to be covered. "Whom it may concern" does not necessarily cover all concerned in a loss. The parties insured by such general terms are only those for whom the insurance was intended. *Richardson v. Home Ins. Co.*, 47 N. Y. Super. Ct. (15 Jones & S.) 138, 154.

An insurance policy insuring certain property in the name of the insured and for "whom it may concern" may inure to the benefit of the person effecting it, or the benefit of any other person for whom he intends it, and who has requested him to effect it, or who adopts it when made. *De Bolle v. Pennsylvania Ins. Co. (Pa.)* 4 Whart. 68, 75, 33 Am. Dec. 35; *Wise v. St. Louis Marine Ins. Co.*, 23 Mo. 80, 84.

In a contract whereby a building contractor insured in his own name the building on which he was engaged, under an agreement between himself and the owner that the contractor should keep the building at all times fully insured against fire for the benefit of "whom it may concern," and in case of loss the indemnity shall be divided between the "parties hereto," the words "whom it may concern" meant the parties to the contract, and would not include a materialman who had a right to have filed a lien on the premises. The persons "whom it may concern" were the "parties hereto." *Moesser v. Donaldson* (Pa.) 10 Atl. 766, 768.

The law is well settled that where insurance is for the applicant and "whom it may concern," the terms thus employed are not intended to mean, nor do they include, every person who may have an interest in the subject insured, but only such as are in contemplation of the contract. Where the description of the party insured indicates that the policy is taken for the benefit of other persons specifically named, the interest of those described is alone covered. *Cincinnati Ins. Co. v. Rieinan* (Ohio) 1 Disn. 396, 397.

"Whom it may concern," as used in an insurance policy declaring that it was issued "for account of whom it may concern," evinces a purpose to keep insured the entire title to the property; and one who purchases a part interest and adopts the insur-

ance will be allowed to recover for a loss, although a printed stipulation in the policy is inconsistent with such right. *Hagan v. Scottish Union & National Ins. Co. (U. S.)* 98 Fed. 129, 130.

A policy on a cargo in the name of a certain person on account of "whom it may concern" will inure to the interest of the party for whom it was intended, provided the party in whose name it is issued had, at the time of effecting the insurance, the requisite authority from such party, or the latter subsequently ratified it. *Hooper v. Robinson*, 98 U. S. 523, 536, 25 L. Ed. 219.

Belligerent property.

A policy of marine insurance, "for whom it may concern," should be construed to cover belligerent property. *Buck v. Chesapeake Ins. Co.*, 28 U. S. (1 Pet.) 151, 158, 7 L. Ed. 90.

Insurable interest.

"For whom it may concern," or any other terms of equivalent import, will not carry the benefit of a policy to a risk or an interest not fairly within the contemplation of the parties to the policy. The result of this principle is that a person who has an interest in the property covered by such a policy at the time of the loss will be protected without any express stipulation to the effect, though he had no interest at the commencement of the risk, providing he was intended to be insured. *Duncan v. China Mutual Ins. Co.*, 29 N. E. 76, 77, 129 N. Y. 237.

An insurance on account of "whom it may concern" is limited to those who have insurable interest in the property, and may be lawfully insured, and must further be restricted to those for whom it was intended under their prior authorization or subsequent adoption. *Frierson v. Brenham*, 5 La. Ann. 540, 52 Am. Dec. 603.

Knowledge of person intended.

A policy of marine insurance in the name of a special party "on account of whom it may concern" will cover the interest of the person for whom it was intended by the party who should order it, though the particular person intended was not known. It is not necessary that the person who takes out the policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough. *Hagan v. Scottish Union & National Ins. Co.*, 22 Sup. Ct. 862, 864, 186 U. S. 423, 46 L. Ed. 1229.

"For whom it may concern," as used in a fire policy specified to be for the benefit of those for whom it may concern, will be

construed "to include all persons having an insurable interest—that is, intended to be covered by it—whether known to the insurers or not." *Johannes v. Phenix Ins. Co.*, 27 N. W. 414, 417, 66 Wis. 50, 57 Am. Rep. 249.

Person entitled to sue.

Under Code Civ. Proc. § 449, requiring every action to be brought in the name of the real party in interest, a part owner of a vessel may bring an action in his own name on a policy of marine insurance which runs "on account of whom it may concern," and which was in fact procured by his agent to whom the loss was made payable, even though the policy does not disclose such part owner's interest therein. *McLaughlin v. Great Western Ins. Co.*, 20 N. Y. Supp. 536, 537.

Where a part owner of a vessel has it insured in his own name "on account of whom it may concern," he may sue in his own name for the benefit of all. This right is confirmed by the Code, which authorizes an action by the person with whom or in whose name a contract is made for the benefit of another. *Walsh v. Washington Ins. Co.*, 32 N. Y. 427, 440.

The use of the words "whom it may concern," in a fire policy, to designate the beneficiary, is sufficient, in the absence of statute, to authorize suit on a policy in the name of the parties intended to be within its protection. *Insurance Co. of North America v. Forchelmer*, 5 South. 870, 875, 86 Ala. 541.

An insertion of a clause in a marine policy that the loss should be payable to the plaintiff or "whom it might concern" was construed to authorize the insured to maintain an action for the whole of the loss, although he was not the owner of the entire vessel. *Martin v. Fishing Ins. Co.*, 37 Mass. (20 Pick.) 389, 395, 32 Am. Dec. 220.

WHOMSOEVER IT MAY CONCERN.

"Whomsoever it may concern," as used in a policy insuring goods in favor of whomsoever it may concern, is a term used to designate whoever may be the owner of the goods at the time they are destroyed, and evidence beyond the policy is receivable to show who are the owners and entitled to receive payment under the policy. *Home Ins. Co. v. Baltimore Warehouse Co.*, 98 U. S. 527, 543, 23 L. Ed. 868.

The insertion of the phrase "whomsoever else shall be concerned," in a fire policy taken out on partnership property by a partner, will operate to create the inference that the insurance was made on the joint account, if such appear to have been the in-

tention of the assured. *Lawrence v. Sebor* (N. Y.) 2 Caines, Cas. 203, 209.

WHORE.

Webster defines a "whore" as "a woman who practices unlawful sexual commerce with men, especially one who does it for hire; a harlot"; and the synonyms given are "harlot, courtesan, prostitute, strumpet, punk, wench, concubine." In Worcester's Dictionary the word is defined: "A woman who practices illicit intercourse with men for hire; a prostitute; a harlot; a concubine; a strumpet; a punk." There is no substantial difference between the words "public whore," charged in a complaint, and "whorish bitch," proved on the trial. *Zimmerman v. McMakin*, 22 S. C. 372, 378, 53 Am. Rep. 720.

A whore is a woman who practices unlawful sexual intercourse with men, especially one who does it for hire. *Wagner v. State*, 17 Tex. App. 554, 558; *Sheehy v. Cokley*, 43 Iowa, 183, 185, 22 Am. Rep. 236.

A whore is a woman who prostitutes her body for hire, the word being generally used as synonymous with "harlot," "courtesan," "prostitute," and "strumpet." In its most general meaning the word includes a woman who practices or holds unlawful sexual intercourse, either for hire or to gratify a depraved passion. *Peterson v. Murray*, 41 N. E. 836, 837, 13 Ind. App. 420; *Zimmerman v. McMakin*, 22 S. C. 372, 378, 53 Am. Rep. 720.

A whore is one who has committed adultery or fornication. *Michelson v. Lavin*, 20 S. E. 292, 293, 95 Ga. 565.

A woman may acquire the character of a whore without being generally accessible to men. She may be the mistress of one and chaste towards all others; but in common parlance one who yields only to solicitations of her affianced cannot be justly called a whore. *Sheehy v. Cokley*, 43 Iowa, 183, 185, 22 Am. Rep. 236.

WHOREDOM.

"Whoredom" is a comprehensive term, including every species of illicit intercourse between the sexes, and any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom, and a single act of the kind makes a woman a whore. *Rodebaugh v. Hollingsworth*, 6 Ind. 339, 343.

WHOREHOUSE.

By common acceptance, to keep a "whorehouse" is to keep a bawdyhouse or a house

of ill fame. Indeed, to charge the former is equally opprobrious and more directly and unquestionably significant, if possible, than to charge the latter. It is a coarser expression conveying the same idea. It is most clearly a charge of keeping a house for common prostitution, which is the precise definition of a bawdyhouse. It is needless to say that a charge of "keeping a whorehouse" imports a crime involving moral turpitude, and words importing such charge are actionable per se. *Wright v. Paige* (N. Y.) 36 Barb. 438, 440.

WHORISH.

"Where" is the synonym for a prostitute, or a lewd or incontinent woman; "whorish" means lewd, unchaste, incontinent. *Scott v. McKinnish*, 15 Ala. 662, 664.

The word "whorish," as defined by Webster, means "resembling a whore in character or conduct; addicted to unlawful sexual pleasures; incontinent; lewd; unchaste." Worcester's definition is, "unchaste; lewd; incontinent." There is no substantial difference between the words "public whore," charged in a complaint, and "whorish bitch," proved on the trial. *Zimmerman v. McMakin*, 22 S. C. 372, 378, 53 Am. Rep. 720.

WICKED.

The term "wicked man," when applied to a bishop, is actionable, because the words virtually represent him as unfit to hold that office or situation. *Craig v. Brown* (Ind.) 5 Blackf. 44, 46.

WICKEDNESS.

An instruction that if defendant purposely killed deceased after reflection, with a wickedness and depravity of heart toward the deceased, etc., the defendant was guilty of murder in the first degree, is sufficient as an allegation of the highest degree of malice. *Lang v. State*, 4 South. 193, 195, 84 Ala. 1, 5 Am. St. Rep. 324.

WIDEN.

"Widen," as used in Act 1864, p. 293, § 2, authorizing a railroad and canal company to shorten, straighten, "widen," or otherwise improve any part of the route of their road at or between its present termini, does not import any change of location. *Beck v. United Jersey R. & Canal Co.*, 89 N. J. Law (10 Vroom) 45, 46.

Act March 17, 1869, declaring that any railroad, canal, or slack-water navigation company might "widen, enlarge, or" otherwise "improve" its line of railroad, cannot be construed to include the widening of the

gauge of a railroad, though in their general sense the words are sufficient to include it, for they are used in connection with the line of the railroad, canal, and slack-water navigation company, which, as to railroads, means its right of way. *Western New York & P. Ry. Co. v. Buffalo, R. & P. Ry. Co.*, 44 Atl. 242, 244, 193 Pa. 127.

To "widen" the street is merely to enlarge its width, and as used in Act March 6, 1890, § 1, authorizing the city council to order the widening of any street within such city, cannot, under any construction, be extended to include grading and gravelling, since to "grade" a street is to reduce it, either by filling or excavation, to a fit or established degree of ascent or descent; and to "gravel" a street is to cover the surface of a street already existing with some durable substance. *Wilcoxon v. City of San Luis Obispo*, 35 Pac. 988, 989, 101 Cal. 508.

WIDOW.

As personal representative, see "Personal Representative."

In common parlance, the term "widow" means an unmarried woman. In re Conway's Estate, 5 Pa. Dist. R. 332, 334.

The recognized definition of the word "widow" is a woman who has lost her husband by death; a wife that outlives her husband. *Cole v. Mayne* (U. S.) 122 Fed. 836, 839.

"The term 'widow' may literally mean a woman deprived of or without a man, but the legal as well as the popular signification of the word is that given by Webster—a woman who has lost her husband by death. Luke xi; Webster's Dict. (last Ed.) 'Widow.' The etymology of the word implies that she has been deprived of a husband." *Wait v. Wait* (N. Y.) 4 Barb. 192, 205.

A "widow" is defined to be an unmarried woman whose husband is dead; one who has lost her husband by death, and has not taken another. In re Ray's Estate, 35 N. Y. Supp. 481, 484, 13 Misc. Rep. 480.

"Widow," as used in a by-law of a mutual insurance company providing that the association, on satisfactory proof of a member's death, will pay to his widow a certain sum, cannot be construed to mean anything else than a woman whose husband is dead, and hence does not include a woman who cohabited with decedent prior to his death, but who was not legally married to him. *Bolton v. Bolton*, 73 Me. 299, 308.

"Widow of the deceased," as used in Acts 1887, c. 270, § 2, known as the "Employer's Liability Act," giving a right of action to the widow of the deceased, compre-

hends every widow, whether citizens, residents, aliens, or nonresident aliens. *Vetalloro v. Perkins* (U. S.) 101 Fed. 393, 397.

The word "widow," as used in a will providing that, if either of testator's sons die without leaving lawful issue, the "widow" of the decedent should receive one-third of the rents of the real estate devised to him by the will, does not restrict the benefit of the provision to a wife living at the time of making the will or at testator's death, but the person who was the wife at the time of the son's death was entitled to the rents. *Swallow v. Swallow's Adm'r*, 27 N. J. Eq. (12 C. E. Green) 278, 280.

A testator devised real and personal property to trustees to pay over the income to a son during his life, and on his decease to pay the same to said son's wife during her life, and on her decease if he should leave a widow, or if he leave no widow then on his decease, to convey the property to the issue of said son then living. The son had a wife living at the time of the making of the will and the death of the testator. Held, that the clause directing the payment of the income to the son's wife during her natural life upon his decease, standing alone, will be construed to mean his wife then living only; and the further provision that on her decease if he leave a widow, or if he leave no widow then on his decease, etc., taken in connection with other clauses of the will, must be construed to refer to any wife he might have married, though possibly unborn at the time of the testator's death. *Schettler v. Smith*, 41 N. Y. 328, 338.

A gift to the "widows and orphans" of the parish of Lindfield was necessarily confined to such of those two classes who were within the scope of general benevolence, and was a good, charitable bequest. *Attorney General v. Comber*, 2 Sim. & S. 93, 94.

A devise to the "widow of my son F.," the son being alive, refers to the wife of said son at the time the will was made. *Beers v. Narramore*, 61 Conn. 13, 19, 22 Atl. 1061.

Deserted wife.

The term "widow," in the laws of a benevolent association providing that benefits shall be payable to the widows of deceased members, designates a wife of deceased whom he deserts, though he afterward contracts a common-law marriage which would have been valid if the first wife had not been living. *Grand Lodge Order of Hermann-Soehne v. Elsner*, 26 Mo. App. 108, 117.

Deserting wife.

"Widow," as used in the Tennessee homestead laws exempting as a homestead certain property for the benefit of a decedent's "widow," etc., means a person who

was a member of his family in a legal sense when he died, and does not include one who has forfeited her rights as a member of his family by eloping before her husband's death and living with another man. *Prater v. Prater*, 9 S. W. 361, 364, 87 Tenn. (3 Pickle) 78, 10 Am. St. Rep. 623.

Within a statute providing that, whenever the widow of a deceased person shall be left in necessitous circumstances and does not possess in her own right property to the amount of \$1,000, she may be entitled to receive from the succession of the deceased husband a sum which will make the total sum owned by her \$1,000, the term "widow" is not used in its ordinary signification of a woman who has left her husband, and will not include an unfaithful wife who has abandoned her husband. *Richard v. Lazard*, 32 South. 559, 560, 108 La. 540. See, also, *Armstrong v. Steeber*, 3 La. Ann. 713.

Divorced wife.

Where husband and wife are divorced a vinculo, the wife, after the husband's death, is not his "widow" and entitled to dower. *Whitsell v. Mills*, 6 Ind. 229, 231.

A wife who had been divorced for the fault of the husband is not his "widow" on the death of the husband without his remarriage, within the meaning of Rev. St. 1894, § 2840 (Rev. St. 1881, § 2483), providing that, if the husband die leaving a widow, one-third of his real estate shall descend to her in fee simple. *Fletcher v. Monroe*, 43 N. E. 1053, 145 Ind. 56.

A woman obtaining a divorce from her husband on the ground of his adultery is not in any sense his widow under the New York statute, so as to entitle her to a right in a distributive share in the personal estate of her divorced husband. In *re Ensign's Estate*, 8 N. E. 544, 546, 103 N. Y. 284, 57 Am. Rep. 717.

"Widow," as used in Rev. St. 740, § 1, endowing a "widow" of a third of all the lands whereof her husband was seised at any time during marriage, etc., includes a woman who had secured a divorce, prior to her husband's death, upon the ground of adultery, such divorce being one a mensa et thoro merely. *Wait v. Wait*, 4 N. Y. 95, 107 (reversing *Wait v. Wait* [N. Y.] 4 Barb. 192, 205).

The term "widow," in the by-laws of a beneficial association providing that certain benefits shall be paid to the widow of a deceased member, does not include a divorced wife of a member, though she had been designated by the insured as a beneficiary. *Tyler v. Odd Fellows' Mut. Life Ass'n*, 13 N. E. 360, 363, 145 Mass. 134.

The word "widow" is construed to mean husbandless, and where testatrix's married

daughter had a dissipated husband from whom, at the time of the death of testatrix, she had obtained a divorce, she was entitled to have ended a trust by which her mother had devised certain property in trust for her life, remainder to her children, with a proviso that if she became a widow the trust should end and the property be turned over to her absolutely. *Rittenhouse v. Hicks*, 10 Ohio Dec. 759.

Marriage of widow.

A "widow" is defined as an unmarried woman whose husband is dead; one who has lost her husband by death, and who has not taken another; but, as used in statutes relative to settlement of estates, it will not be limited to such persons, but will include those who have subsequently remarried. In *re Ray's Estate*, 35 N. Y. Supp. 481, 484, 13 Misc. Rep. 480.

"Widow," as used in Kansas statutes providing that a homestead, etc., occupied by an intestate and his family at the time of his death as a residence, and continued to be so occupied by his widow and children after his death, shall be wholly exempt from the payments of his debts, etc., should not be construed to mean that the property ceases to be subject to a homestead exemption on the remarriage of the widow. *Brady v. Banta*, 26 Pac. 441, 443, 46 Kan. 181.

"Widow," as used in Act April 10, 1849, exempting from the operation of the collateral inheritance tax laws property passing by will to the wife or widow of a son of any person dying seised or possessed thereof, does not include a widow of the testator's son who married again in the lifetime of the testatrix and was still married at the latter's death, the word "widow" being entirely and exclusively descriptive of an unmarried condition, having once been married. *Commonwealth v. Powell*, 51 Pa. (1 P. F. Smith) 438, 440.

"Widow," as used in *Purd. Dig.* p. 518, pl. 64, providing that the widow or the children of any decedent may retain certain property out of the estate for the use of the widow and family, should be construed to mean that the right of the widow to such property ceases when she remarries; the word meaning that she ought to be, at the time she takes the property, the person who is qualified by law to exercise that right, namely, the widow of the decedent. *Appeal of Kerns*, 14 Atl. 435, 438, 120 Pa. 523.

A will devising certain property to testator's widow for life, with the power of sale, "so long as she shall remain my widow," should be construed to mean "so long as she shall remain unmarried," and hence her remarriage terminated whatever interest was limited by such clause. *Bodwell v. Nutter*, 3 Atl. 421, 422, 63 N. H. 446.

"Widow," as used in Code, § 2971, providing that a "widow," and, if no widow, a child or children, may recover for the homicide of a husband or parent, indicates the person, not the state, and is used as synonymous with "wife." Hence the subsequent marriage of the widow of a person killed by a railroad does not take away her right of action, given by the statute, against the company, as the widow of the deceased. *Georgia Railroad & Banking Co. v. Garr*, 57 Ga. 277, 279, 24 Am. Rep. 492.

Widower.

"Widow," as used in Kan. Gen. St. 1889, par. 4518, giving a right of action for death by wrongful act to the "widow" of the deceased, does not include a widower. *Western Union Tel. Co. v. McGill* (U. S.) 57 Fed. 699, 703, 6 C. C. A. 521, 21 L. R. A. 818.

WIDOWHOOD.

See "During Widowhood."

WIDOW'S DOWER.

Where an administrator's deed conveyed by metes and bounds all the real estate of which the intestate husband died seised, "except the widow's dower," such phrase excepted only the widow's right to the use of one-third of the real estate described. "During her life" referred to the interest which the widow had in the land described, and the exception was limited to that interest. *Starr v. Brewer*, 58 Vt. 24, 33, 3 Atl. 479.

Where an administrator sells to a widow so much of a named lot, "except the widow's dower," the phrase "the widow's dower" does not mean the legal right to dower or the dower estate, but the parcel of land which had been set apart as dower, and of which, as a matter of fact, the widow was in possession. *Wells v. Dillard*, 20 S. E. 263, 264, 93 Ga. 682.

WIDOW'S ELECTION.

See "Election."

WIDOW'S SHARE.

"Widow's share," as used in Code, § 2452, providing that the widow's share cannot be affected by any will of her husband, unless she consents thereto, etc., describes the portion of the estate of the decedent which the law assures to the widow; it is called the "distributive share." *Ward v. Wolf*, 9 N. W. 348, 349, 56 Iowa, 465.

"Widow's share," as used in Code, § 2452, providing that the widow's share cannot be affected by any will of her husband unless she consents thereto, etc., includes both personal and real property. *May v.*

Jones, 54 N. W. 231, 233, 87 Iowa, 188 (citing *Ward v. Wolf*, 56 Iowa, 465, 9 N. W. 348; *Linton v. Crosby*, 61 Iowa, 401, 16 N. W. 342).

WIDOW'S THIRDS.

The words "widow's thirds" are generally used in common parlance as synonymous with the words "widow's dower," and mean the life estate which a widow has by law in one-third of the real estate of which her husband died seised. The same expressions are often used as referring to and meaning the land which had been set out to the widow and in which she has such life estate. *Crosby v. Montgomery*, 38 Vt. 238, 239.

WIDOWER.

A widower is "a man who has lost his wife by death." *Walt v. Walt* (N. Y.) 4 Barb. 192, 205 (citing Webster's Dict.).

A divorced man living with an unmarried minor son is a "widower" within the meaning of the statute providing that "husband and wife living together, a widow or widower living with an unmarried daughter or unmarried minor son may hold exempt from sale on judgment or order, a family homestead," etc. It does not require a very great strain of the English language to hold that a divorced man is a widower. True, it is not within the ordinary definition, but we find on examination that the word "widower" is derived from "widow," and that "widow" is a Sanskrit derivation, meaning "without a husband," the lack of a husband; and therefore, in its broadest terms, a "widower" may be defined to be a married man who has lost his wife, either by death or judicial decree. The separation in one case, from the legal point of view, is no more absolute than the other. *Kunkle v. Reeser*, 5 Ohio Dec. 422, 425.

WIDTH.

An act relating to a turnpike road, requiring that the "width" of the macadam shall not be less than 8 inches nor more than 15 inches, will be construed as a requirement that the depth of the macadam shall be as specified, as a literal interpretation would lead to an absurdity. *Bird v. Kenton County Com'rs*, 24 S. W. 118, 95 Ky. 195.

WIFE.

See "Common-Law Wife"; "Plural Wife"; "Surviving Wife."

The popular as well as the lexical meaning of "wife" is a woman who is united to a man in the lawful bonds of wedlock. *Thompson v. Lewiston Daily Sun Pub. Co.*, 39 Atl.

556, 558, 91 Me. 203; *United States v. Tenney*, 8 Pac. 295, 301, 2 Ariz. 29; *Wait v. Wait* (N. Y.) 4 Barb. 192, 205; *Miller v. Miller*, 30 N. Y. Supp. 116, 117, 79 Hun, 197.

"Wife and children," as used by a testator in bequeathing property to the wife and children of a certain designated person, means the lawful wife and children of such person. In *re Davenport's Trusts*, 17 Eng. Law & Eq. 293, 295; In *re Overhill's Trusts*, 17 Eng. Law & Eq. 323.

A "wife" is a woman who has a husband living. To say that a person is a "wife," does not mean simply that she has been married, but that she was then and there a married woman. *Names v. State*, 50 N. E. 401, 20 Ind. App. 168.

The word "wife," when used in laws relating to marital fourths, contemplates a wife in fact, and not one in name merely. It is to enable a faithful wife to continue bene et honeste vivere. It does not intend to reward a woman who has disgraced herself and the family into which she has been taken. *Richard v. Lazard*, 32 South. 559, 563, 108 La. 540. See, also, *Armstrong v. Steeber*, 3 La. Ann. 713.

A testator who had a wife Mary, to whom he was married in 1834, and who survived him, in 1840 went through the ceremony of marriage with a woman whose Christian name was Caroline, and who continued to reside with him to the time of his death. Shortly before his decease he, by will, devised certain property to "my dear wife Caroline," her heirs, etc., absolutely. Held, that Caroline took under this devise, notwithstanding the entire description was not applicable to her. *Gains v. Rouse*, 5 Man., G. & S. *422, 428.

The terms "husband and wife" have a very definite and precise meaning. They are descriptive of persons who are connected by the marriage tie, and are significant of the mutual obligations growing from the marriage contract, and the term "wife" cannot be used to describe a woman who has been, but is no longer, married. *People v. Hovey* (N. Y.) 5 Barb. 117, 118.

The use of the term "wife of H.," in a notice by a town furnishing support to a pauper to the town chargeable therewith that the support has been furnished to the wife of H., is a sufficient designation of the person to whom the support was furnished. *Town of Middletown v. Town of Berlin*, 18 Conn. 189, 195.

Divorcee.

2 N. Y. Rev. St. 687, § 8, declaring that every "person having a husband or wife living" who shall marry again shall be adjudged guilty of bigamy, includes a person against

whom a divorce has been obtained because of adultery, so long as the party obtaining the divorce lives. *People v. Faber*, 92 N. Y. 146, 150, 44 Am. Rep. 357.

In Act 1840, § 5, providing that where a divorce is granted by reason of the aggression of the husband, in addition to alimony, if the "wife" survive her husband she shall have dower, the word "wife" was used to designate the person who had been divorced. *McGill v. Deming*, 11 N. E. 118, 121, 44 Ohio St. 645.

The word "wife" does not include a woman divorced. As used in Rev. St. § 5702, providing that the "wife" may file her petition for alimony alone, such term is regarded as used to designate the person, and not the actual existing relation. *Woods v. Waddle*, 8 N. E. 297, 299, 44 Ohio St. 449 (citing *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415).

WIFE AND CHILDREN.

A life insurance policy, providing that the benefit at the death of the insured shall be paid to his wife and children, means that it shall be paid to his wife and children equally; and not that the wife shall be entitled to one half of it and the children to the other half. *Felix v. Ancient Order of United Workmen*, 1 Pac. 281, 282, 31 Kan. 81, 47 Am. Rep. 479.

WIFE BEATING.

Wife whipping was said by Blackstone to be the ancient privilege of giving moderate correction to wives to secure subordination in the family, and "was not admitted in the age of Judge Blackstone, or, as he says, in the polite reign of Charles the Second, except among the lower rank of the people, who were always fond of the old common law." The privilege is obsolete, and, "ancient though it be, to beat her with a stick, to pull her hair, to choke her, spit in her face, or kick her about the floor, or to inflict upon her other like indignities, is not now acknowledged by our law." *Fulgham v. State*, 46 Ala. 143, 145.

"The learned Judge Blackstone seems to consider the female sex a great favorite of the law of England, yet his more just editor, Christian, in his notes, expresses a fear that there is little cause to pay a compliment to our laws for their favor and respect to the female sex. The right of the husband is to beat his wife "ex causa regiminis et castigationis." It is true he was only allowed modicum castigationem, and this was never doubted until the polite reign of Charles II, yet the lower rank of people, as Blackstone observes, who were always fond of and adhere to the common law, still claim and exert their ancient privileges, and the civil law

allowed the husband a larger authority over his wife, permitting him, for some misdeemeanors, "flagellare et fustibus acriter verberare uxorem." *James v. Commonwealth* (Pa.) 12 Serg. & R. 220, 226.

WIFE'S EQUITY.

The doctrine of a wife's equity may be briefly stated thus: That a wife is entitled to an equitable settlement out of her property, not only against her husband, but against all creditors of and purchasers from him, whenever it is recoverable only in a court of equity, or the aid of that court is actually invoked for its recovery, unless the husband has become a purchaser of the property by an antenuptial contract with the wife. If it be recoverable at law, and the aid of a court of equity be not actually invoked to recover it, her equity does not exist. And it ceases to exist, though the property be recoverable in equity, whenever it has been actually recovered or received without any claim by her to a settlement. *Poin-dexter v. Jeffries* (Va.) 15 Grat. 363, 368, 369 (citing 2 Story's Eq. § 1402).

"It is one of the acknowledged powers of courts of equity to compel a husband to make a settlement on a wife whenever he comes into equity for aid to enable him to reduce her estate which lies in action, pending possession." *Clarke v. McCreary*, 20 Miss. (12 Smedes & M.) 347, 354.

WIFE'S FAMILY.

In construing a devise to I., wife of C., for her and her family's use during her natural life, it was said that neither in common parlance nor by the technical construction of the words "wife's family," without more, is the husband contemplated. If it be asked of what family is he, the question will be answered by being informed from what person he is descended, and who is related by blood to that stock is related to and of the family of it. *Heck v. Clippenger*, 5 Pa. (5 Barr) 385-388.

WILD.

"Wild," as used in the rule that wild animals cannot be the subject of larceny, is used as a generic term to indicate that the animals are of a species not generally domesticated, and does not refer to their comparative docility or familiarity with men; so an animal ordinarily domestic in its nature, which has reverted to a wild state, is not properly a wild animal. *Rex v. Manu*, 4 Hawaii, 409, 410.

WILD BEAST.

"Wild beasts" are those which enjoy their natural liberty and go wherever they please. *Civ. Code La.* 1900, art. 8415.

WILD-CAT TRAIN.

A "wild-cat train" is an occasional train moving without prearrangement, but by special order, without reference to any schedule or the regular trains, and conforming to no conditions save the immediate order of the owner. Such train is also known or styled as a "wild train." *Sheehan v. New York Cent. & H. R. R. Co.*, 91 N. Y. 332, 335.

WILD FOWL.

Where an act was entitled "An act to provide for the protection of game, wild fowl and birds," the words "wild fowl and birds" will be presumed to have been added to the word "game," for the reason that "game" will be understood in its sense of including all game birds, game fowl, and game animals, and hence were intended to include species of wild fowl and birds not covered by the word "game." *Meul v. People*, 64 N. E. 1106, 1107, 198 Ill. 258.

WILD TRAIN.

The term "wild train" is a term used in the railroad business to describe a train consisting of a locomotive, tender, and caboose car on which no persons except the servants of the railroad company in charge of it were permitted to ride. *Powers v. Chicago, M. & St. P. Ry. Co.*, 59 N. W. 307, 57 Minn. 332.

A train running under telegraphic orders, but without any schedule or time card, is known in railroad parlance as a "wild train." *Northern Pac. R. Co. v. Poirier* (U. S.) 67 Fed. 881, 882, 15 C. C. A. 52.

A train running "wild" is a train not on the schedule time of any train. *Larson v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 423, 45 N. W. 722.

WILE.

To "wile" is defined as to cheat cunningly, mislead or lead with guile, hoodwink, lure; so that, as used in the definition of the crime of seduction as the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasion, or "wiles" which are calculated to have and do have that effect, it implies and shows that deception is an essential element in the crime of seduction. *State v. Hamann*, 80 N. W. 1064, 1065, 109 Iowa, 646.

WILL.

See "Against Her Will"; "Tenant at Will."

In its original sense, "will" means desire, command. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

By the term "will," as used in a definition of insanity, is meant the governing power of the mind. *Lowe v. State*, 98 N. W. 417, 424, 118 Wis. 641.

"Will and bequeath," as used in a will declaring that the testator thereby "willed and bequeathed" his land to a devisee, without words of limitation, was sufficient to pass the fee, since the word "will," used in this connection, means "to dispose of" by will, and the word "bequeath" means "to give" by will. Technically, the word "bequeath" relates to personal property more properly than real estate. In this instance "devise" would have been the more appropriate word to use in the disposition of the real estate; but the word "devise," not being used in either item of the will itself, evidenced that there was no careful selection of words; and therefore a natural acceptance of the words would be given them, and this the more, inasmuch as a life estate of the same property had been devised to another without disposition of the remainder, and, if the devise in question should be construed to be a life estate, there would result, therefore, a partial intestacy. *Mills v. Franklin*, 28 N. E. 60, 61, 128 Ind. 444.

As consent.

An indictment for rape, charging that the act was committed on a girl "against her will," implies that it was against her consent, the words "will" and "consent" being synonymous in this sense, and the indictment was sufficient. *State v. Gaul*, 50 Conn. 578, 579.

As creating a trust.

"Willing and desiring," in a will, are frequently construed to amount to a trust; but where the uncertainty is such that the court cannot determine who are meant, it may be construed only as a recommendation to the first devisee, and to make the estate absolute in him. *Harding v. Glyn*, 1 Atk. 469, 470.

Commandatory terms of a will expressing a wish, will, or desire, etc., are sufficient to constitute a trust, unless there be certainty as to the parties who are to take and what they are to take. *Lines v. Darden*, 5 Fla. 51, 72.

The word "will," as used in a will, according to *Perry on Trusts* (volume 1, c. 4, § 112), in a clause that the testator desires that a legatee "will" make a certain disposition of the fund bequeathed, is a word of intention which the court will carry into effect as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 81 Ark. 580, 589.

"Will," as used in a will reciting that it was the testator's wish and "will" that cer-

tain property should be devoted to a certain purpose, has been held to create a trust. It is undoubtedly true that this and other like precatory words will under conditions, but not invariably, raise or imply a trust. *Pratt v. Trustees of Sheppard and Enoch Pratt Hospital*, 42 Atl. 51, 54, 88 Md. 610.

"Will and desire," as used in a will by which testator gave all his estate to his wife and two daughters absolutely, and then declared that if his daughters should marry it was his "will" and desire that the property should not in any instance be liable for the debts of their husbands, are not merely precatory words indicating a desire or recommendation, and not creating a remainder in the children of the devisee. *Collins v. Williams*, 41 S. W. 1056, 1057, 98 Tenn. 525.

"Will and desire," as used in a will where testator makes an absolute gift of property, saying that it is his "will and desire" that it be used in a certain way, is sufficient to raise a trust where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 129.

"Will," as used in a will declaring that "it is my will and desire," etc., is a stronger term and evidences more clearly a "desire" that the thing willed shall become the property of the person in whose favor a bequest is made or the act thus directed shall be performed than does the word "desire," being equivalent to the word "wish," and evidences the intention of the testator to dispose of the property to such person. *McMurry v. Stanley*, 6 S. W. 412, 414, 69 Tex. 227.

The term "will," as used in a will creating a trust, is used in the same sense as "wish" or "direct." *Bliven v. Seymour*, 88 N. Y. 469, 476, 477.

WILL (Auxiliary Verb).

The terms "now" and "hereafter" signify time present and to come and from the period at which they are used. The words "shall" and "will" indicate time in the future to the same period. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 26.

A charge that another "will swear, lie, cheat, or steal" may import that he lies, swears, cheats, and steals, and if used in the latter sense it is to be determined by the jury whether the language is actionable. *Dottarer v. Bushey*, 16 Pa. (4 Harris) 204, 209.

The phrase "he will steal and I can prove it" may well be taken to import a charge that plaintiff has stolen, and when properly alleged with an innuendo to that effect may sufficiently show a cause of action for slander. *Cornelius v. Van Slyck* (N. Y.) 21 Wend. 70.

An order in which A. directs B. to let C. have money or goods and says, "I will

guarantee" that he will pay for them, is a good guaranty and effectual as soon as the goods are delivered, the use of the future tense not being of any effect, unless it appears that something further should be done on the part of the writer before the obligation is to attach. *McNaughton v. Conkling*, 9 Wis. 316, 320.

A letter by a principal to his agent, stating that "as you stated you could get \$30,000 for the place you occupy, * * * and if you can we will sell at that price, * * * and allow you two and a half per cent. on said price," merely authorizes the agent to find a purchaser but not to sell. *Grant v. Ede*, 24 Pac. 890, 891, 85 Cal. 418, 20 Am. St. Rep. 237.

As executory.

"Will sell," as used in an agreement stating that the defendant will sell a certain quantity of ice for a certain sum to be paid in the manner stipulated, imports an executory contract and not a completed one. *Weed v. Boston & S. Ice Co.*, 94 Mass. (12 Allen) 377, 379.

Where the purpose was to adjust all the property rights, a provision in an antenuptial contract that the husband "will release his interest in the wife's property" is not executory in the sense that some act remains to be done on his part. *Buffington v. Buffington*, 51 N. E. 328, 329, 151 Ind. 200.

As imperative.

The word "will" has not an imperative force like the word "shall." *State v. Hilsabeck*, 34 S. W. 38, 40, 132 Mo. 348 (citing *Webst. Int. Dict.*).

An instruction that if the plaintiff has, by a preponderance of the evidence, proved the material allegations of his complaint, the jury "will" find in his favor and that it is their duty to determine the amount of his damage, instead of directing them that they "may" find in his favor and "may" assess his damage, will not be construed as coercive upon the jury, and tending to deprive the jury of their freedom of action in the matter, and hence to be an invasion by the court of the province of the jury. *North Chicago St. R. Co. v. Zeiger*, 54 N. E. 1006, 1007, 182 Ill. 9, 74 Am. St. Rep. 157.

WILL (Testament).

See "Ambulatory Will"; "Contested Will"; "Foreign Will"; "Holographic Will"; "Joint Will"; "Last Will and Testament"; "Mutual Will"; "Nonintervention Will"; "Nuncupative Will"; "Parliamentary Will"; "Reciprocal Will"; "Undutiful Will"; "Under a Will"; "Voidable Will."

A will is the legal declaration of a man's intention, which he wills to be performed after his death—*Jasper v. Jasper*, 22 Pac. 152, 153, 17 Or. 590 (citing *Black*); *Mills v. Newberry*, 112 Ill. 123, 133, 1 N. E. 156, 54 Am. Rep. 213; *Frew v. Clarke*, 80 Pa. (30 P. F. Smith) 170, 178; *Holcomb v. Wright* (U. S.) 5 App. D. C. 76, 83 (citing *Smith v. Bell*, 31 U. S. [6 Pet.] 68, 8 L. Ed. 322)—touching either the disposition of his property, the guardianship of his children, or the administration of his estate, or any or all of these things. It may consist of only one instrument, or it may consist of one instrument and one or more codicils. *Herzog v. Title Guarantee & Trust Co.*, 82 N. Y. Supp. 355, 357. Kent defines it as the disposition of real and personal property to take effect after the death of the testator. *Coulter v. Shelmadine*, 53 Atl. 638, 639, 204 Pa. 120; *Hester v. Young*, 2 Ga. (2 Kelly) 31, 50.

A will is "the declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death." *Leathers v. Greenacre*, 53 Me. 561, 567 (citing *Jarman on Wills*); *Tomkins v. Tomkins* (S. C.) 1 Bailey, 92, 96, 19 Am. Dec. 656; *Byrne v. Hume*, 84 Mich. 185, 192, 47 N. W. 679, 681.

A will is a disposition of one's estate to take effect after his death. *Hassell v. Basket* (U. S.) 11 Fed. Cas. 788, 789; *Chaney v. Same* (U. S.) 5 Fed. Cas. 460, 461.

"A will is an instrument by which a person makes a disposition of his property to take effect after his death." *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 23 Am. St. Rep. 495 (citing *Jarm. Wills*); *Williams v. Noland*, 82 S. W. 328, 329, 10 Tex. Civ. App. 629; *Grigsby's Legatees v. Willis' Estate*, 59 S. W. 574, 577, 25 Tex. Civ. App. 1. See, also, *In re Bomar*, 18 N. Y. Supp. 214, 215, 27 Abb. N. C. 425; *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305. It is in its own nature ambulatory and revocable during life. *Grigsby's Legatees v. Willis' Estate*, 59 S. W. 574, 577, 25 Tex. Civ. App. 1; *Williams v. Noland*, 82 S. W. 328, 329, 10 Tex. Civ. App. 629; *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305; *McDaniel v. Johns*, 45 Miss. 632, 641; *Green v. Lane*, 45 N. C. 102, 113.

A will is the just sentence of our will touching what we would have done after our death. *Payne v. Sale*, 22 N. C. 455, 457.

A will is the formal declaration in writing by which the maker provides for the distribution of his property after his death. *Lott v. Thompson*, 36 S. C. 38, 43, 15 S. E. 278.

A will is the legal declaration of a party's intention which he directs to be performed after his death. *Welch v. Kinard* (S. C.) *Speer*, Eq. 256, 263.

All the law writers, so far as we are informed, define as "wills" those dispositions made by a party which affect property after death. *Williams v. Noland*, 32 S. W. 828, 329, 10 Tex. Civ. App. 629.

A will is any writing whereby a person makes a disposition of his property to take effect after his death. *Cover v. Stem*, 10 Atl. 231, 233, 67 Md. 449, 1 Am. St. Rep. 406; *Ward v. Ward*, 20 Ky. Law Rep. 986, 988, 48 S. W. 411, 412.

"A will is a mere declaration or sentence of a man's mind as to what he would have to be done with his estate after his death. 5 Bac. Abr. tit. 'Of Wills and Testaments' (A) p. 497. The function of a will is to effect the disposition of property after the donee's death in accordance with a mere declaration made by the donor in his lifetime, and during his lifetime entirely inoperative; but no conveyance, contract, trust, or other disposition of property can be declared illegal or ineffectual because it practically discharges the same function as a will after the death of the person who made it." *Dunn v. Houghton* (N. J.) 51 Atl. 71, 79.

A "will or testamentary paper" is an instrument of writing which does not pass an interest or right in the property attempted to be thereby conveyed until the death of the maker. *Reed v. Hazleton*, 15 Pac. 177, 180, 37 Kan. 321.

A will is ambulatory during the life of its maker. It is in effect reiterated as his testament at each moment, and is governed by the law existing at the time when it takes effect upon the testator's death. *In re Kopmeier's Will*, 89 N. W. 134, 136, 113 Wis. 233.

A mutual agreement provided that the property of the intended wife should remain in her, and that she might dispose of the same "by deed, grant, bargain, desire, will or otherwise." Held, that the word "will" was implied in its technical sense as meaning the testamentary disposition. *Cook v. Adams*, 47 N. E. 605, 606, 180 Ill. 599.

A "will" means not barely the signing of it, and the formal publication or delivery, but proof in the language of the candid that he well knew and understood the contents thereof, and did give, will, dispose, and do in all things as in the said will contained. *In re Nadal's Will*, 2 Hawaiian, 400, 403 (citing *Zacharias v. Collis*, 3 Phil. 179).

The four requisites necessary to constitute a valid will are said to be: (1) That the instrument be in writing, signed by the testator; (2) that it be attested by two credible witnesses; (3) that it is subscribed in the presence of these witnesses; (4) that the testator be of sound mind and memory. *Robinson v. Brewster*, 30 N. E. 683, 685, 140 Ill. 649, 33 Am. St. Rep. 265.

As affecting after-acquired land.

"A will as affecting real estate is a disposition of lands from the heir. It is an appointment of a person who shall take the specific land. It is also an appointment of a specific estate, and so far it is in the nature of a conveyance. That a will does not operate to transfer lands acquired after its execution has been settled in England, and wherever the common law prevails unmodified by local usage, from a very early period. But this principle does not extend to wills of personal estate. A reason for the distinction is given by an eminent legal writer, *Powell on Dev.* 151, 152 (Jarman's Ed.). The common law, it is there said, after the introduction of feuds, appointed no heir on whom personal property should descend. If the owner died intestate, it devolved on the church. A testament was then the constitution by the testator of an heir to his personal property, the law having otherwise appointed none. An executor stood in the relation of testator to such property, and was entitled to all of it, the law not giving it to any other person. The only limitation upon his rights was that the property was subjected in his hands to the trusts of the testator. But as to freehold property, the feudal law, when feuds became inheritable, constituted an heir in his own right, whose title was inchoate when a freehold of inheritance was acquired by his ancestor, and the person next in succession was called the apparent, or presumptive, heir. A will of personal property operating, therefore, as the constitution of an heir, and a will of the lands as a disposition from an heir, the one cannot take effect in the same manner as the other does, but each must take effect according to the nature and property of the subject-matter on which it is to operate, and the time of its operation. A will does not pass land acquired by testator after the execution of the will." *George v. Green*, 13 N. H. 521, 524.

As an agreement.

See "Agreement."

As any testamentary disposition.

The term "will" includes every kind of testamentary act taking effect from the mind of the testator and manifested by an instrument in writing. *Flood v. Kerwin*, 89 N. W. 845, 847, 113 Wis. 673.

An instrument in any form, whether a deed poll, or indenture, if the obvious purpose is not to take effect till after the death of the person making it, shall operate as a "will." *In re Harrison's Estate*, 46 Atl. 888, 890, 196 Pa. 576.

St. 1843, c. 92, providing that any "will" of any inhabitant of the state made in any other of the United States, or in any foreign country, which might be approved and al-

lowed according to the laws of such state or country, may be proved and recorded in the state, and be proceeded in and have the same effect as if executed conformably to the laws of the state, should be construed to include every species of testamentary act which takes its effect upon the mind of the testator requiring a sound and disposing mind and capacity, and manifested by the proper execution of an instrument in writing, and thus includes any testamentary writing which operates by way of revocation, and not by way of cancellation. A paper properly executed, written by a testator to a certain person, stating that it was his wish that the will he had made be destroyed and his estate settled according to law, should take effect the same as a will, codicil, or revocation; for it was intended to operate, as far as the testator had capacity to do it, as a testamentary declaration of a personal wish, will, and purpose to annul the will, and a like personal wish and purpose that his estate should be settled after his decease as an intestate estate. It was not intended as a mere authority to the person to whom it was addressed to cancel or destroy his will physically, but also to declare his personal will. *Bayley v. Bailey*, 59 Mass. (5 Cush.) 245, 249.

A will, within the meaning of the statute prohibiting witnesses to any "will" or codicil from taking, etc., cannot be limited to wills devising real property only, but includes all wills. *Lees v. Summersgill*, 17 Ves. 508, 511.

The "last will," says Swineburn, "is a lawful disposing of that which any one would have done after death." It is a voluntary disposition of property in mode recognized by law to take effect after death. Consequently all that is required to constitute "a paper writing appearing to be the will of a deceased person," within Code, § 2163, providing that such a paper, under certain conditions, should be sufficient to dispose of real property, is that the writing should purport to be the disposition of the writer's property after his death. Entries in a diary which either undertake to dispose of property of the writer or to control its disposition constitute a valid will if the other statutory requirements are fulfilled, and this will be true though some of the entries in the diary would be entitled to probate as a holographic will, and some as a will of personality only. All taken together, they would constitute a will. *Reagan v. Stanley*, 79 Tenn. (11 Lea) 316, 324 (citing *Suggett v. Kitchell*, 14 Tenn. [6 Yerg.] 429).

A paper that has not been subscribed and witnessed has no effect as a will, under the statute of Illinois. *Harrison v. Weatherby*, 54 N. E. 237, 240, 180 Ill. 418 (citing *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419).

Except where it would be contrary to the manifest intention, the word "will," as

used in the chapter relating thereto, shall signify a last will or testament, codicil, appointment by will, or writing in the nature of a will, in exercise of a power, and also any other testamentary disposition. Ky. St. 1903, § 4824.

Except where it would be inconsistent with the manifest intent of the Legislature, the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the matter of a will, in the exercise of a power, and also to any other testamentary disposition. Code Va. 1887, § 2511 [Va. Code 1904, p. 1282].

The word "will" embraces a testament, a codicil, an appointment by will or writing in the nature of a will, in exercise of a power, also any other testamentary disposition. Code W. Va. 1899, p. 133, c. 13, § 17.

Codicil included.

The term "will" includes codicils, and legal provisions relating to wills must be understood as embracing codicils. *Fry v. Morrison*, 42 N. E. 774, 775, 159 Ill. 244.

In *Fuller v. Hooper*, 2 Ves. Sr. 242, *Belt's Supp.* 333, Lord Hardwicke said: "A will is to be considered in two lights—as the testament and the instrument. The testament is the result and effect in point of law of what is the will, and that consists of all the parts, and a codicil is then a part of the will, all making but one testament; but it may be made at different times and under different circumstances, and therefore there may be a different intention at making the one and the other. The instrument is that writing in which the will is contained." This distinction shows that, though for most purposes a will and codicil are to be regarded as making but one testament, they will not be regarded as a single instrument where a manifest intention requires otherwise. *Appeal of Alsop*, 9 Pa. St. (9 Barr) 374, 382.

By statute in many states it is provided that the word "will" shall include or mean a codicil. See Rev. St. Okl. 1903, §§ 2808, 6890; Gen. St. Minn. 1894, § 255, subd. 15; Pol. Code Cal. 1903, § 17, subd. 5; Code Civ. Proc. Cal. 1903, § 17, subd. 5; Pen. Code Cal. 1903, § 7, subd. 14; Civ. Code Cal. 1903, § 14, subd. 5; Pen. Code Ariz. 1901, par. 7, subd. 14; Comp. Laws Nev. 1900, § 3091; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 19; Rev. St. Wis. 1898, § 4971; Ky. St. 1903, §§ 463, 4824; Code N. C. 1883, § 3765, subd. 9; Rev. Codes N. D. 1899, §§ 5135, 6166; Civ. Code S. D. 1903, §§ 1089, 2469; Pol. Code Mont. 1895, § 16, subd. 5; Code Civ. Proc. Mont. 1895, § 3463, subd. 7; Civ. Code Mont. 1895, § 4662, subd. 6; Pen. Code Mont. 1895, § 7, subd. 14; Rev. St. Utah 1898, § 2498; Bates' Ann. St. Ohio 1904, § 5913; V. S. 1894, § 11; Code Miss. 1892, § 1519; Rev. Laws Mass. 1902, p. 89, c. 8, § 5, subd. 21; Pub. St. N. H. 1901, p. 64, c. 2, § 22; Comp. Laws

Mich. 1897, § 50, subd. 16; Mills' Ann. St. Colo. 1891, § 4185, cl. 10; Ann. St. Ind. T. 1899, § 3620; Code Iowa 1897, § 48, subd. 17; Gen. St. Kan. 1901, § 7342, subd. 17; Hurd's Rev. St. Ill. 1901, p. 1720, c. 131, § 1, subd. 13; Horner's Ann. St. Ind. 1901, § 240, subd. 8; Code W. Va. 1899, p. 133, c. 13, § 17; Rev. St. Mo. 1899, §§ 4647, 6140; Code Va. 1887, § 2511 [Va. Code 1904, p. 1282]; Code Civ. Proc. N. Y. 1899, § 2514, subd. 4; Rev. St. Wyo. 1899, § 2724; Rev. Code Del. 1893, c. 5, § 1, subd. 8.

As conveyance, contract, or gift.

A "will" is not a contract or conveyance. It is the act of one party only. It is entirely inchoate. No one is bound by it during the life of the testator, and it is revocable at his pleasure. There is no contracting party to it; no delivery and no acceptance of it, as there must be in the case of a contract or conveyance. It is not a gift *inter vivos* nor is it a gift *causa mortis*. *Lewis v. Jones* (N. Y.) 50 Barb. 645, 650.

"A 'will' does not and never can alienate an estate. The estate, however, when a will is executed, passes to the person designated by the will; but this passing of the estate to such person, as before stated, is not an alienation. The passing of an estate to a person must be given some other name, as a 'reception,' or a 'union,' or an 'association.' We know the text-writers have sometimes broadened the word 'alienation' so as to make it include the transfer of property by will and death and the statutes, and perhaps this use of the word in such a case is not inaccurate; but, as before stated, the efficient cause of the alienation in such a case, indeed the sole cause, is death, and the will and the statutes merely say where the title of the estate shall go. In the case of *Comstock v. Adams*, 23 Kan. 513, 524, 33 Am. Rep. 191, the following language is used: 'A will is never a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will a conveyance.'" *Vining v. Willis*, 20 Pac. 232, 233, 40 Kan. 609.

As there was originally no power of testamentary disposition of land, a "will" was originally defined to be "the just sentence of our will touching what we would have done after our death respecting personal estate." The disposition of lands subsequently permitted was not considered so much in the nature of a testament as of a conveyance, by way of appointment of particular lands to a particular person. Per *Tarbell, J.*, in *Clark v. Hornthal*, 47 Miss. 430, 436.

A brother and sister owning separate properties made a will together, which read

as follows: "I, B. C., should I be the first to die, give, devise, and bequeath to the survivor of us all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor," etc.; and directed that at the expiration of the life estate the residue should be divided into nine parts, "three of which parts I give and bequeath," etc.—the singular number being used through the whole instrument. In determining the nature of this writing the court says it is important to a correct understanding of the real ground of the controversy to bear in mind the peculiar characteristics of a contract and those of a will. A contract is an agreement between parties for the doing or not doing of some particular thing. The undertaking of one party is made in consideration of something paid or to be done by or on behalf of the other party, so that the obligation to do and the right to require performance are reciprocal. A will, on the other hand, is simply a statement of a purpose or wish of the maker as it exists at the time. As often as his purpose or wish changes he may change the expression of it, and when and why a change shall be made depends upon himself alone. He is answerable to no one for his determination to make one rather than another disposition of his property. The binding force of a contract comes from the aggregatio mentium of the parties. The binding force of a will comes from the fact that it is the last expressed purpose of the testator in regard to the disposition of his property after his own death, and in view of this principle it is held that the instrument was the separate will of each, and that the survivor as to her property had a right to make a new will containing a different disposition thereof. In *re Cawley's Estate*, 20 Atl. 567, 568, 136 Pa. 628, 10 L. R. A. 93.

While a "will" is a conveyance of real estate in a certain sense, we may say, in legal language, it is not so understood or referred to. The one who takes comes to his estate by purchase, and not by descent; but he is a devisee, and not a grantee; and we do not think, looking to the purpose of the Legislature, that the word "conveyances," as used in *Laws 1885, c. 147*, requiring conveyances in order to be valid against bona fide purchasers to be recorded, includes wills. *Bell v. Couch*, 43 S. E. 911, 912, 132 N. C. 346.

Deed distinguished.

A will is an instrument by which a person makes a disposition of property to take effect after his death, and as its operation is postponed during life it is ambulatory and revocable, and it is this ambulatory and revocable quality which distinguishes it from deeds, and other similar instruments of transfer or conveyance, taking effect, if at all, at

the time of execution. *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305; *McDaniels v. Johns*, 45 Miss. 632, 641.

A "deed" must pass a present interest in the property although the right to possession and enjoyment may not accrue until some future time. It is distinguished from a will which does not pass any interest until after death of the maker. Thus an instrument which purports to be a deed, uses the language ordinarily implied in deeds, conveys a present interest to trustees named, and is executed and acknowledged as a deed, is a deed notwithstanding a reservation of the power of revocation, modification or substitution of the trusts thereby exercised within a certain time. *President, etc., of Bowdoin College v. Merritt* (U. S.) 75 Fed. 480, 483.

In order that a paper be held a deed it must convey an interest to take effect in present, though the enjoyment of this interest may rest in futuro. It is otherwise as to a will. It speaks as of the death of the testator. The instrument may be in the form of a deed. It may be supported by a consideration and by its maker be called a deed, yet, if it purports to convey a title which does not arise until the death of the maker, it is nevertheless a "will." Whether a paper is to operate as a will or deed depends upon the intention of the maker, to be gathered from its language. An instrument executed by a husband, reciting a gift of land to the wife to take effect after her husband's death and reserving the right to sell or dispose of it during his life, in which event the instrument is to be void, is a testamentary devise and not a deed, and hence did not vest any present interest in the land in the wife which would pass by her conveyance during the life of the husband. *Ellis v. Pearson*, 58 S. W. 318, 104 Tenn. 591.

The distinction between a "conveyance by deed" and a "will" is patent. The one is completed by the act, and the other does not become effective until the death of the maker. *Macrae v. Macrae* (Tenn.) 57 S. W. 423, 424.

In determining whether an instrument be a will or a deed, the main question is, did the maker intend any estate or interest whatever to vest before his death and upon the execution of the paper, or in other words did he intend that all the interest and estate should take effect only after his death? If the former it is a deed, if the latter a will, and it is immaterial whether he call it a deed or will. *Whitten v. McFall*, 26 South. 131, 132, 122 Ala. 619.

As last will or testament.

The words will and testament and the phrase last will and testament, are exactly synonymous by common usage all over the world. *Hill v. Hill*, 35 Pac. 360, 7 Wash. 409.

8 Wds. & P.—43

In common phrase any paper executed in testamentary form is called a will. In a legal sense the testator's will is a paper executed and existing under such circumstances as entitle it to probate. In this sense the word "last" adds nothing, and the phrase used in an appeal from a decree probating a will as follows "because such instrument was not the last will and testament of such deceased," is in effect a denial that the instrument was in fact a will, and constitutes a legally sufficient reason. *Lane v. Hill*, 44 Atl. 597, 598, 68 N. H. 398.

It is provided by statute in some states that the word "will" shall be construed to mean "last will and testament" (see *Rev. Code Del.* 1893, c. 5, § 1, subd. 8; *Code Civ. Proc. N. Y.* 1899, § 2514, subd. 4; *Ky. St.* 1903, § 4824), or an instrument purporting to be such (*Rev. Codes N. D.* 1899, § 6166). And in other states the word "will" is declared to include a testament. See *Horner's Ann. St. Ind.* 1901, § 240, subd. 8; *Rev. St. Mo.* 1899, § 6140; *Rev. St. Wyo.* 1899, § 2724; *Code W. Va.* 1899, p. 133, c. 13, § 17; *Code Va.* 1887, § 2511 [*Va. Code* 1904, p. 1282]; *Rev. St. Mo.* 1899, § 4647.

As matter of intention.

A will is defined to be the legal declaration of a man's intentions which he wills to be performed after his death. *Eckford v. Eckford* (Iowa) 53 N. W. 345, 346; *Appeal of Lininger*, 101 Pa. 161, 163; *Coulter v. Shelmadine*, 53 Atl. 638, 639, 204 Pa. 120; *Appeal of Jameson*, 1 Mich. (Man.) 99, 102; *Adams v. Cowen*, 20 Sup. Ct. 668, 669, 177 U. S. 471, 44 L. Ed. 851; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370. These intentions are to be collected from his words and ought to be carried into effect if they be consistent with law. *Adams v. Cowen*, 20 Sup. Ct. 668, 669, 177 U. S. 471, 44 L. Ed. 851; *Eckford v. Eckford*, 58 N. W. 1093, 1096, 91 Iowa, 54, 26 L. R. A. 370. It follows, therefore, that it is the duty of the court in the construction of wills to give full and complete effect to the intention of the testator. *Appeal of Jameson*, 1 Mich. (Man.) 99, 102.

A "will" is but the medium through which the intent of the testator is made known. That intention, within the limits of the disposable portion, is the law of the case, and if made manifest and unmistakable must have execution. *Gueydan v. Montagne*, 33 South. 61, 62, 109 La. 38.

Where a testator does not violate any principle or public policy, religion or morality, nor infringe on any statute, he may make such disposition of his property as he sees proper. *Appeal of Lininger*, 101 Pa. 161, 163.

As muniment of title.

A "will" is a muniment of title, but to be effectual to pass either real or personal

property, it must be duly proved and allowed in the county court as required by statute. *Hanley v. Kraftczyk*, 96 N. W. 820, 821, 119 Wis. 352.

As order.

A will executed in the usual form is not an order such as is required by a stipulation of a contract of life insurance, which makes the insurance payable to a person therein designated, unless a different payee is appointed by an order acknowledged before a justice of the peace. *Mellows v. Mellows*, 61 N. H. 137.

Testament distinguished.

A "will" is more properly called a devise of real estate and is of an entirely different and opposite character to a testament, which in strictness concerns personal property merely. A devise is a conveyance of land and not under the same jurisdiction as a testament. 2 Bl. Comm. 501. The deviser must have reached the age of twenty-one years; and it is complete or may be executed without the appointment of an executor or administrator. Indeed, these offices are neither of them predicable of a devise of real estate. The deviser may require some future act to be done, in order to the vesting of an estate; and may, and often does, delegate the power to some friend who is to designate the devisee, and make a sale and distribution of lands already devised in fee. But in this his friend does not act as an executor. *Conklin v. Egerton's Adm'r* (N. Y.) 21 Wend. 430, 436.

WILLFUL—WILLFULLY.

"Willfully" is defined by Webster to mean "in a willful manner; obstinately; stubbornly; by design; with set purpose." *Whitman v. State*, 22 N. W. 459, 460, 17 Neb. 224; *Huff v. Chicago, I. & L. Ry. Co.*, 56 N. E. 932, 934, 24 Ind. App. 492, 79 Am. St. Rep. 274; *Miller v. Miller*, 47 N. E. 338, 339, 17 Ind. App. 605; *Dull v. Cleveland, C., C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571; *Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 565, 1 Ind. App. 298.

"Willful" means proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. *Parsons v. Smilie*, 97 Cal. 647, 655, 32 Pac. 702, 704 (citing Bl. Comm.).

The word "willfully" means "willingly; designedly; purposely; and obstinately or stubbornly." *Richardson v. State*, 5 Tex. App. 470, 472.

"Willful" is defined by Webster to mean "obstinate; perverse; inflexible; stubborn; refractory." *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, 146.

The word "willful," or "willfully," is variously construed. Abbott, in his Law Dictionary, says that it is a term used in averring or describing an act, particularly one charged as a crime, to show that it was done in the free activity of the perpetrator's will. The author also quotes from the opinion in the case of *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, as follows: "To authorize a conviction under a penal statute prescribing a punishment for willfully removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to the punishment under the statute, for the reason that he cannot be deemed to have acted willfully." *Minkler v. State*, 14 Neb. 181, 183, 15 N. W. 330, 331.

The word "willfully," when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending on the context in which it is used. It is employed in penal statutes more frequently to distinguish between those acts which are intentional and by design, and those which are thoughtless or accidental. It may sometimes mean corruptly or unlawfully, or again designedly or purposely, with an intent to do some act in violation of law. *Highway Com'rs v. Ely*, 54 Mich. 173, 180, 19 N. W. 940.

An estoppel exists where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position. The word "willfully," as used in this connection, is not to be taken in the limited sense of the term "maliciously" or of the term "fraudulently," nor does it of necessity imply an active desire to produce a particular impression or to induce a particular line of conduct. Whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally chargeable with an intent—a willful design—to induce the other to believe him. *Preston v. Mann*, 25 Conn. 118, 128.

Accidental distinguished.

The term "willfully," when used to characterize murder, means intentionally; that is, not accidentally. *State v. McKenzie*, 45 S. W. 1117, 144 Mo. 40; *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. Brooks*, 5 S. W. 257, 260, 92 Mo. 542; *State v. Howell*, 23 S. W. 263, 267, 117 Mo. 307; *State v. Fitzgerald*, 32 S. W. 1113, 1115, 130 Mo. 407; *State v. Schaefer*, 22 S. W. 447, 450, 116 Mo.

96; *State v. Harper*, 51 S. W. 89, 91, 149 Mo. 514; *State v. Silk*, 44 S. W. 764, 766, 145 Mo. 240; *State v. McMullin*, 71 S. W. 221, 224, 170 Mo. 608; *Strutton v. Commonwealth (Ky.)* 62 S. W. 873, 877; *Clark v. Commonwealth*, 63 S. W. 740, 746, 111 Ky. 443; *Anderson v. How*, 22 N. E. 695, 697, 116 N. Y. 336; *Leicester v. Hoadly*, 71 Pac. 318, 319, 66 Kan. 172, 65 L. R. A. 523; *State v. Stein*, 51 N. W. 474, 475, 48 Minn. 466; *State v. Zdanowicz*, 55 Atl. 743, 746, 69 N. J. Law, 619.

"Willfully," as used in reference to homicide, means "that the act charged was intentionally done, and not the result of accident or misfortune." *Anderson v. Territory*, 13 Pac. 21, 25, 4 N. M. (Johns.) 108.

"A 'willful act' is defined to be an act done designedly, intentionally, or purposely, as contradistinguished from accident, inadvertence, or absence of intention or design." *Commonwealth v. Perrier (Pa.)* 3 Phila. 229, 232.

The word "willful," as used in connection with the charge of murder, means an intentional killing, and not an accidental killing. It means an act which results in death, that is intentionally done, and one that is not accidentally done. There is a great difference between that which is in the law accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death, that is outside of the definition of the word "accident," is intentional in the law, whether it grows out of specified design to take life, or whether it grows out of a gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken. That which is an accident in the law is something that occurs after the exercise of the care that the law requires to be exercised to prevent such an occurrence. When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally or reasonably or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act, as done in that way, is intentional; and whenever an act is done, and it is an act that may naturally or probably produce a certain result, that act is done intentionally, the result is intentional. For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a willful act upon his part, and, when that state of facts exists, the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act pro-

duced death, because there is a known connection between the act and the result, which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. *United States v. Boyd (U. S.)* 45 Fed. 851, 855.

Bad purpose.

The word "willfully" means not merely voluntarily, but with a bad purpose. *Potter v. United States*, 15 Sup. Ct. 144, 147, 155 U. S. 438, 89 L. Ed. 214; *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206; *Williams v. People*, 57 Pac. 701, 702, 26 Colo. 272.

Bad motive is necessary to make an act willful, and the fact that the act of omission is done in obedience to the will is not enough. *State v. Alcorn*, 14 S. W. 663, 664, 78 Tex. 387.

The word "willfully," as used in Act Cong. July 12, 1882, § 13, imposing a penalty upon one who shall willfully violate, as well as upon one who shall resort to any device to evade, the provisions of the act, means not merely voluntarily, but with a bad purpose. *Spurr v. United States*, 19 Sup. Ct. 812, 815, 174 U. S. 728, 43 L. Ed. 1150.

The word "willful," as used in a statute providing that the act of cutting trees must be willful to authorize punishment therefor, means intentionally, malevolently, with a bad purpose, an evil purpose, without ground for believing the act to be lawful. *Hateley v. State*, 44 S. E. 852, 853, 118 Ga. 79 (citing *King v. State*, 103 Ga. 265, 30 S. E. 80).

The word "willfully," when used in a statute creating a criminal offense, means not merely voluntarily, but with a bad purpose. *State of North Carolina v. Vanderford (U. S.)* 35 Fed. 282, 287.

"Willfully," in the ordinary sense in which it is used in the statutes, means not merely voluntarily, but with a bad purpose. A "willful act," in the usual sense of the words, is one done designedly, intentionally, or purposely; and also "willful misconduct" means misconduct to which the will is a party. Hence it is held that, in an action against a railroad for killing stock, an allegation in the complaint that the killing was willfully done is sufficient to show an intentional killing. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 300, 27 N. E. 564.

Capacity of party.

The word "willfully," as used in Acts 1869, No. 4, § 3, providing that, whenever any person in the state of intoxication shall willfully commit any injury upon the person or property of another, any person who, by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be li-

able to the party injured, is such willfulness as a drunken person may have, and that could only have been intended by the statute. If that of a sober person had been intended, no intoxicated person would have it, and the statute would not apply to anything. If the act is the result of such capacity for determining what he will do as the intoxicated person has, it is within the meaning of the statute. The presumption in the first instance always is that a person intends to do what he does, so far as he can intend. Accordingly, proof that an intoxicated person committed an injury, if no excuse or justification appears out of the circumstances, is sufficient from which to find that he did it willfully according to his capacity, and such proof will make out his part of the case under the statute unless some excuse or justification is made to appear by way of defense. *Smith v. Wilcox*, 47 Vt. 537, 545.

Consciously.

In common parlance willful means intentional as distinguished from accidental or involuntary. In *Black, Law Dict.* 1242, "willful" is defined as follows: "Proceeding from a conscious motion of the will; intending the result which actually came to pass; designed; intentional; malicious." *King v. State*, 30 S. E. 30, 31, 103 Ga. 263.

"Willful," as used in criminal and penal statutes, has frequently been interpreted to mean not merely a voluntary act, but an act committed with evil intent. *Hurd's Rev. St.* 1889, c. 93, § 14, declaring that any injury by willful failure to comply with the provisions of the act requiring a light to be furnished at the top of every shaft of a mine shall give a cause of action for injuries received, is not in the nature of a penal statute, and provides for compensation for injuries inflicted, not punishment. An act consciously committed is willfully committed within the meaning of the word "willful," as used in this enactment. *Odin Coal Co. v. Denman*, 57 N. E. 192, 194, 185 Ill. 413, 76 Am. St. Rep. 45 (citing *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131).

Corruptly and falsely distinguished.

1 *Mills' Ann. St.* § 2170 (Gen. St. 1883, § 787), defines perjury as testifying willfully, corruptly, and falsely. "Willfully" is a word of stronger meaning than either "corruptly" or "falsely." "Willfully," as employed in criminal and penal statutes, usually means something more than intentionally and voluntarily. It implies that the act done which it characterizes is designedly done with some bad purpose or without justifiable excuse. *Williams v. People*, 57 Pac. 701, 702, 26 Colo. 272.

The words "willfully," "unlawfully," and "feloniously," when used in an indictment

for forgery, though not words of the same import, have a broader and more extensive signification than the word "falsely," and are more than its equivalent; so that the word "falsely" is not essential to the validity of the indictment. *State v. McKiernan*, 30 Pac. 831, 832, 17 Nev. 224.

"Willfully," as used in *Rev. St.* § 5392, which makes it of the essence of the offense of perjury that it be committed willfully, means with design, with some degree of deliberation, and, as so construed, is not the same as "corruptly," which means viciously or wickedly. Thus, an indictment charging that the testimony was corruptly given was not a good indictment alleging the offense described in the statute. *United States v. Edwards* (U. S.) 43 Fed. 67.

As used in an indictment, that a person "willfully, knowingly, maliciously, and falsely" said, deposed, and swore on oath is equivalent to saying that he corruptly swore; for the words used necessarily involved "corruptly." It could not have been willfully, knowingly, maliciously, and falsely, without being corruptly, done. *State v. Bixler*, 62 Md. 354, 356. See, also, *Mills v. Glennon*, 6 Pac. 116, 118, 2 Idaho (Hasb.) 105; *State v. Stein*, 51 N. W. 474, 475, 48 Minn. 466.

Criminal or specific intent.

A charge in an indictment that the prisoner did "willfully and feloniously" forge a certain instrument is a sufficient allegation of defendant's criminal intent. In *re Van Orden*, 65 N. Y. Supp. 720, 721, 32 Misc. Rep. 215.

A statute defining murder as the "willful killing," etc., of a human being means a killing where "there is a specific intent and design or purpose formed to take life." *People v. Pool*, 27 Cal. 572, 585.

"Willful," as used with relation to homicide, implies that the act was done by the perpetrator with the intent that the life of the party killed should be destroyed. *State v. Wells*, 1 N. J. Law (Coxe) 424, 1 Am. Dec. 211.

"Willfully," as used with relation to homicide, means on purpose, with intent that the act by which the life of a party is taken should have that effect. *Anthony v. State*, 19 Tenn. (Meigs) 265, 277, 33 Am. Dec. 143.

A statute defining murder in the first degree, and stating that it must be a "willful" killing, means that the murderer intended to kill. This supposes an actual condition of the mind in regard to killing when the deed takes place. *Bower v. State*, 5 Mo. 364, 379, 32 Am. Dec. 325.

A willful killing is simply an intended killing, and nothing could make a killing willful except the intended result of the act; and

to charge in an indictment that the act was committed with a specific intent to kill and murder is equivalent to a charge that the killing was "willful," as used in Code, § 3049, defining murder in the first degree. *State v. Townsend*, 24 N. W. 535, 66 Iowa, 741.

The words "willfully, unlawfully, feloniously, and maliciously" are properly used in an information of arson. Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building, which is an element of the crime of arson. *People v. Moonrey*, 59 Pac. 761, 762, 127 Cal. 339.

"Willfully," as used in Rev. St. c. 4, § 6, which imposes a penalty on a person for willfully giving a vote at an election, knowing himself not to be a qualified voter, etc., means designedly, purposely, with an intent to claim and exercise the right of suffrage on that occasion in common with the legal voters. The word sometimes means corruptly or unlawfully. *Commonwealth v. Bradford*, 50 Mass. (9 Metc.) 268, 270.

The words "willful, malicious, deliberate, and premeditated," denote the intent with which killing must be done to make it murder in the first degree. Moreover, they denote not only the moral impulse, but peculiarly the mental process through which the crime is conceived and the act resolved upon. "Willful" is common in the definition of many crimes, and yet it may have a peculiar meaning in its application to murder in the first degree, because of its peculiar emphasis and intensity, as used in such connection. *Cannon v. State*, 31 S. W. 150, 151, 60 Ark. 564.

Deliberation and premeditation.

Pen. Code, § 606, provides that every person who willfully and intentionally breaks down or otherwise injures any public jail shall be punished, etc. Held that the word "willful," in that connection, imports that the act must be done with deliberation, and not through surprise, confusion, or bona fide mistake. "To do a thing willfully is to do it by design, with set purpose. To do a thing with deliberation is to do it after examining the reasons for and against a choice, after consideration. After indulging in this mental process, if the act is done as the result of it, it is a willful act. A purpose or willingness to commit the act renders it willful." *People v. Sheldon*, 9 Pac. 457, 459, 68 Cal. 434.

The word "willfully," as used in Pen. Code, § 96, defining perjury, means merely that the perjured testimony must have been given with some degree of deliberation. *Krauskopf v. Tallman*, 56 N. Y. Supp. 967, 969, 38 App. Div. 273.

"Willfully" means with design; with some degree of deliberation. To say that

testimony was corrupt was to say that it was wicked or vicious; whereas, to say that it was willful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence or mistake, but to design. *United States v. Edwards* (U. S.) 43 Fed. 67.

A willful act is one which presumes that the thing was done in consequence of deliberate design. If an act is a willful wrong, it does not add to the force of the consequences that that wrong may have been plotted with another. *Horton v. Equitable Life Assur. Soc.*, 71 N. Y. Supp. 1060, 1062, 35 Misc. Rep. 495.

The phrase "willful violation of law" means a violation thereof knowingly and deliberately committed. *Catlett v. Young*, 32 N. E. 447, 448, 143 Ill. 74.

"Willfully," as used in Code, § 1062, making it a misdemeanor to unlawfully and willfully deface, damage, or injure any house, means deliberately, of purpose, and without regard to whether it is done rightfully or wrongfully. *State v. Howell*, 12 S. E. 569, 107 N. C. 835.

A person who deliberately does an act which he knows to be unlawful or wrongful is generally held to have done it willfully. *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, 146.

"Willful" means more than mere intention. It is sometimes used to mean perverse, deliberate design and malice. *Wales v. Miner*, 89 Ind. 118, 127.

"Willful" means intentional or deliberate. It may mean, when used in a statute, an intentional and deliberate doing of a wrongful act. *In re Maples* (D. C.) 105 Fed. 919, 921.

Where an indictment charged murder committed "feloniously with malice aforethought, and with premeditation and deliberation," the omission of the word "willfully" did not render it defective as a charge of murder in the first degree. A willful killing is an intended killing. Both the words "deliberation" and "premeditation" involve a prior purpose to do the act in question. And it is impossible to conceive of a murder committed with a felonious intent that is not willful. 1 Whart. Cr. Law, § 380. The word "willful" finds its equivalent in the other terms employed. *Aubrey v. State*, 35 S. W. 792, 62 Ark. 368.

Design.

To do a thing willfully is to do it by design, with a set purpose. *People v. Von Tiedeman*, 52 Pac. 155, 158, 120 Cal. 128.

Webster defines "willful" to mean "by design or set purpose." *Northern Ry. of*

France v. Carpenter (N. Y.) 18 How. Prac. 222, 223.

To do an act willfully is to do it willingly; by design; on purpose. *People v. Boas*, 1 N. Y. Cr. Rep. 132, 135 (citing *Worcester Dict.*).

The word "willfully" involves design and purpose. *Montgomery v. Muskegon Booming Co.*, 50 N. W. 729, 731, 88 Mich. 633, 26 Am. St. Rep. 308.

A willful act is one done designedly, intentionally, or purposely, as contradistinguished from accident, inadvertence, or absence of intention or design. *Commonwealth v. Perrier (Pa.)* 3 Phila. 229, 232.

While the word "willful" might in common parlance be held to be synonymous with "intentional," there can be no doubt that to make the destruction of books a willful act, so as to raise the presumption that they were willfully suppressed as adverse evidence, the destruction must be designedly done with the purpose of suppressing evidence, and the mere fact that it was intentional was not sufficient. *Hay v. Peterson*, 45 Pac. 1073, 1078, 6 Wyo. 419, 34 L. R. A. 581.

The word "willful," employed in penal statutes, has not always the same meaning; but as used in Code, § 3257, which declares that any person who willfully interrupts or disturbs any assemblage of people, etc., is guilty of a misdemeanor, it is used as a synonym of intention or design, pursuant to intention or design without lawful excuse. *Harrison v. State*, 37 Ala. 154, 156.

"Willfully," as used in a statute imposing on railroads a penalty for willfully neglecting to post up a schedule of fixed fares, means designedly, as opposed to inadvertently. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa, 187, 204.

The word "willfully," in Rev. St. c. 4, § 6, enacting that if any person, knowing himself not to be a qualified voter, shall vote at an election, he shall forfeit, etc., means designedly, purposely, with an intent to claim and exercise the right of suffrage. *Commonwealth v. Connelly*, 40 N. E. 862, 863, 163 Mass. 539.

The expression "willfully kill," as used in criminal law, is not equivalent to the expression "with a design to effect death." A man may willfully do an act which caused death, and yet have no design to effect death. *State v. Smith*, 81 N. W. 17, 78 Minn. 362.

The word "willful," as used in the statute providing for the punishment for willfully cutting and carrying away timber, means either intentional, or by design regardless of intent. *Carl v. State*, 28 South. 505, 510, 125 Ala. 89.

In the ordinary sense in which the word "willfully" is used in statutes, it means not merely voluntary, but designedly, perversely. *State v. Stein*, 51 N. W. 474, 475, 48 Minn. 466.

The use of the word "willfully" involves design and purpose. The allegation that defendant willfully left the spark arrester open, and thereby allowed sparks to escape and be carried by the wind upon plaintiff's docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed the act. It involves more than negligence. It implies malice. The word has no office in the count unless given its ordinary acceptation. *Montgomery v. Muskegon Booming Co.*, 50 N. W. 729, 731, 88 Mich. 633, 26 Am. St. Rep. 308.

Evil intent, etc.

A willful act is one committed with an evil intent. *Huff v. Chicago, I. & L. R. Co.*, 56 N. E. 932, 934, 24 Ind. App. 492, 79 Am. St. Rep. 274 (citing *Dull v. Cleveland, C., C. & St. L. R. Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Miller v. Miller*, 17 Ind. App. 605, 47 N. E. 338); *Williams v. People*, 57 Pac. 701, 702, 26 Colo. 272.

"Willfully," in legal parlance, signifies with evil intent or legal malice, or without legal ground to believe the act to be lawful, and the trial court, in charging the jury upon a case involving the question of false swearing, should, as an essential part of the law of the case, instruct the jury as to the legal meaning of the word "willful." *Stebber v. State*, 23 Tex. App. 176, 179, 4 S. W. 880, 882.

The word "willful," as used in Rev. St. 1889, §§ 3732, 3734, must be restricted to such acts as are done with an unlawful intent, and implies tort, wrong; it implies legal malice, that is, that the act was done with evil intent or without reasonable grounds to believe that the act was lawful. *State v. Grassie*, 74 Mo. App. 313, 316.

The term "willful," as it is used in reference to willfully disturbing a religious congregation, "means with evil intent, or without reasonable grounds for believing the act to be lawful." *Holmes v. State*, 45 S. W. 487, 488, 39 Tex. Cr. R. 231, 73 Am. St. Rep. 921; *State v. Alcorn*, 14 S. W. 663, 664, 78 Tex. 387; *Owens v. State*, 19 Tex. App. 242, 249; *Yoakum v. State*, 17 S. W. 254, 255, 21 Tex. App. 260.

The word "willfully," when used in a penal statute to characterize the forbidden act, means evil intent or legal malice, or without reasonable ground to believe the act to be lawful. *Trice v. State*, 17 Tex. App. 43, 46; *Rose v. State*, 19 Tex. App. 470, 471; *Shubert v. State*, 16 Tex. App. 645, 646; *Thomas v. State*, 14 Tex. App. 200, 205;

Lane v. State, 16 Tex. App. 172, 177; *Savage v. Tullar* (Vt.) *Bray* 223; *State v. Clark*, 29 N. J. Law (5 Dutch.) 96, 98; *State v. Preston*, 84 Wis. 675, 682; *King v. State*, 30 S. E. 30, 31, 103 Ga. 263; *Cornellison v. State*, 49 S. W. 384, 40 Tex. Cr. R. 159.

A "willful act" as the term is used in the criminal law, "is one committed with an evil intent, with legal malice, and without legal justification." *High v. State*, 10 S. W. 238, 241, 28 Tex. App. 545, 8 Am. St. Rep. 488; *Mills v. Glennon*, 6 Pac. 116, 118, 2 Idaho (Hasb.) 105.

"Willfully," as defined in 1 Bish. Cr. Law, § 428, is frequently understood as signifying an evil intent without justifiable excuse. *Felton v. United States*, 6 U. S. (3 Dall.) 699, 702, 24 L. Ed. 875; *Potter v. United States*, 15 Sup. Ct. 144, 147, 155 U. S. 438, 39 L. Ed. 214.

A willful act is one committed with an evil intent, with legal malice, and without reasonable ground for believing the act to be lawful, and without legal justification. *Bowers v. State*, 7 S. W. 247, 24 Tex. App. 542, 5 Am. St. Rep. 901; *Ferguson v. State*, 35 S. W. 369, 370, 36 Tex. Cr. R. 60.

Governed by will, not yielding to reason.

"Willful" means governed by the will, without yielding to reason. *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37; *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, 146. And such is its meaning in the definition of murder in the first degree as being any willful, deliberate, malicious, and premeditated killing of a human being. *Martin v. State*, 25 South. 255, 257, 119 Ala. 1; *Mitchell v. State*, 60 Ala. 26, 28.

Intentional.

According to Bouvier, the word "willfully" means "intentionally." *Northern Ry. of France v. Carpenter* (N. Y.) 13 How. Prac. 222, 223.

The only definition Bouvier in his Law Dictionary gives of "willfully," is "intentionally"; and in *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25, the Supreme Court says: "A jury would doubtless understand the word 'willfully' to mean the same as the word 'intentionally.'" *Sullivan v. Dee*, 8 Ill. App. (8 Bradw.) 263, 265.

The terms "willfully" and "intentionally" in law are synonyms. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, 470.

In common parlance, the word "willful" is used in the sense of designed or intentional. An intentional failure to perform a statutory duty would be a willful refusal. *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 31, 41, 19 S. W. 308.

"Willful" means intentional; by design; with set purpose. *Northern Ry. Co. of France v. Carpenter* (N. Y.) 8 Abb. Prac. 259, 261.

In common parlance, "willful" is used in the sense of intentional, as distinguished from accidental or involuntary. To make the killing of sheep a willful act, it must have been committed with an evil intent, with legal malice, and without legal justification. It is not every intentional act that is willful. *Thomas v. State*, 14 Tex. App. 200, 205; *Lane v. State*, 16 Tex. App. 172, 177.

The word "willfully," as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity, according to the context and evident purpose of the writer. It is sometimes so modified and reduced as to mean little more than plain, "intentionally" or "designedly." Such is not, however, its ordinary signification, when used in criminal law and penal statutes. *State v. Preston*, 84 Wis. 675, 682.

The word "willful," though broader in its signification than "intentional," embraces the latter in its meaning; so that a statement that wherever there is, in committing a homicide, a specific intention to take life, there is a willful, deliberate, and premeditated killing, and the offense is murder in the first degree, makes every homicide murder in the first degree where the killing is willful. *State v. Bonofiglio*, 52 Atl. 712, 713, 67 N. J. Law, 239, 91 Am. St. Rep. 423.

A willful act is one designedly, purposefully, or intentionally done, as contradistinguished from accident, inadvertence, or the absence of design. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. 564. True, there may be a willful act, in a legal sense, without a formed and direct intention, and there may be willfulness where there is no direct or positive intention to inflict injury. In other words, there may be a constructive or implied intent. *Barr v. Chicago, St. L. & P. R. Co.*, 37 N. E. 814, 815, 10 Ind. App. 433.

"Willful," as used in 2 Rev. St. p. 696, § 38, making the willful neglect of duty by a public officer a misdemeanor, means an intentional neglect. Where the officer knew what was asked of him, and knew what he refused, there was nothing like surprise, inadvertence, or misapprehension. His refusal to act was willful. Every intentional act is necessarily a willful one. *People v. Brooks* (N. Y.) 1 Denio, 457, 459, 43 Am. Dec. 704.

There is considerable learning in the law on the meaning of "willfully," when used in statutes; and it seems to make a difference whether the statute is penal or not. The word "willful," as used in a statute providing for the punishment of one

making a willful refusal to deliver an inventory of his property for taxation, means intentional, and nothing more. *Buchanan v. Cook*, 40 Atl. 102, 104, 70 Vt. 168.

In a statute punishing the willful or malicious killing or disfiguring of domestic animals, it is held that the word "willful" means intentional. *Commonwealth v. McLaughlin*, 105 Mass. 460, 463.

The word "willful," as used in the New York school law, means intentional. In *re Light*, 49 N. Y. Supp. 345, 350, 21 Misc. Rep. 737.

The word "willfully," as employed in Comp. Laws, § 6933, enacting that every mortgagor who willfully destroys, etc., the mortgaged property, is guilty of a felony, is to be construed as signifying intentionally. *State v. Bronkol*, 67 N. W. 680, 682, 5 N. D. 507.

The word "willfully," as used in the statute punishing any one who shall willfully interrupt or disturb an assemblage of people met for religious worship, is construed as synonymous with "intentionally" or "designedly." When any of the acts declared by the statute to be an ingredient of the offense is committed intentionally, and its natural tendency is to interrupt or disturb the assemblage, the law presumes a guilty intent. *Williams v. State*, 3 South. 743, 744, 83 Ala. 68.

"Willfully" is a strong word; much stronger than the word 'intentionally.' It means governed by the will; obstinate; perverse." *Johnson v. State*, 61 Ala. 9, 11.

The words "willfully," "intentionally," and "voluntarily" seem to be used interchangeably in relation to acts or declarations creating an estoppel. *Gillett v. Wiley*, 19 N. E. 287, 290, 126 Ill. 310, 9 Am. St. Rep. 587.

By "willful burning," in a charge of burning a cotton house, is meant intentional burning. *Jones v. State*, 5 Tex. App. 130, 131.

To constitute a willful injury, the act which produces it must have been intentional, or must have been done under such circumstances as evince reckless disregard for the safety of others and willingness to inflict the injury complained of. It involves conduct which is quasi criminal. *Parker v. Pennsylvania Co.*, 134 Ind. 673, 679, 34 N. E. 504, 23 L. R. A. 552; *Brooks v. Pittsburgh C., C. & St. L. R. Co.*, 62 N. E. 694, 696, 158 Ind. 62; *Louisville, N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 53, 7 N. E. 807, 808. Whatever idea the word "willful" may express, when used in the phrase "willful negligence," it is beyond question that, to entitle one to recover for an injury to which his own negligence may have contributed,

the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it might have been so committed under such circumstances as that its natural and probable consequences would be to produce injury to others. *Belt R. & Stockyard Co. v. Mann*, 107 Ind. 89, 93, 7 N. E. 893, 895.

Knowingly.

"Willfully" is equivalent to "knowingly." *Fry v. Hubner*, 57 Pac. 420, 421, 35 Or. 184; *Catlett v. Young*, 32 N. E. 447, 448, 143 Ill. 74; *Galveston, H. & S. A. Ry. Co. v. Bowman (Tex.)* 25 S. W. 140, 141.

The term "willfully" implies that the act is done knowingly. *North Carolina v. Vanderford (U. S.)* 35 Fed. 282, 286; *State v. Stein*, 51 N. W. 474, 475, 48 Minn. 466.

The word "willfully" implies, on the part of the wrongdoer, knowledge, and a purpose to do the wrongful act. *Potter v. United States*, 15 Sup. Ct. 144, 147, 155 U. S. 438, 39 L. Ed. 214; *Spurr v. United States*, 19 Sup. Ct. 812, 815, 174 U. S. 728, 43 L. Ed. 1150; *State v. Smith*, 8 N. W. 870, 871, 52 Wis. 134.

"Willfully," as used when saying that an act was willfully done, implies that the act was done by design; done for a set purpose; and it would follow that it was knowingly done. *Wong v. City of Astory*, 11 Pac. 295, 296, 13 Or. 538.

"Willfully," as used in connection with an act forbidden by law, means that the act must be done knowingly or intentionally, and that the act was committed with knowledge, and that the will consented to, designed, and directed the act. *Woodhouse v. Rio Grande R. Co.*, 3 S. W. 323, 324, 67 Tex. 416.

In common parlance, "willful" is used in the sense of "knowingly," as distinguished from "accidental" or "involuntary." Whatever one does intentionally he does willfully. The term "willful," in Act 1855, § 70, making the willful opening, breaking down, or injuring of any fences belonging to or in the possession of any other person a misdemeanor, refers only to such acts as would amount to trespass, and does not relate to an intentional opening of a fence for the purpose of going upon the land of another, if done by permission or for a lawful purpose. *State v. Clark*, 29 N. J. Law (5 Dutch.) 96, 98.

A "willful failure" to comply with the provisions of the mine law means that there must have been some knowledge that the party was violating it, some knowledge which should have induced him not to do what he did do, some knowledge of the fact, for instance, that the engineer operating the hoist engine in a mine was incompetent, and that he was not the kind of man who should

have been put in such a place. Otherwise, the word "willful," in a clause of this kind in the law, would not have a very special meaning. *Mulhern v. Lehigh Valley Coal Co.*, 28 Atl. 1087, 1088, 161 Pa. 270.

An indictment for perjury which charged that the defendant "feloniously, willfully, and corruptly did depose," etc., but omitted the word "knowingly," is not bad on account of the omission of such word, though it is used in the statute; the word "willfully" implying intention as well as deliberation and purpose. *Johnson v. People*, 94 Ill. 505, 510; *Ferguson v. State*, 35 S. W. 369, 370, 36 Tex. Cr. R. 60. See, also, *Frantz v. Hanford*, 54 N. W. 474, 475, 87 Iowa, 469.

The word "willfully," as used in the statute punishing perjury, the same being "a false statement willfully made," is synonymous with "knowingly," and distinguishes it from a statement made through inadvertence or mistake or under agitation. *Garza v. State* (Tex.) 47 S. W. 983.

Where the president of a corporation did not know of the obstruction of a public road, and had no part therein, he is not guilty of willfully or knowingly obstructing such road. *State v. White*, 69 S. W. 684, 685, 96 Mo. App. 34.

The word "willfully," as used in Code, § 4899, prescribing the punishment for one knowingly and willfully resisting an officer in serving a process, is not synonymous with "knowingly," and implies that the act is done by design or with set purpose. One might purposely do an act which would have the effect of impeding the officer in the performance of his duties, in ignorance of the capacity in which such officer was acting. An indictment, therefore, which charges that one unlawfully and willfully resisted an officer in serving process, is not sufficient. *State v. Perry*, 80 N. W. 401, 109 Iowa, 353.

Rev. St. art. 3393, providing that official misconduct, with reference to county officers, means any unlawful behavior in relation to the duties of his office, willful in its character, of any officer intrusted in any manner with the administration of justice or the execution of the laws, should not be construed in its most general sense, for, under that, every act done in obedience to the will may be said to have been done willfully, even if the actor, with the lights before him, honestly believed that he was discharging his duty under the law, but was mistaken in this. An official act done or omitted cannot be said to have been willful unless the officer knew or believed that it was his official duty to do or omit the act, and with such knowledge or belief obstinately, perversely, and with intent to do wrong, acted or failed to act. *State v. Alcorn*, 14 S. W. 603, 664, 78 Tex. 387.

To authorize a conviction under a penal statute prescribing a punishment for willfully removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty, in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted willfully. *United States v. Three Railroad Cars* (U. S.) 28 Fed. Cas. 144, 146 (cited in *Highway Com'rs v. Ely*, 19 N. W. 940, 944, 54 Mich. 173, 180; *Minkler v. State*, 15 N. W. 330, 331, 14 Neb. 181, 183; *State v. Preston*, 34 Wis. 675, 685).

Malice.

"Willful," as used in a penal statute, does not necessarily involve the element of malice. *Parker v. Parker*, 71 N. W. 421, 423, 102 Iowa, 500.

"Willfully," as used in statute imposing on railroads a penalty for willfully neglecting to post up a schedule of fixed fares, does not imply malice. *Fuller v. Chicago & N. W. R. Co.*, 81 Iowa, 187, 204.

The word "willfully," when used in a criminal statute to characterize the forbidden act, implies legal malice. *Shubert v. State*, 16 Tex. App. 645, 646; *Thomas v. State*, 14 Tex. App. 200, 205; *Lane v. State*, 16 Tex. App. 172, 177; *Rose v. State*, 19 Tex. App. 470, 471; *Ferguson v. State*, 35 S. W. 369, 370, 36 Tex. Cr. R. 60; *Bowers v. State*, 7 S. W. 247, 24 Tex. App. 542, 5 Am. St. Rep. 901; *High v. State*, 10 S. W. 238, 241, 26 Tex. App. 545, 8 Am. St. Rep. 488; *Savage v. Tullar* (Vt.) *Brayt*, 223; *State v. Clark*, 29 N. J. Law (5 Dutch.) 96, 98; *State v. Preston*, 34 Wis. 675, 682; *King v. State*, 30 S. E. 30, 31, 103 Ga. 263; *Cornellison v. State*, 49 S. W. 384, 40 Tex. Cr. R. 159; *Wales v. Miner*, 89 Ind. 118, 127.

The term "maliciously" is to such an extent synonymous with "willfully" that, where the word "willfully" is used in a statute, it will be sufficient if the word "maliciously" is employed in an indictment thereunder. *State v. Robbins*, 66 Me. 324, 325.

The decisions and text writers upon criminal law make a marked distinction between the meaning of the words "willful" and "malicious," holding that the word "malicious" means more than the word "willful," which signifies little more than intentionally or designedly. To make "willful" imply both a wrong and malice is to give to it a force and effect beyond what it will bear either in common acceptance or its legal import. *Anderson v. How*, 22 N. E. 695, 697, 116 N. Y. 336.

The word "willfully" does not mean maliciously. Willfully implies that an act done in that spirit is done knowingly and obstinately and persistently, but not necessarily maliciously. *Brown v. Brown*, 32 S. E. 320, 321, 124 N. C. 19, 70 Am. St. Rep. 574 (citing *State v. Massey*, 97 N. C. 465, 2 S. E. 445). See, also, *State v. Harwell*, 40 S. E. 48, 129 N. C. 550.

The use of the words "willfully and unlawfully" in an indictment is not sufficient to charge malice, as the term "willfully" means only that the act was done intentionally, or that it was done purposely or deliberately, and the term "unlawfully" implies an act not done as the law allows or requires. *State v. Lightfoot*, 78 N. W. 41, 42, 107 Iowa, 344. See, also, *State v. Gove*, 34 N. H. 510, 516.

On a prosecution for arson, a charge that defendant "willfully and feloniously" set fire to the house is equivalent to a charge that the act was done "willfully, maliciously, and unlawfully." *Young v. Commonwealth*, 75 Ky. (12 Bush) 243, 245.

"Willfully," as used in Gen. Laws (11th Sess.) 1880-81, p. 307, providing for the punishment of the mortgagor of mortgaged property who, while such mortgage exists, willfully removes from the county where the mortgage is recorded the property mortgaged, or any part thereof, without the written consent of the mortgagee, has a well-defined signification. *Bouvier* says it has been decided that "maliciously" is its equivalent. This term implies not merely voluntarily or intentionally, but legal malice and evil intent; without justifiable excuse; with a bad purpose; corruptly. *Mills v. Glennon*, 6 Pac. 116, 118, 2 Idaho (Hasb.) 105.

The term "willfully" implies that the act is done knowingly and of stubborn purpose, but not of malice. *State of North Carolina v. Vanderford* (U. S.) 35 Fed. 282, 286. See, also, *Benkert v. Benkert*, 32 Cal. 467, 471.

"Willfully," as used in an ordinance providing that any corporation willfully violating its provision shall, on conviction, be fined, etc., was used with the understanding and acceptance of its legal definition, and was intended to punish a corporation that could, but would not, comply with the directions contemplated. The word "willful," when used or employed in the penal statute in reference to a person who neglects or fails to discharge a duty, implies that the party had the ability so to do. The word "willful" is more frequently understood to approximate the idea of the milder question of legal malice than as signifying an evil intent without justifiable excuse. *City of Indianapolis v. Consumers' Gas Trust Co.*, 39 N. E. 943, 945, 140 Ind. 246 (citing *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695).

Neglect, omission, or misapprehension.

Rev. St. c. 200, § 10, which provides that, if the cause of action in any action of trespass or trespass on the case has arisen from the "willful and malicious" act or neglect of the defendant, the court before whom the action is tried shall cause a certificate thereof to be made on the back of the execution issued in such action, and that in such case the defendant shall not be discharged on giving bond, applies to injuries arising from mere neglect, if it be willful and malicious, as well as to cases where the act complained of is accompanied with force, and hence an action for deceit is within the statute. *Nelson v. Ladd*, 47 N. H. 343, 346.

Laws 1864, c. 555, § 18, authorizing the superintendent of public instruction to remove trustees of school districts in case of "willful" disobedience of any decision or order of the superintendent, means intentional, and does not relate to any case of neglect, omission, or misapprehension on the part of the trustees. *People v. Draper*, 18 N. Y. Supp. 282, 284, 63 Hun, 389.

On a prosecution for "willfully intruding into a public office," contrary to Pen. Code, § 56, defendant may show that he entered under a bona fide claim of right after advice of counsel; and it is error for the court to charge that the word "willfully" means intentionally, not by inadvertence, and that, if defendant intended to do so, he did it willfully; the word "willfully" not covering a case where one entered under a bona fide claim of right. *People v. Bates*, 29 N. Y. Supp. 894, 896, 79 Hun, 584.

Negligence.

In *Parker v. Pennsylvania Co.*, 134 Ind. 673, 679, 34 N. E. 504, 506, 23 L. R. A. 552, it was said "willfulness" does not consist in "negligence"; on the contrary, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such degree as to become willfulness. *Brooks v. Pittsburgh, C. & St. L. Ry. Co.*, 62 N. E. 694, 697, 158 Ind. 62; *Linton Coal & Mining Co. v. Persons*, 43 N. E. 651, 653, 15 Ind. App. 69; *Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 1014, 21 Ind. App. 571.

In construing a statute providing that a railroad company failing to fence its road against live stock running at large, at all points where it has the right to fence, shall be absolutely liable to the owner of any such stock injured or killed by reason of the want of such fence, unless the injury complained of is occasioned by the willful act of the owner or his agent, the court said: "A will-

ful act is an obstinate, stubborn, perverse act; and an act done willfully is one done stubbornly, by design, with set purpose. Now, the mere passiveness which indolently permits an act to be done through the lack of will to prevent falls very far short of that positive condition of the mind which causes an act to be done by design and with set purpose. The mere neglect of an owner of stock to repair his fence, whereby an animal escapes from the inclosure, or mere neglect to reconfine him after he has escaped, is not such a willful act as is referred to in the statute." *Stewart v. Burlington & M. R. R. Co.*, 32 Iowa, 561, 563.

"Willful," in legal parlance, means intentional, though not necessarily that expressed intent characterized by premeditated design. Willful misconduct, in the law, by reason of which a person is injured, constitutes gross negligence, though it has no element of inadvertence, which is a necessary element of negligence. Where an injury is willfully inflicted, contributory negligence on the part of the injured person will not preclude his recovering damages therefor. Neither will the fact that he was, at the time of receiving such injury, a willful trespasser upon the property of the person guilty of the willful act. *Bolin v. Chicago, St. P., M. & O. Ry. Co.*, 84 N. W. 446, 450, 108 Wis. 333, 81 Am. St. Rep. 911.

The word "willfully," in a complaint against a railroad for injuries sustained at a crossing, and which complaint charged that defendant willfully violated the speed ordinance, did not amount to an allegation that the killing was willful, but amounted to no more than a charge of negligence. *Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 372, 21 Ind. App. 10.

Purpose or willingness.

A willful act is one done on purpose. *Leicester v. Hoadley*, 71 Pac. 318, 319, 66 Kan. 172, 65 L. R. A. 523 (citing *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695).

A wrong willfully done is a wrong purposely done. *Judd v. Ballard*, 30 Atl. 96, 98, 66 Vt. 668.

A wrong that is purposely done is willfully done, and, if a man intentionally deals a blow to his neighbor, the law intends that the act was willful. *Mullin v. Flanders*, 50 Atl. 818, 815, 73 Vt. 95.

The shooting and killing of a cow is willful when it is the development of a pre-conceived purpose, not an impulse of anger excited by unexpectedly seeing a repetition of annoying trespasses by the animal. *State v. Brigman*, 94 N. C. 888, 889.

The word "willful," as used in Comp. Laws, § 6402, punishing the willful disobedience of an order lawfully issued by the

court, implies simply a purpose or willfulness to commit the forbidden act. *Freeman v. City of Huron*, 66 N. W. 928, 929, 8 S. D. 435.

To constitute willful injury, there must be design, purpose, intent to do wrong and inflict the injury. *Birmingham Ry. & Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345. Thus, a count in a complaint which avers that defendant's engineer, who had control of the running of the locomotive, "wantonly and willfully failed to blow the whistle or ring the bell at least one-fourth of a mile before reaching the regular station, and wantonly or willfully failed to continue to ring the bell or blow the whistle at short intervals, and because of such willfulness and wantonness the said passenger train ran into and against a passenger car of another line at its crossing," does not show that the purpose of defendant in failing to ring the bell or blow the whistle was to run into the passenger car of the other line. Nor does it aver a state of facts from which knowledge could be imputed to defendant that the natural and probable consequences of his conduct would result in the collision. *Louisville & R. R. Co. v. Anchors*, 22 South. 279, 281, 114 Ala. 492, 62 Am. St. Rep. 116.

To do an act willfully is to do it willingly; by design; on purpose. In order to justify a conviction for willfully excluding a vote at an election it must be shown that the action was willful; that is, if not malice, at least a decided intention designedly and purposely to exclude the vote, must be proved. *People v. Boas* (N. Y.) 29 Hun, 377, 379.

The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage. *Pen. Code Ariz.* 1901, par. 7, subd. 1; *Pen. Code Idaho* 1901, § 4544, subd. 1; *Pen. Code Mont.* 1895, § 7, subd. 1; *Rev. St. Utah* 1898, § 4053; *Rev. St. Okl.* 1903, § 2686; *Pen. Code Cal.* 1903, § 7, subd. 1; *Ann. Codes & Sts. Or.* 1901, § 2176; *Rev. Codes N. D.* 1899, § 7713; *Pen. Code S. D.* 1903, § 808. See, also, *Towle v. Matheus*, 62 Pac. 1064, 1066, 130 Cal. 574; *People v. Sheldon*, 9 Pac. 457, 459, 68 Cal. 434; *People v. Von Thedeman*, 52 Pac. 155, 158, 120 Cal. 128; *State v. Bloor*, 52 Pac. 611, 614, 20 Mont. 574; *People v. O'Brien*, 31 Pac. 45, 47, 96 Cal. 171; *Louisville, N. A. & C. Ry. Co. v. Bryan*, 7 N. E. 807, 809, 107 Ind. 51; *Brooks v. Pittsburgh, O., C. & St. L. Ry. Co.*, 62 N. E. 694, 697, 158 Ind. 62; *Pittsburgh, C., O. & St. L. Ry. Co. v. Judd*, 36 N. E. 775, 778, 10 Ind. App. 218; *People v. Hartman*, 130 Cal. 487, 490, 62 Pac. 823, 824 (citing *People v. O'Brien*, 96 Cal. 171, 176, 31 Pac. 45).

Reckless or careless.

The word "willful" imports that the act to which it refers is done intentionally, purposely. This is not necessarily so with the word "reckless." *Kansas City, M. & B. R. Co. v. Crocker*, 11 South. 262, 269, 95 Ala. 412.

In *Harrison v. State*, 37 Ala. 154, the Supreme Court drew a distinction between the words "willful" and "reckless," as used in Code 1866, § 4033, punishing any person who willfully disturbed a religious assemblage, and held that recklessness did not necessarily imply willfulness. A grossly careless act may be characterized as reckless, and serious consequences might flow therefrom, yet such consequences would not necessarily be willfully brought about. In such case the court simply asserted that the word "reckless" was not the synonym for the statutory word "willful," and therefore it was error to assert that it was enough if the disturbance was willfully or recklessly done. It was decided that there might be recklessness without willfulness. An act may be careless, heedless, rash, reckless, and still be willful. *Johnson v. State*, 9 South. 539, 540, 92 Ala. 82.

Whether the words "wanton," "reckless," and "careless" are taken singly or collectively, they are not the equivalents of the word "willful," and, when used in the petition in an action to recover for the death of a person caused by the willful negligence of another, they will not charge willful negligence; though it will not be said that the terms "reckless" and "wanton" may not be so used as to be equivalent to the word "willful." *City of Lexington v. Lewis' Adm'r*, 73 Ky. (10 Bush) 677, 680.

The word "willfully" implies an act willfully done; an operation of the mind that consents to an act; as applied in a prosecution for manslaughter, if defendant's mind approved or consented to fire the shot that killed decedent, then to this extent the act was willfully done. It does not necessarily follow that the jury must find that the defendant intended to kill decedent when he fired. If he used a dangerous and deadly weapon in a careless and reckless manner, and so killed decedent without justification, this will constitute an act willfully done, and amount to manslaughter; or if he fired the fatal shot purposely, intending to shoot decedent, and in so doing used unnecessary force and violence, this will also render the act willful and constitute manslaughter. *State v. Windahl*, 64 N. W. 420, 421, 95 Iowa, 470.

Reckless disregard of rights.

"Willful," as used in an indictment, signifies without reasonable ground for believing the act to be lawful, or a reckless dis-

regard of the rights of others. *Finney v. State*, 15 S. W. 175, 29 Tex. App. 184.

To constitute a willful injury, the act which produces it must have been intentional, or must have been done under such circumstances as evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. *Pittsburgh, C., C. & St. L. Ry. Co. v. Judd*, 36 N. E. 775, 778, 10 Ind. App. 213 (citing *Louisville, N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807); *Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 62 N. E. 694, 697, 158 Ind. 62.

It is uniformly held that the term "willful" in statutes relating to the punishment of trespassers not only means intentionally or deliberately done, but with a particular or evil purpose as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to known duty, or without authority, and careless, whether he have the right or not. *Parker v. Parker*, 71 N. W. 421, 423, 102 Iowa, 500 (citing *State v. Massey*, 97 N. C. 465, 2 S. E. 445; *United States v. Three Railroad Cars* [U. S.] 28 Fed. Cas. 144).

Unlawful or felonious.

See, also, "Felonious—Feloniously."

In *State v. Langston*, 45 La. Ann. 1182, 14 South. 137, it was held that "willfully" has a significance, and, where used in the statute as descriptive of the offense denounced, its employment in the indictment is essential. "Unlawfully" or "feloniously" has not the same meaning and import as "willfully"; neither is the equivalent of "willfully." *State v. Robinson*, 28 South. 1002, 1003, 104 La. 224.

The term "willfully," required to be used in charging an offense, is not supplied in substance by the words "unlawfully and maliciously." The term "unlawfully" implies that an act is done or not done as the law allows or requires. *State v. Massey*, 2 S. E. 445, 446, 97 N. C. 465.

"Willfully" is not synonymous with "unlawfully." "A man may do many things willfully which are not unlawful, and he may do many things unlawfully which are not willfully done." *State v. Hussey*, 60 Me. 410, 411, 11 Am. Rep. 206; *State v. Townsell*, 50 Tenn. (3 Heisk.) 6, 7.

On a trial for the "willful" and wanton killing of an animal, an instruction authorizing the jury to convict if they believe that the accused unlawfully killed the animal was erroneous, because the killing might have been unlawful and yet not willful. *Jones v. State*, 9 Tex. App. 178, 179.

The expression "willfully and maliciously," as used in an information alleging

that defendant did "willfully and maliciously" make an assault upon a certain person, is equivalent to the term "unlawfully" as used in Cr. Code, § 17, providing for the punishment of any person who shall unlawfully assault another. *Hodgkins v. State*, 54 N. W. 86, 36 Neb. 160.

Voluntary.

The words "willfully," "intentionally," and "voluntarily" are synonymous terms in discussing the question of the making of declarations or performing acts from which it is alleged an estoppel arises. *Gillett v. Wiley*, 19 N. E. 287, 290, 128 Ill. 310, 9 Am. St. Rep. 587; *The Ottumwa Belle* (U. S.) 78 Fed. 643, 647.

"Willful," as used in a penal statute, is not synonymous with "voluntary." *Parker v. Parker*, 71 N. W. 421, 423, 102 Iowa, 500.

The word "willfully" imports something more of determination to execute one's own will in spite and defiance of the law than "voluntarily" does—some bad purpose. It does not import so much of wickedness as "maliciously" does. *State v. Alexander*, 14 Rich. Law, 247, 254.

The term "willfully," in an act entitled "An act more effectually to prevent trespasses," is not to be construed as synonymous with "voluntarily," but implies a tort or wrong. *Savage v. Tullar* (Vt.) *Brayton*, 223.

St. § 4087, provides that any corporation willfully failing or refusing to make the report required by section 4078 shall be fined \$1,000. Held, that the term "willfully" simply means the voluntary act of a party, as distinguished from coercion, or, in other words, that he was free to report or not to report; and, in order to constitute a willful failure, it is not necessary that the corporation should have had actual knowledge of the statute. *Louisville & J. Ferry Co. v. Commonwealth*, 47 S. W. 877, 878, 104 Ky. 726.

Within the statute providing that any one who shall willfully furnish intoxicating drinks by sale, gift, or otherwise to any person of known intemperate habits shall be deemed guilty of a misdemeanor, a willful act is an act that is not done by surprise or by accident, but is an act that is governed by one's will, or a voluntary act. *Zeigler v. Commonwealth* (Pa.) 14 Atl. 237, 238.

The word "willfully," as used in the Vermont "Act more effectually to prevent trespasses in divers cases," is not to be construed as synonymous with "voluntarily," but implies a tort or wrong. *Savage v. Tullar* (Vt.) *Brayton*, 223.

In the ordinary sense in which it is used in statutes, "willfully" means not merely voluntarily, but with a bad purpose. *Felton v.*

United States, 96 U. S. 699, 702, 24 L. Ed. 875 (citing *Commonwealth v. Kneeland*, 37 Mass. [20 Pick.] 206, 220).

"Willfully" means by design, on purpose, with set purpose, intentionally, in an obstinate manner, as being governed by will, without regard to reason or without yielding to reason. To say that an act has been done willingly and "willfully" is to indicate that it has been done voluntarily, and implies that the person doing it knew what he was doing, and acted from choice as a free agent. *Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 1 Ind. App. 298.

"Willful" is a word of familiar use in every branch of the law, and it amounts to nothing more than this: that the person knows what he is doing, and intends to do what he is doing, and is a free agent. *Illinois Cent. R. Co. v. Leiner*, 67 N. E. 398, 400, 202 Ill. 624, 95 Am. St. Rep. 266 (citing *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45).

In *McManus v. State*, 36 Ala. 285, speaking of the word "willful" as employed in statutory murder, the court says: "'Willful' is not the synonym of 'voluntary.' In truth, they express no idea which is common to both. The former is a word of much greater strength than the latter. 'Willful' in this connection denotes governed by the will, without yielding to reason, obstinate, stubborn, perverse, inflexible. 'Voluntary,' in this connection, means willing, acting with willingness. It is the antithesis of 'involuntary.'" *State v. Preston*, 34 Wis. 675, 682.

The word "willfully," as used in Pen. Code, § 654, providing for the punishment of a person who willfully injures any property of another, said Judge Andrews, in *Wass v. Stephens*, 128 N. Y. 128, 28 N. E. 23, means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose or a design to injure another, or one committed out of mere wantonness or lawlessness. *Yeamans v. Nichols*, 81 N. Y. Supp. 500, 502.

The term "willful," in St. 1899, § 4409, directing that every county superintendent of schools shall, before the 1st day of August, settle his accounts, and that for willful failure to make the settlement as required he shall be guilty of a misdemeanor, means simply the voluntary act of a party, as distinguished from coercion; or, in other words, that he was free to report or not to report. *Tracy v. Commonwealth* (Ky.) 76 S. W. 184, 185.

Wanton.

"Willful" is the wanton doing of an act without reasonable excuse. *Meyer v. Standard Tel. Co.* (Iowa) 92 N. W. 720, 721.

McClain's Code, § 4571, provides that for willful trespass in injuring trees on the land of another the perpetrator shall pay treble damages to the person entitled to protect or enjoy the property. Held, that the term "willful" in such statute does not mean willfully or purposely, but rather wantonly or without reason or excuse. "It is a mistake to suppose that a willful act which authorizes the recovery of treble damages means simply 'willingly or purposely.' It means rather an act done wantonly and without any reasonable excuse, as if the defendant in good faith believed that the road was within the lines of the fences, and the trees cut were obstructions to travel, he should be allowed so to show, in order to show that his act in cutting the trees was not wanton or malicious." *Werner v. Flies*, 59 N. W. 18, 19, 91 Iowa, 146.

"Willful injury," within the meaning of Gen. St. § 1433, providing that any person willfully injuring a public building, etc., is an injury done wantonly, or with an evil intent, and does not include a slight injury to a building done under an honest though erroneous belief of authority in the performance of a supposed duty. *State v. Foote*, 43 Atl. 488, 490, 71 Conn. 737.

St. 1862, c. 160, which provides for the punishment of any one who willfully or maliciously injures a building, "is not sufficiently defined as the willful doing of the act, but it must be done either out of a spirit of wanton cruelty or wicked revenge." *Commonwealth v. Williams*, 110 Mass. 401, 402.

The word "willfully" usually means stubbornly, and, as used in an indictment charging that defendant "unlawfully, willfully, and feloniously" did attempt to destroy the reputation of B. by the use of certain slanderous language, did not mean more than that defendant intentionally used such language, and it did not necessarily mean that he did so in a wanton and malicious manner. *State v. Harwell*, 40 S. E. 48, 129 N. C. 550. See, also, *City of Lexington v. Lewis' Adm'rs*, 73 Ky. (10 Bush) 677, 680.

The word "willfully" in a statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose or with a design to injure another, or one committed out of mere wantonness or lawlessness. *Hewitt v. Newburger*, 36 N. E. 593, 594, 141 N. Y. 538. See, also, *Parker v. Parker*, 71 N. W. 421, 423, 102 Iowa, 500.

In *State v. Abram*, 10 Ala. 928, where the mutilation by a slave of any of the members of a white person, when willfully committed, was declared by the statute to be mayhem, it was held that a mutilation could not be regarded as willfully done unless under the circumstances it could be considered

as having been wantonly done, when it would be deemed willful within the meaning of the act. The courts say that it was not intended by the term "willful" to exclude those acts which were purely accidental, without blame of any kind. *State v. Preston*, 34 Wia. 675, 682.

Without just cause or excuse.

The word "willfully" sometimes means little more than plain "intentionally" or "designedly." Yet it is more frequently understood to extend a little further, and approximate the idea of the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse. *United States v. Meagher* (U. S.) 87 Fed. 875, 881.

The word "willful" has perhaps no very well-established meaning, and is to be construed in different statutes in somewhat different senses, depending on the connection in which it is used. In the statute providing that if any mortgagor of personal property, while the mortgage is unsatisfied, willfully destroys, sells, or disposes of the property without the written consent of the mortgage holder, he shall be guilty of larceny, it implies a determination to do the prohibited act with a bad intent and without justifiable excuse. *Kletzing v. Armstrong*, 93 N. W. 500, 501, 119 Iowa, 505.

The word "willful" in Rev. St. § 2516, imposing a punishment for the commission of a willful trespass on lands, means that the acts prohibited must have been done with an evil intent and without justifiable excuse. *Tufts v. State*, 41 Fla. 663, 668, 27 South. 218, 219.

"Willfully," as used in Code, § 970, providing that a husband who "willfully" abandons his wife without providing adequate support for her and their children is guilty of a misdemeanor, means more than an intention not to live with the wife. It means without a cause to justify him in refusing to live with her, and a husband who has abandoned his wife is not liable to prosecution under such statute where the wife has been guilty of adultery. *State v. Hopkins*, 40 S. E. 973, 974, 130 N. C. 647.

A "willful" act, as used in criminal law, means an act without legal justification, without justifiable excuse. *Potter v. United States*, 15 Sup. Ct. 144, 147, 155 U. S. 438, 39 L. Ed. 214; *Felton v. United States*, 96 U. S. 690, 702, 24 L. Ed. 875; *Mills v. Glennon*, 6 Pac. 116, 118, 2 Idaho (Hasb.) 105; *Ferguson v. State*, 35 S. W. 369, 370, 36 Tex. Cr. R. 60; *Bowers v. State*, 7 S. W. 247, 24 Tex. App. 542, 5 Am. St. Rep. 901; *High v. State*, 10 S. W. 238, 241, 26 Tex. App. 545, 8 Am. St. Rep. 488.

Without reasonable belief.

To do an act forbidden by law, without reasonable belief that it is lawful, is to do

the act "willfully." *State v. Nicholls*, 23 South. 980, 986, 50 La. Ann. 699; *Owens v. State*, 19 Tex. App. 242, 249; *Galveston, H. & S. A. Ry. Co. v. Bowman* (Tex.) 25 S. W. 140, 141. See, also, *Trice v. State*, 17 Tex. App. 43, 46; *Yoakum v. State*, 17 S. W. 254, 255, 21 Tex. App. 260; *State v. Alcorn*, 14 S. W. 663, 664, 78 Tex. 387; *Holmes v. State*, 45 S. W. 487, 488, 39 Tex. Cr. R. 231, 73 Am. St. Rep. 921; *Shubert v. State*, 16 Tex. App. 645, 646; *Thomas v. State*, 14 Tex. App. 200, 205; *Lane v. State*, 16 Tex. App. 172, 179; *Rose v. State*, 19 Tex. App. 470, 471; *Finney v. State*, 15 S. W. 175, 29 Tex. App. 184; *Savage v. Tullar* (Vt.) *Brayton*, 223; *State v. Clark*, 29 N. J. Law (5 Dutch.) 96, 98; *State v. Preston*, 34 Wis. 675, 682; *King v. State*, 30 S. E. 30, 31, 103 Ga. 263; *Cornelison v. State*, 49 S. W. 384, 40 Tex. Cr. R. 159.

The term "willfully," as used in Pen. Code, art. 405, not only covers cases in which evil intent prompts the acts, but also those in which the obstruction to a highway is made without reasonable ground to believe it lawful. *Sanders v. State* (Tex.) 26 S. W. 62.

WILLFUL ACT.

See "Willful—Willfully."

WILLFUL AND MALICIOUS DESERTION.

The "willful or malicious desertion" which authorizes a divorce a vinculo, under Code, § 2448, subsec. 4, means a desertion not only without any reasonable cause, but for cause of malice, and the malice contemplated by the statute is not malice in law, but malice in fact. There must be enmity of heart, or unprovoked malignity, toward the person deserted. If the party goes away and remains even without good and sufficient cause, but not of malice, the divorce a vinculo cannot be obtained. *Majors v. Majors*, 1 Tenn. Ch. 264, 265 (citing *Stewart v. Stewart*, 32 Tenn. [2 Swan] 591; *Rutledge v. Rutledge*, 37 Tenn. [5 Sneed] 554).

"Willful and malicious desertion," within the meaning of the phrase as used in the statute making it a ground for divorce, means a departure without adequate cause. But it is held that where a wife, on being struck by her husband, leaves the house, but without any intention of giving up her home, and on going back a day or two after finds the locks changed, so that she can enter only by breaking a window, for doing which her husband prosecutes her, after which she does not return, her absence thereafter is not a willful and malicious desertion, entitling him to divorce, his conduct indicating an intention to prevent her return. *Hardie v. Hardie*, 29 Atl. 886, 887, 162 Pa. 227, 25 L. E. A. 697.

A Pennsylvania statute authorizes a divorce for "willful and malicious desertion." A husband lived apart from his wife, a few squares away. There was evidence that she did not want his company, had not spoken to him for two or three years before they separated, and had rented his room in the house to a boarder. Held, that such facts do not show "willful and malicious desertion," within the meaning of the statute, so as to entitle the wife to a divorce. *Graham v. Graham*, 25 Atl. 766, 153 Pa. 450.

"Willful and malicious desertion" means simply intentional desertion. Actual malice need not be proved, but, if it be proved that the husband willfully absented himself from his wife, such absence is in legal acceptance "malicious," within the statute, sufficient to support a decree for divorce thereunder. *Appeal of McClurg*, 66 Pa. (16 P. F. Smith) 366.

"Willful and malicious desertion" without reasonable cause for the space of two years, as a ground for divorce, means a desertion with no reasonable cause to leave or remain away, which is actuated by malice against the party who is thus deserted. *Rutledge v. Rutledge*, 37 Tenn. (5 Sneed) 554, 556.

WILLFUL DESERTION.

From army.

"Willful desertion from the army" is an abandonment of the service permanently or for some indefinite time, unaccompanied by an intention to return. Mere absence without leave does not constitute the offense of desertion, though it is a violation of duty and punishable as such. *Inhabitants of Hanson v. Inhabitants of Scituate*, 115 Mass. 336, 342.

Of spouse.

"Willful desertion," in divorce laws, is a voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other. *Sisemore v. Sisemore*, 21 Pac. 820, 821, 17 Or. 542 (citing 1 Bish. Mar. & Div. § 776).

To constitute willful desertion within the meaning of the statute of Minnesota providing that a divorce may be had for "willful desertion of one party by the other for the term of one year next preceding the filing of the complaint," the going away and refusal to return by the accused party must be without justifiable cause therefor. *Stocking v. Stocking*, 79 N. W. 172, 173, 76 Minn. 292.

"Willful desertion," as used in the statute authorizing a divorce for willful desertion, means intentional and wrongful cessation of matrimonial cohabitation. *Benkert v. Benkert*, 32 Cal. 467, 471.

The separation of a wife from her husband and living apart from him with his consent is not a "willful desertion" within the meaning of the statute constituting willful desertion as a cause for divorce. *Reed v. Reed*, 37 S. W. 230, 231, 62 Ark. 611.

Willful desertion is the voluntary separation of one of the married parties by the other, with intent to desert. Civ. Code Cal. 1903, § 95; Civ. Code Idaho 1901, § 2024; Civ. Code Mont. 1895, § 135.

WILLFUL EXPOSURE TO DANGER.

A provision in a policy of insurance, that the company should not be liable for any injury happening to the assured by reason of his "willfully and wantonly exposing himself to any unnecessary danger or peril," necessarily implied that any degree of negligence falling short of willful and wanton exposure to an unnecessary danger would not prevent a recovery. The provision would be unmeaning if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant. *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28, 32, 1 Am. Rep. 157.

WILLFUL HOLDING OVER.

Rev. St. Mo. § 5102, providing that an action for unlawful detainer may be brought against the tenant for "willfully holding over," means any holding over by the tenant without right. The fact that he holds over in good faith is no defense to the action. *Lehnen v. Dickson*, 13 Sup. Ct. 481, 485, 148 U. S. 71, 37 L. Ed. 373.

WILLFUL IGNORANCE.

"Willful ignorance is equivalent in law to actual knowledge. A man who abstains from inquiry when inquiry ought to be made cannot be heard to say so and to rely on his ignorance." *Mackey v. Fullerton*, 4 Pac. 1198, 1200, 7 Colo. 556.

The "willful ignorance" which will prevent one from being relieved from the consequences of his failure to do some act which he was entitled to do is said, in 1 Platt, Leases, 759, to exist where a person neglects the means of information which ordinary prudence would suggest, and it is clear that ignorance of a man's own rights, conferred by an instrument actually in his possession or power, where the other party is consequently innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, cannot excuse the performance of any conditions imposed on the person claiming under the instrument. *Thiebaud v. First Nat. Bank of Vevay*, 42 Ind. 212, 222.

WILLFUL INJURY.

See "Willful—Willfully."

WILLFUL INJURY TO PROPERTY.

Where a woman abstracted certain railway shares, with coupons attached, belonging to plaintiff, and converted the same into money and absconded with the same, there was a "willful injury to property" within Code, § 179, subd. 5, declaring that no female shall be arrested in any action except for a willful injury to person, character, or property. *Northern Ry. of France v. Carpentier* (N. Y.) 13 How. Prac. 222, 223. And this provision also includes a person aiding others in taking from another certificates of stock and disposing of the same, and converting them into money which they retained to their own use. *Northern Ry. of France v. Carpentier* (N. Y.) 3 Abb. Prac. 259, 261.

WILLFUL KILLING — WILLFULLY KILL.

See "Willful—Willfully."

WILLFUL MALFEASANCE.

"Willful malfeasance," as applied to a trustee, means a conscious, deliberate breach of trust. *Van Sieten v. Bartol* (U. S.) 95 Fed 793, 798.

WILLFUL MISAPPLICATION — WILLFULLY MISAPPLY.

"Willful misapplication," as used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], which makes "willful misapplication" of the money and funds of a national banking association an offense and punishes the same, means a misapplication of the money, funds, etc., of the association for the use, benefit, or gain of the party charged, or some company or person other than the association whose funds are so misapplied. *United States v. Britton*, 2 Sup. Ct. 512, 522, 107 U. S. 655, 27 L. Ed. 520.

The term "willfully," in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], making the willful misapplication of the funds of a national bank by its president, director, officers, etc., a crime, means designedly, and the statute applies where one of the persons mentioned in the section designedly and knowingly misapplies the property of the bank. *United States v. Lee* (U. S.) 12 Fed. 816, 818.

The words "willfully misapplied" are insufficient to describe the act complained of in an indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], making it criminal to misapply the money, funds, and credits of a national bank; but the acts showing the misapplication must be alleged, as the words

"willfully misapplied" in the act have no settled technical meaning. *Batchelor v. United States*, 15 Sup. Ct. 446, 447, 156 U. S. 426, 39 L. Ed. 478.

Embezzle distinguished.

As used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], punishing the president, cashier, or agent of any national bank who shall embezzle or willfully misapply any of its funds, the words "embezzle" and "willfully misapply" are not synonymous. In order to misapply the funds of a bank, it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterward criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication. *United States v. Northway*, 7 Sup. Ct. 580, 583, 120 U. S. 327, 30 L. Ed. 664.

WILLFUL MISCONDUCT.

No degree of mere carelessness or inadvertence constitutes gross negligence or willful misconduct. *Decker v. McSorley*, 93 N. W. 808, 809, 116 Wis. 643.

WILLFUL NEGLIGENCE.

Willful omission distinguished, see "Willful Omission."

"Willful neglect" means the intentional disregard of a plain or manifest duty, in the performance of which the public or the person injured has an interest. *Louisville & N. R. Co. v. Chism*, 20 Ky. Law Rep. 584, 587, 47 S. W. 251.

"Willful neglect" means an intentional failure to perform a known or manifest duty in which the public has an interest, or which is important to the person injured, either in preventing or avoiding the injury to him. *Union Warehouse Co. v. Prewitt's Adm'r*, 21 Ky. Law Rep. 67, 70, 50 S. W. 964.

"Willful neglect" is where the conduct of the party in fault was such as to evidence reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty in the performance of which the public and the party injured had an interest. *Eskridge's Ex'rs v. Cincinnati, N. O. & T. P. Ry. Co.*, 89 Ky. 367, 374, 12 S. W. 580, 582 (citing *Claxton's Adm'r v. Lexington & B. S. R. Co.*, 76 Ky. [13 Bush] 636, 637).

The term "willful neglect," as used in the statute authorizing the recovery of puni-

tive damages for a loss of life by the willful neglect of any person, means willful negligence. It signifies a reckless indifference to or intentional disregard of the safety of others. It is *sui generis*. The word "willful" was not used as synonymous with the word "gross." *Cincinnati, N. O. & T. P. R. Co. v. Privitt's Adm'r*, 92 Ky. 223, 226, 17 S. W. 484, 485.

"Willful neglect," jeopardizing life, is, when it is the occasion of death, often a crime, and always may be treated as quasi criminal. "Willful neglect" and "wanton neglect" are nearly synonymous, each implying either actual malice or recklessness, and is within the contemplation of Act March 10, 1854, § 3, providing that if the life of a person is lost by willful neglect punitive damages may be recovered, and section 1, authorizing compensatory damages only when death has resulted from simple neglect. *Board of Internal Improvement of Shelby County v. Scarce*, 63 Ky. (2 Duv.) 576, 577.

"Willfully neglected and refused," in reference to the directors of a school district having willfully neglected and refused to perform their duty, is not equivalent to "neglected or refused without valid cause." If a duty be enjoined on an officer, his refusal to perform it is willful. He had no discretion as to its performance; but if he be commanded to do a certain act, unless he have a valid excuse for not doing it, and he then refuses for cause, the question is at once raised between him and his superior whether the cause is sufficient to excuse him in his disobedience. It brings the judgment and discretion of the subordinate at once under the supervision of his superior. *In re Walker*, 36 Atl. 148, 150, 179 Pa. 24.

"Willful neglect," within the meaning of Gen. St. c. 57, § 3, making persons or corporations liable in an action by the widow or personal representative for punitive damages for loss of life through their willful neglect, is intentional neglect or recklessness evidencing an intent to injure. *Louisville & N. R. Co. v. Coniff's Adm'r* (Ky.) 27 S. W. 865, 866.

Willful neglect is the neglect of the husband to provide for the wife the common necessities of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy, or dissipation. *Civ. Code Mont. 1895, § 143; Rev. Codes N. D. 1899, § 2741; Civ. Code S. D. 1903, § 71; Civ. Code Cal. 1903, § 105; Civ. Code Idaho 1901, § 2025.*

WILLFUL NEGLIGENCE.

Law writers have classified "negligence" by such distinguishing names as "slight," "ordinary," and "gross"; to these the courts have added the term "willful." Since "negli-

gence" means inadvertence or carelessness—words implying an absence of thought, care, or intention—it has been said that the term "willful negligence" is a misnomer. Nevertheless the term has come to have a well-settled signification in the law. *Victor Coal Co. v. Muir*, 38 Pac. 378, 385, 20 Colo. 320, 28 L. R. A. 435, 46 Am. St. Rep. 299.

"Willful negligence" is said to be an inapt term, and means a failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another. *McDonald v. International & G. N. R. Co. (Tex.)* 21 S. W. 774, 777; *Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. 70, 73, 112 Ind. 250; *Victor Coal Co. v. Muir*, 38 Pac. 378, 385, 20 Colo. 320, 28 L. R. A. 435, 46 Am. St. Rep. 299.

By "willful negligence" is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of the will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty which is important to the person injured in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligent in any proper sense, and the term "willful negligence," if these words are interpreted with scientific accuracy, is a misnomer. *Holwerston v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 777, 157 Mo. 216, 50 L. R. A. 850.

Some law writers, some judges, and some courts habitually use the terms "willful negligence," "intentional negligence," and "malicious negligence," but most of them very properly repudiate such expressions as contradictory and absurd. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 870, 92 Wis. 97.

As gross negligence.

Willful negligence is a higher degree of negligence than gross. *Kentucky Cent. R. Co. v. Carr (Ky.)* 43 S. W. 193, 194.

The words "willful" and "gross," as applied to negligence, are not synonymous. As used in St. § 6, providing that punitive damages may be recovered when an act causing the death of a party is willful or the negligence gross, the word "willful" is descriptive of the act, while the word "gross" is descriptive of a degree of negligence. *Clarke's Adm'x v. Louisville & N. R. Co.*, 39 S. W. 840, 841, 101 Ky. 34.

As wanton or reckless conduct.

Conduct which is wanton and reckless in its injurious consequences is described by the term "willful negligence." *Florida Southern Ry. v. Hirst*, 11 South. 506, 513, 30 Fla. 1, 16 L. R. A. 631, 32 Am. St. Rep. 17.

"Willful negligence," as contemplated by a statute providing that damages may be recovered for the death of a person caused by the willful neglect of another, is such conduct as evidences reckless indifference to the safety of the public, and an intentional failure to perform a plain and manifest duty in the performance of which the public has an interest. *City of Lexington v. Lewis' Adm'x*, 73 Ky. (10 Bush) 677, 680 (citing *Jacobs' Adm'r v. Louisville & N. R. Co.*, 73 Ky. [10 Bush] 263).

To constitute "willful and wanton negligence," it is not always necessary to prove that the defendant's servants are actuated by ill will towards the plaintiff. *Thompson*, in his Commentaries on the Law of Negligence, defines "willful negligence" to be a willful determination not to perform a known duty. The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed, or which is imposed upon the person by operation of law. *Illinois Cent. R. Co. v. Leiner*, 67 N. E. 398, 400, 202 Ill. 624, 95 Am. St. Rep. 266.

Willful and wanton negligence means something more than simply negligence or even gross negligence, though it does not include the element of malice or the actual intent to injure another. When a person discovers another in a position of peril, although the latter is a trespasser and negligently placed himself in such position, and the former, after so discovering him, can by the exercise of ordinary care avoid injuring him, but omits to do so, he evinces such reckless disregard of the safety of others as to constitute in law willful and wanton negligence. *Sloniker v. Great Northern Ry. Co.*, 79 N. W. 168, 76 Minn. 306.

WILLFUL OBSTRUCTION.

The word "willful," as used in a statute punishing the willful obstruction of a street, means that if any person shall place any obstruction upon or in any public road, of a permanent character, knowing or having good reason to know that the same was a public road, such act would in law be deemed to have been willfully done. *Loyd v. State*, 19 Tex. App. 321, 322.

Rev. St. c. 19, § 101, providing a penalty for willfully obstructing a highway, cannot be construed so as to embrace an obstruction directed in the most perfect good faith by the landowner, believing that no highway existed at the place, and acting under the advice and direction of the proper public officer charged by law with the general supervision and control of all the roads and highways in the town. Such an obstruction cannot be regarded as willful, even under

the mildest construction which can here be put upon that term. *State v. Preston*, 34 Wis. 675, 682.

"Willfully," as used in Rev. St. 1858, c. 19, § 101, requiring that any person who shall willfully obstruct a highway shall be liable to an action for a penalty imposed thereby, is used in the sense of obstinately, stubbornly, and with knowledge of want of right so to do, and hence excepts from its operation the deposit of materials in a highway by a landowner in good faith and for a justifiable purpose. *State v. Smith*, 8 N. W. 870, 52 Wis. 134.

The word "willfully," as used in Code, § 3979, fixing the punishment for willfully obstructing any highway, means intentional, and therefore an admission that defendant placed the obstruction across the road is an admission of a willful obstruction. *State v. Teeters*, 66 N. W. 754, 756, 97 Iowa, 458.

WILLFUL OMISSION.

The phrase "willful omission to perform such duty," in Pen. Code, § 154, declaring that where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty is punishable as a misdemeanor, is synonymous with the phrase "willfully neglects to perform the duty," in Pen. Code, § 117, declaring that a public officer or person holding a public trust or employment upon whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor. *People v. Herlihy*, 72 N. Y. Supp. 889, 892, 35 Misc. Rep. 711.

WILLFUL TRESPASS.

See "Willful—Willfully."

WILLFULLY AND OF MALICE AFORETHOUGHT.

"Willfully and of malice aforethought" was first used in the statute 23 Hen. VIII, c. 1, § 3, which took away the benefit of clergy in all cases where a homicide was committed "willfully and of malice aforethought." Prior to that time manslaughter was the only form of homicide known, and all convicted of the crime were allowed the benefit of clergy. The statute created the distinction between murder and manslaughter. *State v. Lowe*, 5 S. W. 889, 896, 93 Mo. 547.

The term "willfully and with malice aforethought," as applied to murder, has a meaning that is peculiar to the law, and in finding their existence it is not necessary that the proof should show that a motive for the act done existed. The law recognizes that the cause of the killing is sometimes so hidden in the mind and the breast of the

party who kills that it cannot be fathomed, and, as it does not require impossibilities, it does not require the jury to find it. There is no motive that can be weighed on the one side of the scale, with the crime of wicked and deliberate murder upon the other side of it, and be pronounced by honest men as equal in weight to the crime committed. *Pointer v. United States*, 14 Sup. Ct. 410, 416, 151 U. S. 896, 38 L. Ed. 208.

WILLFULLY BLASPHEMY.

St. 1782, c. 8, providing that punishment shall be inflicted upon any one who shall "willfully" blaspheme the holy name of God, means not merely voluntarily, but with a bad purpose, and should be construed to import an intended design to calumniate and disparage the Supreme Being, and to destroy the veneration due him. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220.

WILLFULNESS.

Willfulness arises from the spontaneous action of the will and cannot exist without purpose or design. *Huff v. Chicago, I. & L. Ry. Co.*, 56 N. E. 932, 934, 24 Ind. App. 492, 79 Am. St. Rep. 274 (citing *Dull v. Cleveland, C. & St. L. Ry. Co.*, 21 Ind. App. 571, 52 N. E. 1013).

To establish a charge of willfulness, an actual intent to do the particular injury need not be shown; but if there is an utter disregard of consequences, this may be sufficient to supply the place of a specific intent, and constitute willfulness. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 474, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

Willfulness which will justify a recovery notwithstanding contributory negligence may exist in a legal sense without a formal and direct intention to injure, or, in other words, there may be a constructive or implied intent without an express one. *Brannen v. Kokomo, G. & J. Gravel Road Co.*, 115 Ind. 115, 120, 17 N. E. 202, 7 Am. St. Rep. 411.

An injury may be willful if there is such a reckless disregard of human life as to justify an inference that there was a constructive intent to inflict the injury. *Indiana, B. & W. Ry. Co. v. Wheeler*, 115 Ind. 253, 255, 17 N. E. 563.

By "willfulness," when used with respect to the crime of murder, is meant that the act was of purpose, with the intent that by the given act the life of the party should be taken. *People v. Cox*, 18 Pac. 332, 334, 76 Cal. 281; *State v. Shuff* (Idaho) 72 Pac. 664, 668.

Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him it must ap-

pear that the latter had knowledge of his situation in time to have prevented the injury, or it must appear that the injurious act or omission was by design, and was such, considering the time and place, as that its natural and probable consequence would be to produce serious hurt to some one. To constitute a willful injury, it must have been intentional, or must have been done under such circumstances as evidenced a reckless disregard for the safety of others and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. *Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 62 N. E. 694, 696, 158 Ind. 62 (citing *Louisville, N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 53, 7 N. E. 807, 808).

Willfulness does not consist in negligence; on the contrary, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such degree as to become willfulness. *Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 62 N. E. 694, 696, 158 Ind. 62 (citing *Parker v. Pennsylvania Co.*, 134 Ind. 673, 679, 34 N. E. 504, 506, 23 L. R. A. 552).

There can be no middle ground between willfulness and negligence. The authorities affirm that each of these elements is the opposite of the other. Consequently, when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered gross negligence cannot support a charge that the injury was willfully or intentionally inflicted by the party accused. *Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 451, 149 Ind. 490.

WILLING.

See "Ready and Willing."

WILLINGLY.

"Willingly" means voluntarily; readily; without reluctance; in the manner of being ready to do an act; of free choice; with one's free choice or consent, as if a man inclines or is favorably disposed to do an act. To say that an act has been done willfully and willingly is to indicate that it has been done intentionally, and implies that the person doing it knew what he was doing, and acted from choice as a free agent. *Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 1 Ind. App. 298.

"Freely and willingly," as used in a statute providing that the certificate of acknowl-

edgment to a deed by a married woman should show that she declared that she did freely and willingly sign and seal the deed, is equivalent to "without bribe, threat, or compulsion," as used in a certificate showing that she acknowledged that she signed the deed without bribe, threat, or compulsion from her husband. Her freedom of action and willingness to make the deed have reference to and are designed to negative any improper influence or duress by the husband. She may regret to part with her property, or she may think the price inadequate, or she may be loath to change her residence, and be unwilling to execute the deed for such purposes in one sense, while she, from considerations controlling her will other than any constraint from her husband, may wish earnestly, or even anxiously, to execute the deed. *Belcher v. Weaver*, 46 Tex. 293, 294, 26 Am. Rep. 267.

The term "knowingly and willingly" characterizes the act of a carrier of live stock in confining animals in carriage for more than 28 consecutive hours without food or water, as prohibited by Rev. St. §§ 4386-4388 [U. S. Comp. St. 1901, pp. 2995, 2996], which makes carriers liable to a penalty for knowingly and willingly failing to comply with the act, even though the act of the carrier is caused by an accident to its train, if such accident is the result of its negligence. *Newport News & M. V. Co. v. United States (U. S.)* 61 Fed. 488, 490, 9 C. C. A. 579.

Wittingly distinguished.

"Willingly" and "wittingly" are not synonymous words, and do not convey the same idea. The one relates to the will, and means freely or voluntarily, while the other relates to the wit or understanding, and means knowingly or designedly. *Harrington v. State*, 54 Miss. 490, 493.

WIND.

See "Brisk Wind."

WINDMILL.

Where, on the sale of windmill, pump, and tank to be used for the purpose of watering live stock, the seller warranted "the within ordered windmill to be well made and of good material," the term "windmill" was construed to extend to the tank as well. *Fairbanks v. De Lissa*, 36 Mo. App. 711, 719.

WINDOW.

See "Bay Window."

A plate-glass shop front fixed with wooden wedges, without screws, nails, or glue, and which can be removed without injuring

the premises, is a "window" within the meaning of a covenant in a lease to yield up the premises at the end of the term, with all windows, etc., which then were or at any time thereafter should be thereunto fixed or belonging, although such window may not be a fixture in the ordinary sense of the term. *Burt v. Haslett*, 36 Eng. Law & Eq. 276, 278, 18 C. B. 162, 173; *Id.*, 893, 901.

"Window," as used in a tornado insurance policy providing that plate glass in doors and "windows" whereof the dimensions are nine feet are not covered by insurance on the building, cannot be construed to include a pane of plate glass nine feet square in the front of a store building, it being immovable and stationary, having but one of the qualities of a window, i. e., that of admitting light into the building, but not for ventilation. A "window" is defined by standard lexicographers to be an aperture or opening in the wall of a building for the admission of light and air to the interior, and to enable those within to look out. *Hale v. Springfield Fire & Marine Ins. Co.*, 46 Mo. App. 508, 510 (citing *Worcester Dict.* 1673; *Bouv. Dict.* 670).

Windows are strictly part of the house, and ordinarily affixed permanently thereto; so that a statement that a certain person stole windows from a house is not actionable as imputing a charge of larceny or even an act of malicious mischief. *Wing v. Wing*, 66 Me. 62, 64, 22 Am. Rep. 548.

WINDOW FRAMES.

A contract of sale of "window frames set with glass" will be construed to embrace the sashes in which the glass is set. *Way v. Ryther*, 42 N. E. 1128, 165 Mass. 226.

WINE.

See "Pure Sweet Wine"; "Pure Wine."

"Wine" is the fermented juice of the grape, or a preparation of other vegetables by fermentation. *State v. Moore* (Ind.) 5 Blackf. 118.

"Wine" is fermented liquor, defined by *Johnson* to be the fermented juice of grapes. *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403.

Worcester defines "wine" as the "fermented juice of the grape; a spirituous liquid resulting from the fermentation of grape juice; the fermented juice of certain fruits, resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived, as ginger wine, gooseberry wine, currant wine," etc. *Hinton v. State*, 31 South. 563, 564, 132 Ala. 29; *Feldman v. City of Morrison*, 1 Ill. App. (1 Bradw.) 460, 462.

Hence fermented juice of blackberries is a vinous liquor. *Hinton v. State*, 31 South. 563, 564, 132 Ala. 29.

The word "wine," in an information charging that defendant sold wine, spirituous liquors, or other intoxicating beverages to a common drunkard, is not of the same import as the words "intoxicating beverages," and consequently the offense is charged in the alternative, and the complaint is insufficient by reason thereof. *Smith v. State*, 19 Conn. 493, 499.

"Wines," within the meaning of a statute prohibiting the sale of strong or spirituous liquors or wine, includes all wines used for drinking; and it is not necessary, in a prosecution for the violation of the statute, to show that the wine sold was intoxicating. *Schwab v. People* (N. Y.) 4 Hun, 520, 524.

The use of the word "wine" as designating the subject of a legacy is so uncertain as to render the legacy void, as the heir could liberate himself by giving a drop of wine. *Succession of Trouard*, 5 La. Ann. 390.

As used in an act relating to the adulteration of wines, the word "wine" means the fermented juice of undried grapes; provided, however, that the addition of pure white or crystallized sugar to perfect the wine, or the using of the necessary things to clarify and refine the wine, which are not injurious to health, shall not be construed as adulterations; but such wines shall contain at least 75 per cent. of pure grape juice, and shall not contain any artificial flavoring whatever. *Bates' Ann. St. Ohio* 1904, § 4200-58.

Ale, beer, or cider.

The term "wine" includes the fermented juice of the grape, and possibly of other fruits. It does not include ale. *People v. Crilley* (N. Y.) 20 Barb. 246, 247.

In common parlance, cider and beer are never called vinous liquors or wine, although there may be found in works on chemistry general expressions that wine is the expressed juice of ripe fruits containing sugar, which causes it to readily undergo fermentation. *Feldman v. City of Morrison*, 1 Ill. App. (1 Bradw.) 460, 462.

The term "wine," in Rev. St. § 2139, prohibiting the introduction of spirituous liquor into the Indian country, does not include lager beer. *Sarlls v. United States*, 14 Sup. Ct. 720, 722, 152 U. S. 570, 38 L. Ed. 556.

As intoxicating liquor.

See "Intoxicating Liquor."

As spirituous liquor.

"Wine" is a fermented liquor, and does not come within the terms of a statute for-

bidding the sale of spirituous liquors. *Caswell v. State*, 21 Tenn. (2 Humph.) 402, 403; *State v. Moore* (Ind.) 5 Blackf. 118.

A statute authorizing the granting of licenses to persons to be innholders, with liberty to sell ale, wine, beer, and other fermented liquors, cannot be construed to authorize such holders to sell brandy, rum, or other spirituous liquors. *Commonwealth v. Jordan*, 35 Mass. (18 Pick.) 228.

WINE SPIRITS.

"Wine spirits" is the product resulting from the distillation of fermented grape juice, and shall be held to include the product commonly known as "grape brandy." U. S. Comp. St. 1901, p. 2171.

WINNER.

The term "winners," in Gen. St. c. 47, § 2, providing that if any person shall lose to another at any one time, or within any 24 hours, \$5 or more of property or things of value, and shall pay or transfer or deliver the same, such loser or any creditor of his may recover the same or the value thereof from the winners, applies to the proprietors of a hotel, who operate a poker room in their hotel and receive a certain percentage of the winnings to defray the expenses of the players for suppers, cigars, etc., and as profits. *Triplett v. Seelbach*, 14 S. W. 948, 949, 91 Ky. 30.

Stockbroker.

A broker with whom one enters into a gambling stock contract, putting up securities for margins, is, on selling the stock at a loss and retaining the securities therefor, a "winner" of the securities, within Cr. Code, § 132, providing that any one who shall lose by a wager anything amounting to more than \$10 and shall pay or deliver it may recover it from the winner by action or proceedings in chancery. *Jamieson v. Wallace*, 47 N. E. 762, 766, 167 Ill. 388, 59 Am. St. Rep. 302; *Kruse v. Kennett*, 54 N. E. 965, 967, 181 Ill. 199.

Where a person enters into an optional contract with a broker, the latter to take options on such person's account, but in his own name, and in case there are losses such person is to pay them, and if there are profits he is to have the benefit of them, the broker to have a commission in any event, and losses result, in adjusting the differences the broker is a "winner," within the statute allowing recovery from the winner of money lost in gaming. *Pearce v. Foote*, 113 Ill. 228, 234, 55 Am. Rep. 414.

The term "winner," as used in Rev. St. Ill. 1883, c. 38, § 132, would not include a commission broker on the Board of Trade, selling grain by the orders of a principal,

who meets with a loss thereby. *White v. Barber*, 8 Sup. Ct. 221, 238, 123 U. S. 392, 31 L. Ed. 248.

WINNING.

Winning at or upon game implies a wager of some kind. *Middaugh v. State*, 2 N. E. 292, 293, 103 Ind. 78.

WINTER-STRAINED LAMP OIL.

A contract for the sale of "winter-strained lamp oil" sometimes means either whale or sperm oil. By the usage of the trade it is generally understood to mean sperm lamp oil. *Hart v. Hammett*, 18 Vt. 127, 129.

WIPER.

A railway employé, whose duty is to clean the engines inside and outside, assist in getting them in and out of the round-house, clean out cinder pits, load coal, and do general work; hence he was in the line of his duty when coupling a car to an engine in order to remove it from the track leading to the ash pit, other wipers having been in the habit of so doing. *Grannis v. Chicago, St. P. & K. O. R. Co.*, 46 N. W. 1067, 81 Iowa, 444.

WIRE.

"Wire," as used in instructions to the agent for a bank not to return any drafts, but, if they are not paid, to wire, means "send a telegram." *Freeman v. Citizens' Nat. Bank*, 42 N. W. 632, 78 Iowa, 150, 4 L. R. A. 422.

Ordinarily the "wire or wiring" of an electric plant would not be taken to include reflectors, insulators, etc., and in a contract for the sale of the plant they would be construed in their ordinary meaning. *Muckle v. Moore*, 19 Atl. 801, 134 Pa. 608.

WISELY.

A will wherein testator directed that the residue of his estate be placed in the hands of a trustee, "to bestow as he may wisely direct," gave the trustee discretion as to the manner and person to whom the residuary estate should be given, and hence the provision was invalid, owing to the absence of a defined beneficiary. *In re Foley*, 10 N. Y. Supp. 12, 14, 2 Con. Sur. 298.

WISH.

Either of the words "wish," "desire," "command," or "direct" is an apt word to be used in a will to show testator's intent to

make a will. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571.

While the words "give, devise, and bequeath" are the usual words used in wills, yet they are not essential to the validity of a gift; and if it appears that it was the intent of the testator to have the property go to the person named as legatee, even if the words "wish or desire" are used, then the intention of the testator will be followed out. *In re Copeland*, 77 N. Y. Supp. 931, 38 Misc. Rep. 402.

As mandatory.

The word "wish," in a will, is sufficient when standing alone to constitute an effectual bequest. *Decker v. High St. M. E. Church*, 50 N. Y. Supp. 260, 262, 27 App. Div. 408 (citing *Phillips v. Phillips*, 112 N. Y. 197, 202, 19 N. E. 411, 8 Am. St. Rep. 737).

The words "wish and desire," in a will in which testator suggested that it was his wish and desire that all his real estate should be divided between his children, was construed to be not merely the expression of a desire on the part of the testator, but to be operative words sufficient to pass the property. *Brasher v. Marsh*, 15 Ohio St. 103, 111.

"Wish," as used in a will reciting, "I wish" the sum of \$1,000 "to have go to my daughter's children," means the same as if the testator had said "I will," or "I direct." *Bliven v. Seymour*, 88 N. Y. 469, 476.

The word "wish," as used in a will, stating that testator's wishes, desires, and intentions are that certain persons should share in the real estate, will be held mandatory, and used in the sense of "direct," where the will undertakes to dispose of the entire estate. *Meehan v. Brennan*, 45 N. Y. Supp. 57, 58, 16 App. Div. 395.

The "wish" of a testator as to a disposition expressed in writing and formally signed in his lifetime is just as effective as his "I will," or "I desire," or "I direct." His death makes the one just as imperative as the other. *In re Gaston's Estate*, 41 Atl. 529, 188 Pa. 374, 68 Am. St. Rep. 874.

"Wish," as used in wills, is sometimes used as a mere precatory word, and sometimes is equivalent to the word "will" or "direct," and so, as used in a will giving a husband the use of certain property, and providing that at his death "I wish the property to be divided," etc., is used in the latter sense of "will" or "direct." *In re Metcalfe's Estate*, 27 N. Y. Supp. 879, 880, 6 Misc. Rep. 524.

In a will bequeathing certain property to the testator's wife, and declaring that at her decease "I wish my estate to go to" certain persons, "wish" should be construed as a mandatory word, and not as a precatory

word, merely expressing the wish that his wife should give or bequeath the estate to such persons. *Appeal of Fox*, 99 Pa. 282, 287.

The words "wish and desire," as used in a will in which the testator recited that it was his "wish and desire" that his slaves should be free at the expiration of seven years from his death, are not to be construed merely as an expression of the testator's "wish and desire," but are an actual gift of freedom to the slaves at the expiration of seven years from the testator's death. *Phebe v. Quillin*, 21 Ark. 490, 495.

Testator devised to his wife all his estate, real, personal, and mixed, to her sole and separate use, behoof, and control, forever, but in a subsequent item provided that it was also his "desire and wish," after his wife's death, that his house and lot should go to his daughter for her sole and separate use. Held that, while the words "wish and desire" were sometimes considered to be precatory words merely in wills, and not mandatory, as where they are used as expressing a desire for an act to be done by some person or persons named, no such presumption or construction obtains when the words are used to express the intention and will of the testator, as in the devise quoted, in which case such words are to be treated as mandatory, and hence the testator intended to give his wife only a life estate in the house and the lot, with remainder to the daughter. *Taylor v. Martin* (Pa.) 8 Atl. 920, 922.

As a request.

The word "wish," when used in a will in which the testator states that "it is my wish" that property should go in a certain way, generally operates as a direct bequest. Yet they will be construed to mean rather an inclination of the mind than an act of the will, where a different construction would produce inconsistency and repugnancy in the different provisions of the will. *Brunson v. King* (S. C.) 2 Hill, Eq. 483, 490.

"Wish to cancel," as used in a letter stating that the writers "wish to cancel" a certain contract, "imports nothing in the nature of a request for consent or deference to the views of the other party. It announces the intention of the writer to exercise a definite right." *Ireland v. Dick*, 18 Atl. 735, 736, 130 Pa. 299.

In a will, which, after disposing of the residuary estate of the testatrix to her husband absolutely, expressed the wish that he should so arrange his affairs that at his decease whatever might remain of the property should go to the son of testatrix, "wish" is merely a word of solicitation, and was not intended to control his discretion in the

disposition of the property. *Nunn v. O'Brien*, 34 Atl. 244, 245, 83 Md. 198.

A testator, after making provision for the establishment of a library, stated that he did not wish any work to be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals, or medicine, provided they contain neither ribaldry nor indecency. Held, that the word "wish" should not be construed as a command, but that it merely expressed a preference of the testator, and was subject to the discretion of the executors and trustees. *Manners v. Philadelphia Library Co.*, 93 Pa. 165, 172, 39 Am. Rep. 741.

As creating a trust.

The authorities are conclusive and harmonious that a trust will be created by such precatory words as "hope," "wish," request," etc., if they be not so modified by the context as to amount to no more than mere suggestions. *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374, 79 Ky. 378.

Words expressive of a wish or a desire, used in a will, may in given instances create a trust or impose a charge. The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant simply to advise or influence the discretion of the devisee, or to himself control the direct disposition intended. In such cases the whole will, so far as it bears upon the inquiry, must be looked to. *Phillips v. Phillips*, 19 N. E. 411, 412, 112 N. Y. 197, 8 Am. St. Rep. 737.

The word "wish" has been held to create a trust, and it is undoubtedly true that this and other like precatory words will under conditions, but not invariably, raise or imply a trust. *Pratt v. Trustees of Shepard & Enoch Pratt Hospital*, 42 Atl. 51, 54, 88 Md. 610.

Commendatory terms of a will, expressing a wish, will, or desire, etc., are sufficient to constitute a trust, unless there be uncertainty as to the parties who are to take and what they are to take. *Lines v. Darden*, 5 Fla. 51, 72.

In a will, where testator makes an absolute gift of property, saying that it is his "wish and request" that it be used in a certain way, such words are sufficient to raise a trust, where the subject and object of the trust are sufficiently certain. *Major v. Hernon*, 78 Ky. 123, 129.

"Wish," as used in a will, wherein testator makes a devise and thereafter expresses a wish as to the disposition of the property or fund, is a precatory word, suffi-

cient to create a trust in the property devised. *Curd v. Field*, 45 S. W. 92, 103 Ky. 203.

It is held that the word "wish" is a sufficient expression of testator's intention and desire to create a trust. *Cook v. Ellington*, 59 N. C. 371, 373, 374.

The term "wish," as used in a will creating a trust, is used in the same sense as "will" or "direct." *Bliven v. Seymour*, 88 N. Y. 469, 476, 477.

Testator gave to his wife all his property, amounting to about \$100,000, naming her executrix, and adding: "If she finds it always convenient to pay my sister the sum of \$300 a year, and to give my brother \$700 per year, I wish it to be done." Held, that a trust was created, contingent only on the widow's convenience, and not on her volition, as the word "wish," in a will, is often equivalent to a command. *Phillips v. Phillips*, 19 N. E. 411, 412, 112 N. Y. 197, 8 Am. St. Rep. 737.

WITH.

See "Along With"; "Carry With It."

As used in a will by which testator gave to M. during her natural life a certain house, with all the household goods thereof, the word "with" was so conjoined to the devise that the devisee took only the same interest in the household goods as she was given in the house. The word "with" would have the same effect in a grant. *Leeke v. Bennett*, 1 Atk. 470.

The word "with" in a sheriff's deed, reciting the sale of land on execution and that in consideration, etc., the sheriff "doth hereby bargain, sell, alien, convey, and confirm with the said" D., does not affect the sense or operation of the instrument, as upon the context it is evident between or with whom the contract is, and by and to whom the estate is conveyed. *Brooks v. Ratcliff*, 33 N. C. 321, 326.

"With and by means of poison," in an indictment, sufficiently charges the mode of killing. *State v. Labounty*, 21 Atl. 730, 731, 63 Vt. 374.

An indictment alleged that the prisoner "with a certain rifle gun, charged with gunpowder and two leaden bullets, which in his hands he had and held at and against the said F., then and there feloniously," etc., "did shoot off and discharge," and it was contended that there was no sufficient averment that the gun was shot off or that the contents were discharged. Held, that the contention was of no merit, since, while to say "with a gun did shoot off and discharge" might be an unusual form of expression, it

could not be said that it was inaccurate, especially as it was added that he did shoot off and discharge with a gun charged with gunpowder and leaden bullets. *State v. Freeman* (S. C.) 1 Speers, 57, 61, 65.

The word "with," in Rev. St. c. 148, § 2, providing that the affidavit to authorize the arrest of a debtor, "when he is about to depart and reside beyond the limits of this state, with property or means," must have been used in the sense of having or owning property or means, and not as indicating that he is about to take his property with him beyond the limits of the state. *Bramhall v. Seavey*, 28 Me. (15 Shep.) 45, 48.

A lease, in which a description of the premises was followed by the words "with the privileges thereto belonging as enjoyed by S.," did not subject the tenant to a covenant of S., the former tenant, not to remove erections put up during his term. *Ombony v. Jones*, 19 N. Y. 234, 237.

The words "to," "on," "along," "with," or "by" a mountain or ridge mean summit point, or summit line, unless otherwise expressed. Pol. Code Cal. 1903, § 3905; Pol. Code Mont. 1895, § 4105.

The words "to," "by," "along," "with," "in," "up," or "down" a creek, river, slough, strait, or bay, mean the middle of the main channel thereof, unless otherwise expressed. Pol. Code Cal. 1903, § 3906; Pol. Code Mont. 1895, § 4106.

The words "along," "with," "by," or "on" the shore line mean on a line parallel with and three miles from the shore. Pol. Code Cal. 1903, § 3907.

As at same time.

The word "with," as used in Laws Iowa 18th Gen. Assem. c. 185, § 3, providing that, before any allowance of attorney's fees shall be made by the court, the court shall be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit shall be filed with the original papers, that there has been no agreement between the attorney and any other person to divide the fee, is synonymous with "at the same time," instead of "placed among." *Wilkins v. Troutner*, 24 N. W. 37, 66 Iowa, 557.

The Illinois statute relating to ne exeat and injunction, and authorizing affidavits filed "with" the bill and answer to be read on motion to dissolve, does not require that the affidavit and the pleadings should be filed at the same time. *Hummert v. Schwab*, 54 Ill. 142, 145.

In the appellate court, the affidavit of the plaintiff has two distinct effects. One is to prevent the defendant from putting in a plea, unless "he shall file with his plea an affidavit." Section 37, c. 110, "Practice,"

Rev. St. 1893. The Supreme Court in effect held, in *Goldie v. McDonald*, 78 Ill. 605, that "with," as to the plaintiff's affidavit, was used in the statute in the sense of Webster's second definition, "to denote association in respect of situation or environment," not simultaneous happening. Whatever meaning "with" has in one part of the section, it should have in the other. Now, in the appellate court, the defendant cannot file with his plea an affidavit, because he does not file a plea at all. As no plea is filed, nothing can be filed with it. *Furness v. Helm*, 54 Ill. App. 435, 436.

An affidavit of claim, filed more than 10 days before the convening of the court for the term at which the declaration is filed, will be regarded as having been filed "with the declaration." *Goldie v. McDonald*, 78 Ill. 605, 606.

Rev. Code, art. 44, § 28, requiring every power of attorney authorizing an agent or attorney to convey real estate to be attested and acknowledged in the same manner as a deed, and recorded "with the deed" executed in pursuance of such power, means on the proper records where the deed is recorded, and not that the recordation must be simultaneous. *Rosenthal v. Ruffin*, 60 Md. 324, 326.

The preposition "with" is generally used as denoting connection, appendage, company of, and concomitance. Pursuant to this definition it is held that a devise which provides that certain slaves shall be emancipated with their children as soon as they severally arrive at 30 years of age, manumits the children when the slaves designated attain that age. *Hart v. Fanny Ann*, 22 Ky. (6 T. B. Mon.) 49, 51.

As attached to.

Act April 9, 1868, authorizing judgment in actions upon bills, notes, etc., and on claims for the loan or advance of money, whether the same be reduced to writing or not, but that no judgment shall be entered unless the plaintiff shall, on or before the return day of the original process, file with his declaration or statement a copy of the instrument of writing, book entries, record of claim on which the action has been brought, etc., is construed to be satisfied by the filing of the affidavit at the time the declaration is filed, and not to require that it be attached to or accompany the declaration. *Hossler v. Hartman*, 82 Pa. 53, 55.

By synonymous.

"With" and "by" are closely allied in many of their uses, and it is not easy to lay down a rule by which to distinguish their uses. It is held that the colonial patent of October 30, 1876, to the town of Southold, lying northerly of Peconic and Gardiner's

Bays, describing the southern boundary of the grant as "on the south with an arm of the sea," does not give the town title to the lands under water in those bays, as the word "with," in the description, should be deemed synonymous with "by," and the south boundary of the patent is the high-water mark on the north side of those bays. *Town of Southold v. Parks*, 84 N. Y. Supp. 1078, 1079, 41 Misc. Rep. 456.

As from.

"With," as used in a declaration alleging that the commencement of the four years for the continuance of a partnership was to be with the day of the date of the contract, is equivalent to "from" as used in the articles of copartnership, stating that the commencement of the four years for its continuance was from the day of the date of the contract and includes the date. "A datu" does not exclude the date; and it was the same with "cum datu." *Seignorett v. Nogulre*, 2 Ld. Raym. 1241, 1242.

As in addition to.

The term "with," in a clause of the exemption statute exempting two horses, with sufficient forage for the keeping of the same, is to be construed as connecting two independent subjects, rather than as joining an independent or qualifying clause to one subject. It is the same as if the statute had read "a yoke of oxen, and, in addition thereto, forage," etc., and therefore the debtor is entitled to the forage exemption, although he does not own the designated animals. *Kimball v. Woodruff*, 55 Vt. 229, 231.

Under 2 Rev. St. p. 255, § 169, subd. 4, providing that all sheep to the number of ten, with their fleeces and the yarn or cloth manufactured from the same, shall be exempt from execution, etc., the fleeces, or the yarn or cloth manufactured from the fleeces, of ten sheep, are exempted from execution while in the hands of a householder, whether he be or not the owner of sheep. *Hall v. Penney* (N. Y.) 11 Wend. 44, 45, 25 Am. Dec. 601.

"With a reserve of the two streets," as used by one of two mutual releases by tenants in common effecting a division, by which the land was described as "lying easterly on C. street and northerly of the M. lots, containing twelve house lots of a quarter of an acre each, more or less, with reserve of the two streets contemplated by a plan" made by a certain party, did not import a reservation to the releasor, but was merely descriptive of the premises conveyed. *Palmer v. Dougherty*, 33 Me. 502, 507, 54 Am. Dec. 636.

As an incident to.

In an indenture demising a fee in lands, except and always reserved the woods, un-

derwoods, and trees now growing or hereafter to grow on said premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down and carry away the said wood, and to dig, work, and carry away the said mines, quarries, and seams of clay, the word "with" must be taken to mean "and as incident thereto." *Durham & S. Ry. Co. v. Walker*, 2 Adol. & E. (N. S.) 940, 968.

As join in.

The §100 act (Purd. Dig. p. 355) enacts that where the defendant is the appellant he shall be bound with surety in the nature of special bail. Held, that the word "with" was used as synonymous with "by," and hence it was not necessary that the defendant should join in the recognizance. *Boyce v. Wilkins* (Pa.) 5 Serg. & R. 329, 330.

"With," as used in an Oregon statute providing that the undertaking of the appellant must be given "with" one or more sureties, etc., should be construed to mean that such undertakings be executed by the appellant, as well as the sureties, and not to mean that the sureties alone should execute it. *Droullhat v. Schmidt* (Or.) 9 Pac. 67, 69.

St. 1 Jac. I, c. 8, providing that executions on writs of error shall not be stayed unless the person in whose name the writ of error is brought shall be "bound with sufficient sureties," means that sufficient sureties shall be given; and, if sufficient surety is entered, the execution must be stayed, though the party himself is not bound. *Cavence v. Butler* (Pa.) 6 Bin. 52, 53.

In an act of assembly directing that an appellant shall produce one or more sufficient sureties, who shall enter into a recognizance "with the prothonotary" in the nature of special bail, is not to be construed literally as requiring that the prothonotary himself must be bound in the recognizance, but according to the intent, which is that the appellant should give sufficient security in the nature of bail, to be filed in the office of the prothonotary, and that it should be entered into before such persons as are legally authorized to take bail in the court where the suit is depending. *Jones v. Badger* (Pa.) 5 Bin. 461, 462.

WITH ALL DISPATCH.

See "With All Possible Dispatch."

A charter party, providing that a cargo was to be discharged according to the custom of the port of discharge "with all dispatch," is not complied with by a discharge delayed by the fact that the charterers have

a number of other vessels in the port, whose cargoes of sugar they are unloading, and to which they chose for their own convenience or business purposes to furnish all the available weighers. *Smith v. Roberts* (U. S.) 67 Fed. 361, 362, 14 C. C. A. 417.

WITH ALL FAULTS.

A contract for the sale of a copper-fastened vessel, to be taken "with all faults," means all faults which a copper-fastened vessel might have. *Henshaw v. Robins*, 50 Mass. (9 Metc.) 83, 90, 43 Am. Dec. 367.

An agreement of sale, where the buyer agreed to purchase personally with "all faults," does not mean all faults or defects such as the thing described ordinarily has, but means such faults or defects as the article might have and still retain its character and identity as the article described, as, for instance, in the sale of a copper-fastened vessel "with all faults," the term meaning such faults as a copper-fastened vessel might have, but would not cover the sale of a vessel not copper-fastened. *Whitney v. Boardman*, 118 Mass. 242, 247.

A sale of personal property, by which the vendee takes the article "with all faults," etc., means that the purchaser shall make use of his eyes and understanding to discover what defects there are, but the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault which he, the vendor, knew to exist. By the vendee's taking the article with all faults, the vendor is relieved from disclosing any faults he may know to exist in the thing sold. *Smith v. Andrews*, 30 N. C. 3, 6.

An offer of sale, in which the vendor, after describing the property, adds that the article is to be taken "with all faults," means all the faults which the thing described may have, consistent with its being the thing described. *Smith v. Richards*, 38 U. S. (13 Pet.) 26, 43, 10 L. Ed. 42; *Shepherd v. Kain*, 5 Barn. & Ald. 240. Thus in an advertisement for the sale of a ship, describing her as a copper-fastened vessel, adding that she was to be taken "with all faults," without any allowance for defect whatsoever, the words "with all faults" could not mean the fault of not being a copper-fastened vessel. *Shepherd v. Kain*, 5 Barn. & Ald. 240.

As used in a conveyance of a ship, providing that the vessel is to be taken by the purchaser "with all faults, without any allowance for any defect or error whatever," is to be construed as a declaration that the seller does not warrant the vessel in any respect. Per *Pollock, C. B.*, in *Taylor v. Bullen*, 5 Exch. 779, 783.

WITH ALL POSSIBLE DISPATCH.

A charter party, providing that a cargo was to be delivered within the reach of the vessel's tackles "with all possible dispatch," means that the charterers should designate a berth for the loading and discharging of the cargo which was not occupied by any other vessel, and that they should furnish the cargo at the place of loading as fast as it might be possible for the vessel to receive it. *Moody v. 500,000 Laths* (U. S.) 2 Fed. 607.

A stipulation in a charter party that the vessel should proceed from Melbourne to Calcutta "with all possible dispatch" could only be construed to mean that she was to proceed directly from one place to the other. To that extent time was made of the essence of the contract. It could not include a permission to make any out of the way port. *Lowber v. Banga*, 69 U. S. (2 Wall.) 728, 738, 17 L. Ed. 768.

"With all possible dispatch," as used in a contract which provided that one party thereto should manufacture rifles for the other with all possible dispatch, meant within a reasonable time. *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1, 23.

Where a charter party stipulated that the vessel should proceed with all possible dispatch to the port of loading, the phrase "with all possible dispatch" amounted to a warranty, and was not merely a representation that she would so proceed. *Giuseppe v. Manufacturers' Export Co.* (U. S.) 124 Fed. 663, 666.

WITH BENEFIT OF SURVIVORSHIP.

Where a bequest was made to several persons between them, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship, it was held that the words "with benefit of survivorship" were not sufficient to change the tenancy in common conferred by the previous words to a joint tenancy. *Haws v. Haws*, 3 Atk. 523, 525.

WITH CARGO.

In a charter party describing the vessel as "now sailed or about to sail from B. with cargo to P.," the words "with cargo" implied that the vessel was loaded, since that phrase applied, not only to the words "about to sail," but to the word "sailed," and, if the vessel "had sailed with cargo," she must have had her cargo on board, and hence such representation was material, and its falsity authorized a repudiation of the charter party. *The Whickham*, 5 Sup. Ct. 346, 850, 113 U. S. 40, 28 L. Ed. 885.

WITH CHILD.

"Woman with child," as used in an indictment charging that the defendant administered certain medicine to the prosecutrix, she being then a woman with child, with intent to induce a miscarriage, was sufficient to meet the requirements of 3 Rev. St. p. 932, § 11, providing that every person who shall administer to any "pregnant woman" any medicine, with intent thereby to induce a miscarriage, shall be punished, since the words "woman with child" are in their ordinary sense synonymous with "pregnant woman." *Eckhardt v. People*, 83 N. Y. 462, 464, 33 Am. Rep. 462 (affirming 22 Hun, 525, 526).

WITH COSTS.

A judgment of reversal of a judgment against the appellant, "with costs," means all costs of both the trial and the appellate court. *Schoonmaker v. Bonnie*, 3 N. Y. Supp. 492, 493, 51 Hun, 34.

When the Court of Appeals grants a new trial, "with costs" to the plaintiff to abide the event, it is only the costs in the Court of Appeals which are referred to. *Belt v. American Cent. Ins. Co.*, 53 N. Y. Supp. 363, 364, 33 App. Div. 239.

The allowance of costs in equity being discretionary, though defendants answered separately, a judgment in their favor, affirmed, "with costs," on an appeal in which they were all joined, authorizes but one bill of costs, in which should be included costs of all the defendants. *Sweet v. City of Syracuse*, 20 N. Y. Supp. 924, 925, 66 Hun, 629.

Where the New York appellate court reverses an order of the General Term confirming a report and award of commissioners, setting aside the report, "with costs," and directing a rehearing before new commissioners, the formula "with costs" in the final order, without more, meant only the costs of appeal to the appellate court; but where the judgment of the trial court is reversed and a new trial granted in either an equitable or legal proceeding "with costs to abide the event," all the costs incurred in either court up to that time are included. *Franey v. Smith*, 27 N. E. 559, 126 N. Y. 658.

WITH THE COURT.

A cause left "with the court" is one held for consideration and decision, such decision to be given at a subsequent term, and to relate back and be as of the time of the term at which the case was heard. *Yatter v. Miller*, 17 Atl. 850, 852, 61 Vt. 147.

WITH DESIGN TO EFFECT DEATH.

The words "with a design to effect death" do not necessarily imply murder, and

are not inconsistent with manslaughter as known at the common law. At common law killing with design might be either murder or manslaughter. Malice was the distinguishing element. With malice, killing with design was murder, as killing in obedience to the dictates of a wicked and malignant heart; but manslaughter is not necessarily killing without a design to effect death. *State v. Greenleaf*, 54 Atl. 38, 41, 71 N. H. 606 (citing *State v. Calligan*, 17 N. H. 253).

WITH EACH OTHER.

"With each other," as used in Hill's Code, § 1873, providing for the punishment of any person who, being within the degrees of consanguinity within which marriages are prohibited, shall intermarry or commit adultery or fornication with each other, implies a concurrent act and the consent of both parties. If one of the parties is compelled by force to consent to the act, there can be no consent of such party, and the act cannot be committed "with each other." *State v. Jarvis*, 26 Pac. 302, 303, 20 Or. 437, 23 Am. St. Rep. 141.

WITH EFFECT.

See "Prosecute to or with Effect."

WITH EXCHANGE.

The words "with exchange" in a draft distrains defendant's negotiability. *Nicely v. Winnebago Nat. Bank (Ind.)* 47 N. E. 476, 477, 18 Ind. App. 30; *Orner v. Sattley Mfg. Co.*, 47 N. E. 644, 645, 18 Ind. App. 122.

The business world has practically agreed that the words "with exchange" do not destroy the negotiability of paper containing them. *Flagg v. Barnes County School Dist. No. 70*, 58 N. W. 499, 500, 4 N. D. 30.

Under Comp. Laws Dak. 1887, tit. 15, c. 1, entitled "Negotiable Instruments," providing that a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment, and must not contain any other contract than a promise or request for the payment of a certain sum of money to order or bearer, an instrument by which the maker promises that at a certain time after date he will pay to the order of the payee therein named a specified sum, "with exchange and costs of collection," and with interest at a specified rate, is not a negotiable instrument. The phrase "with exchange and costs of collection" contains a condition other than that authorized by the statute, and also a condition not certain of fulfillment, as it is uncertain as to whether any such costs will be incurred. *Second Nat. Bank v. Basuler (U. S.)* 65 Fed. 58, 59, 12 C. C. A. 517.

"With exchange," as used in the following check: "Pay to the order of M. Cat-

the Co. \$22,000.00, with exchange"—cannot be construed to increase the amount called for by the check. The words are clearly surplusage. *North Atchison Bank v. Garretson* (U. S.) 51 Fed. 168, 171, 2 C. C. A. 145.

WITH FORCE AND ARMS.

See "Vi et Armis."

WITH HYPOTHESIS.

In the common parlance of the bench and bar a charge with hypothesis, "if the jury believe the evidence they will find" so and so, is also known as the general affirmative charge, though the phrase "with hypothesis" is often added in naming such an instruction. *Dannelley v. State*, 30 So. 452, 130 Ala. 132.

WITH INTENT.

"With intent to sell," as used in an indictment charging that defendant killed a calf less than four weeks old, with intent to sell the meat of said calf, is equivalent to the phrase "for the purpose of sale," as used in St. 1866, c. 253, § 1, making it an offense to kill a calf less than four weeks old for the purpose of sale. *Commonwealth v. Raymond*, 97 Mass. 567, 570.

"With intent to sell," as used in a statute which provides that no person shall own or keep any intoxicating liquors, with intent to sell the same in this state, are equivalent to the words "for the purpose of sale"; and an indictment charging that the defendant had in his possession liquors "for the purpose of sale" is a sufficient compliance with the statute. *State v. Mohr*, 5 N. W. 183, 184, 53 Iowa, 261.

WITH INTEREST.

A contract whereby one agrees to pay money generally, with interest, signifies interest at the statutory rate. *O'Brien v. Young*, 95 N. Y. 428, 430, 47 Am. Rep. 64; *Hackettstown Nat. Bank v. Rea* (N. Y.) 64 Barb. 176, 178.

A note promising to pay a certain amount, "with interest" at the rate of 6 per cent. per annum, implies a promise to pay interest from the date of the note. *Smith v. Goodlett*, 21 S. W. 106-108, 92 Tenn. (8 Pickle) 230.

A judgment which gave to a party a certain sum of money, "with interest at 5 per cent. from" May 19, 1877, is equivalent to the phrase, "with interest at 5 per cent. per annum from" May 19, 1877. *Brady v. His Creditors*, 9 South. 59, 62, 43 La. Ann. 168.

Testator's will recited that he gave and bequeathed to a daughter \$1,000 to be paid on her marriage or when she arrived at age, "with interest after" at her option, meant that interest should be reckoned on the sum named after the occurrence of one of the two events named as the time when the principal sum was to be paid. *Bradford Academy v. Grover*, 55 Vt. 462, 463.

WITH LEAVE.

The words "with leave," etc., following the *absque hoc* in a plea of covenants performed *absque hoc*, imply always an equitable defense such as arises out of special circumstances, which the defendant thereby intimates that he means to offer in evidence. *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 Pa. (1 Casey) 803, 804.

WITH LIKE EFFECT.

See "Effect."

WITH QUICK CHILD.

"With quick child" is when the child has quickened. *Reg. v. Wycherley*, 8 Car. & P. 262, 264.

The phrase "with quick child" is synonymous with "quick with child," both importing that the child has quickened in the womb. *State v. Cooper*, 22 N. J. Law (2 Zab.) 52, 57, 51 Am. Dec. 248.

WITH RECOURSE.

The words "with recourse," indorsed on the assignment of a note, do not make the assignor a guarantor of payment, and create no liability other or different from that of an assignor. *Redden v. First Nat. Bank*, 71 Pac. 578, 66 Kan. 747.

WITH STRONG HAND.

The term "strong hand" is thus explained by *Ryder, C. R.*, in *Rex v. Bathurst*, *Sayer*, 225: "The words 'manu forti' are understood to import something criminal in its nature, something more than is meant by the words 'vi et armis.' And *Rolle* had previously said (*Style*, 135) that these words distinguished 'a forcible entry with strong hand' from an ordinary trespass by entering into another's land, which is not so violent as a forcible entry is supposed to be." *Butts v. Voorhees*, 18 N. J. Law (1 J. S. Green) 13, 18, 22 Am. Dec. 489.

"With a strong hand," as used in an indictment charging that persons entered into a house belonging to the prosecutor, and "with a strong hand violently expelled him," means something more than common trespass. The statute uses the words "with a

strong hand" as describing that degree of force which makes an entry or distrainer of lands criminal, and entitles the prosecutor under the circumstances to restitution and damages; and in an indictment under the statute it is sufficient to state that the defendants entered "with a strong hand"; it being considered that those words imply that the entry was accompanied with that terror and violence that constitutes the offense. *Rex v. Wilson*, 8 Term R. 357, 361. See, also, *Commonwealth v. Brown*, 21 Atl. 17, 138 Pa. 447.

The offense of "forcible trespass" must be done "with a strong hand," or, as otherwise expressed, "manu forti," which it is held implies greater force than is expressed by the phrase "vi et armis." Consequently it is held that a charge that the trespass was committed vi et armis is insufficient to charge a forcible trespass. *State v. Ray*, 32 N. C. 89, 40.

WITHDRAW.

The term "withdraw," in a corporation charter authorizing the state to withdraw privileges and franchises, means to take away what has been enjoyed; to take from. *Central R. & Banking Co. v. State*, 54 Ga. 401, 409.

A statute chartering a water company to supply a city with water for domestic purposes and extinguishment of fires authorized it to take water from a designated pond, and prohibited any other persons to cut below the pipes of the company, or withdraw the water, or obstruct the works. Held, that the words "withdraw the water or obstruct the works," in the connection in which they were used, should be construed to refer to the particular clause, the subject-matter in question, and that the Legislature was not deprived of the right to grant the use of water in the pond not required for the purposes named. *Rockland Water Co. v. Camden Water Co.*, 15 Atl. 785, 789, 80 Me. 544, 1 L. R. A. 388.

Where dividends received by a stockholder impair or reduce the capital stock of the corporation, the capital stock is "withdrawn," within Comp. Laws 1897, § 7057, providing that, if the capital stock of a corporation is withdrawn and refunded to the stockholders before payment of all corporate debts for which the stock is liable, the stockholder shall be liable to corporate creditors to the amount so refunded. *American Steel & Wire Co. v. Eddy*, 89 N. W. 952, 130 Mich. 268.

The word "withdrawn," written in the margin of an entry book, does not prove the entry to have been withdrawn. *Mills' Heirs v. Lee*, 22 Ky. (6 T. B. Mon.) 91, 93, 94, 17 Am. Dec. 118.

Withhold synonymous.

Laws Wis. 1885, c. 222, authorizes the commissioners of public lands to withdraw any lands from sale, and provides that, when reoffered, the lands so withdrawn shall first be offered at public sale. Const. art. 10, § 8, empowers the commissioners to withhold any of the public lands from sale, and Rev. St. § 207, permits them at their discretion to withhold such portions as they might deem best, either before or after advertisement of sale. Held, that while etymologically there is a difference in the meaning of the words "withhold" and "withdraw," yet since, in the construction of statutes, words are taken in their more ordinary and popular meaning, without too great refinement or research into their etymology as applied to the subject-matter of these statutes, it would make little difference in the common apprehension whether it should be said "that the commissioners may withhold the land from sale," or "the commissioners may withdraw the lands from sale," and therefore the two words should be construed as synonymous. *State v. Cunningham*, 59 N. W. 503, 504, 88 Wis. 81.

WITHDRAWAL.

See "Voluntary Withdrawal."

The withdrawal of a certificate or other evidence of right of land contemplated by certain Texas land acts, providing that such certificate and evidence should be returned with the survey and not withdrawn, etc., is the "withdrawal" by the act of the owner or some one for him, and does not include a theft or unauthorized withdrawal of a certificate. *Snider v. Methvin*, 60 Tex. 487, 495.

WITHDRAWING A JUROR.

"Withdrawing a juror" describes a fiction to which a court may resort when it appears that, owing to some accident or surprise, defect of proof, unexpected and difficult question of law, or like reason, a trial cannot proceed without injustice to a party. The withdrawal of a juror is always by an agreement of the parties, and is frequently done at the recommendation of the judge, when it is doubtful whether an action will lie. Such procedure is not necessary under statutes making complete provision for stopping a case by dismissal without prejudice or continuance for cause shown. *Wabash R. Co. v. McCormick*, 55 N. E. 251, 222, 23 Ind. App. 258.

WITHDRAWING STOCKHOLDERS.

The term "withdrawing stockholders," as used in the by-laws of a building association, providing that no money can be drawn from the loan fund for any other purpose, except for making loans on security, and pay-

ing amounts due withdrawing stockholders, means not only those who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterwards. *Vought v. Eastern Building & Loan Ass'n of Syracuse*, 65 N. E. 496, 497, 172 N. Y. 508, 92 Am. St. Rep. 761.

WITHERITE.

See "Carbonate of Baryta."

WITHHOLD.

"Withhold," as used in an indictment charging that defendant did, with intent to deprive the true owner of certain property and to appropriate same to himself, willfully, unlawfully, and feloniously appropriate, secrete, withhold, take, steal, and carry it away, means to retain, to keep back. *People v. Lammerts*, 58 N. E. 22, 24, 164 N. Y. 137.

As used in Act June 17, 1878, c. 259, § 1, 20 Stat. 140, Supp. Rev. St. p. 186 [U. S. Comp. St. 1901, p. 2734], providing that the Postmaster General, if satisfied that a postmaster has made default in returns of the business, may withhold commission on such returns, "withhold" implies a temporary suspension, rather than a total and final denial or rejection of the same. *United States v. Dumas*, 13 Sup. Ct. 872, 873, 149 U. S. 278, 37 L. Ed. 734.

The term "withheld salary," as used in Pol. Code, § 1699, providing that any teacher whose salary is withheld may apply to the Superintendent of Public Instruction, etc., means a withholding by the board of school trustees of the original warrant in favor of the teacher. The first portion of the section provides simply that any teacher whose salary is withheld may appeal to the superintendent. The next portion provides for the investigation of the facts, and then that the superintendent shall pronounce a final judgment, and that the county superintendent, if the judgment is in favor of the teacher, shall, if the trustee refuse to issue an order for said withheld salary, issue his requisition in favor of said teacher. This last portion of the section clearly informs us that the "withheld salary" results from, and consists of, the refusal of the trustees to issue their warrant in the teacher's favor. *Williams v. Bag-nelle*, 72 Pac. 406, 409, 138 Cal. 699.

Withdraw synonymous.

See "Withdraw."

WITHIN.

Where a statute prohibited the erection of a wooden building, or of any addition to a wooden building, having a chimney within

it, the words "having a chimney within it" are to be strictly construed; and hence, where a wooden addition was put up which had a chimney without it, the case was not within the statute. *Dagget v. State*, 4 Conn. 60, 64, 10 Am. Dec. 100.

The phrase "within three months before the commencement of the imprisonment," strictly construed, excludes the time of imprisonment; but in an act relating to assignments by debtors, made before imprisonment, it will be taken to include it, and to mean a "period commencing three months before the imprisonment." *Becke v. Smith*, 2 Mees. & W. 191, 198.

An agreement that certain work was to be done "within a fortnight" before Michaelmas means during the period which elapses in the fortnight immediately before Michaelmas, and not between the time the expression was used and the commencement of that fortnight. *Thomas v. Lambert*, 3 Adol. & El. 61.

Where a mortgage provided that, if default should be made in the payment of interest, the mortgagor should, "within six months after such default shall have accrued, the same default still continuing," give possession, and that, if such default was made and continued, the trustee might take possession of the property, the phrase "within six months" meant a default in payment of interest which had continued for six months. *Union Trust Co. v. Chattanooga Electric Ry. Co.*, 47 S. W. 422, 101 Tenn. 297.

Under the statute disqualifying a juror to serve when he is related to the defendant or to the prosecutor within the sixth degree, computing by the civil law, a juror related in the sixth degree to the prosecutor is incompetent, as the term "within," as a limit of time, or space, or degree, embraces the last day or degree, or entire distance, covered by the limit. *Hamilton v. State*, 47 S. W. 695, 696, 101 Tenn. 417.

As abutting on.

St. 11 Geo. III, c. 15, enacted for the better paving of High street, and authorizing commissioners for the defraying of expenses to rate all and every person or persons who shall inhabit, hold, occupy, possess, or enjoy any house, shop, etc., "within the said street," should be construed to mean abutting on said street; "it being clear," says Alderson, B., "that no house is, strictly speaking, 'within the street.' We must, therefore, consider the intention of the Legislature in using these words; the intention being to impose a rate on all persons whose access to their houses was improved by the paving and repairing of the street. Therefore the words 'every inhabitant within the street' meant every person whose sole access to his prem-

ises is from the street." *Baddeley v. Gingell*, 1 Exch. 319, 334.

As any time before.

As used in a statute requiring that the summons in a proceeding under the landlord and tenant act may be returned "within four days," the phrase quoted means it is returnable at the discretion of the justice at any time not more than four days, and does not mean "not less than four days." *Hower v. Krider* (Pa.) 15 Serg. & R. 43.

St. 1855, c. 231, § 2, declares that a lien on a vessel shall be dissolved unless a certificate is filed within four days from the time such ship or vessel shall depart from the port at which she was when the debt was contracted. Held, that the provision "within four days from the time," etc., was a limit beyond which the certificate could not be filed, but could not be construed as a limitation within which the certificate must be filed, so that it could not legally be filed before the departure of the vessel; and hence the certificate might legally be filed at any time before the expiration of the four days, and whether it is filed before or after the beginning of the four days is immaterial. *Young v. The Orpheus*, 119 Mass. 179, 185.

"Within," as used in Rev. St. Ill. c. 82, § 81, declaring that a subcontractor's notice shall be served within 40 days from the completion of the subcontract, or within 40 days after payment should have been made, is used as a preposition, and in the sense that the service of notice is to be inside the limit or compass of 40 days after the completion of the contract or the maturity of payments thereunder, and not later, and does not mean that the notice shall not be served until the subcontract has been completed or the payment fallen due. *Carey-Lombard Lumber Co. v. Fullenwider*, 37 N. E. 899, 900, 150 Ill. 629.

As used in a city ordinance providing that a contractor must give written notice of any balance due on his contract "at any time within 10 days after the completion" of the contract, these words do not mean that the notice cannot be given before the completion of the contract, and that the contractor is limited to the 10 days after the completion, since it might be difficult for him to know when the contract was completed, but mean that notice must be given before the expiration of the 10 days after the completion. *Merchants' & Traders' Nat. Bank v. City of New York*, 97 N. Y. 355, 361.

The word "within," as used in Code, § 510, requiring a writ to be returned within 60 days from its date, indicates that the writ need not be deferred until the sixtieth day, and due diligence on the part of the officers requires the return to be made promptly. *Nebraska Loan & Trust Co. v. Hamer*,

58 N. W. 695, 698, 40 Neb. 281. See, also, *Guerney v. Moore*, 32 S. W. 1132, 1136, 131 Mo. 650.

"It has always been the opinion of the profession that, while a mortgage payable within a certain time may at the option of the mortgagor be paid off at any time beyond that, a debt payable in a certain time cannot be extinguished without the consent of the creditor before the expiration of the time specified." In re *Hofmann* (Pa.) 14 Wkly. Notes Cas. 563, 565.

The use of the word "within," in a bond by which the obligor is entitled to a reconveyance of land if he first pay a sum of money, with interest, within a certain time, authorizes the payment of the money and a reconveyance of the land at any time within the year. Whether a party who has executed a promissory note for the payment of a sum of money, with interest, within a year, may tender the money before the expiration of the year, is questionable; but it seems that upon a contract for the delivery of specific articles within a certain period performance may be tendered before the expiration of the time. *Buffum v. Buffum*, 11 N. H. 451, 456.

Where a party purchases a tract of land at a price named, and pays for the same in a city lot, stipulating that said lot shall sell within one year at that price and over, and in case of its not selling for that amount he will make up the deficiency in cash, etc., the term "within" was held to include any time during the subsequent year, so that the other party is at liberty to sell the lot at a public auction at any time during the year, and if it does not bring the price stipulated the party will be liable for the deficiency. *Hakes v. Peck*, *40 N. Y. (1 Keyes) 505, 508.

As at or before.

"Within a certain period," "on or before a day named," and "at or before a certain day" are equivalent terms, and the rules of construction apply to each alike. *Leader v. Plante*, 50 Atl. 54, 95 Me. 339, 85 Am. St. Rep. 415.

As at end of.

A direction to return an execution issued by a justice of the peace "within 60 days" is equivalent to "in 60 days," or "at the end of 60 days." *Adams v. Cummiskey*, 58 Mass. (4 Cush.) 420, 423.

As at least.

Rev. St. § 2257, providing for the admission of recorded instruments without other or further proof of their execution, unless the opposite party shall, "within three days before the trial" of the case, file an affidavit stating that he believes such instrument of writing to be forged, means at least three

days before the trial of the case. *Hammond v. Connolly*, 63 Tex. 62, 64.

As excluding first day.

The statutory requirement that a town liable for the support of a pauper shall cause him to be removed to the town of his settlement "within 30 days" from the time of receiving notice from another town that support has been furnished, etc., is satisfied by a removal on the 8th of April, in pursuance of a notice received on the 9th of March. "Whether the removal was in time turns on the controverted question whether the day on which the notice was received is to be counted as one of the 30. We consider it now well settled as a general rule that when an act is to be done within a given number of days from the date, or day of the date, of act done, the day of the date is excluded. Otherwise an act to be done in one day must be done on the same day, and as there is no fraction of a day such stipulation must create an obligation to do it instantaneously." *Per Shaw, C. J., in Inhabitants of Seekonk v. Inhabitants of Rehoboth*, 62 Mass. (8 Oush.) 371, 373. See, also, *Barcroft v. Roberts*, 92 N. C. 249; *Miller v. Henshaw*, 34 Ky. (4 Dana) 325, 327.

In computing the 20 days "within" which a writ of error is to be taken out on an award of property, either the day of filing the award or the day of filing the writ is excluded. *Frantz v. Kaser* (Pa.) 3 Serg. & R. 395.

Where process is made returnable "within" 30 days, the day on which the process is issued is to be excluded in computing the time. *McDonald v. Vnette*, 17 N. W. 319, 320, 321, 58 Wis. 619.

"Within five days," as used in Laws 1884, p. 288, § 718, providing that, if the defendant in an action before a justice of the peace be served with summons in the precinct in which the action is brought, he must appear and answer the complaint within five days, does not include the first day; that is, the day of the issue of the summons. *Ducheneau v. House*, 10 Pac. 427, 4 Utah, 363.

Under Gen. St. c. 123, § 57, requiring a copy of the deed and the return of the attachment of bulky and personal property to be deposited in the town clerk's office at any time "within three days" thereafter, the day of the attachment is to be excluded in the computation of the time. *Bemis v. Leonard*, 118 Mass. 502, 509, 19 Am. Rep. 470.

In computing the time within which suit against a boat for stores furnished should be commenced, the day on which the delivery was completed should be excluded. *The Mary Blane v. Beehler*, 12 Mo. 477.

Where a contract required a conditional payment of a sum of money at any time

"within five years," and provided that, if the condition did not happen "within five years from its date," then payment should be made absolutely, in computing the time, the day on which the contract was executed must be excluded. *Shelton v. Gillett*, 79 Mich. 173, 44 N. W. 428.

"Within two years after," as used in Rev. St. art. 3203, providing that certain actions "shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards," should be construed to exclude the date on which the cause of action accrues; and hence, where a cause of action accrued on July 3, 1883, a suit brought on July 3, 1885, was not barred by the statute. *Smith v. Dickey*, 11 S. W. 1049, 1050, 74 Tex. 61.

Rev. St. § 3203, providing that certain actions may be commenced within two years after the cause of action shall have accrued, and not after, is to be construed as excluding the day on which the cause of action accrued. *Smith v. Dickey*, 11 S. W. 1049, 1050, 74 Tex. 61.

Laws 41st Sess. c. 94, § 17, providing that an appeal shall be taken from a judgment rendered in a justice's court "within" four days from the date of the rendition of the judgment, should be construed so as to exclude the first day—that is, the day on which the judgment was rendered; so that an appeal taken on the 16th of the month from a judgment rendered on the 12th was taken within four days within the meaning of the statute. *Ex parte Dean* (N. Y.) 2 Cow. 605, 606, 14 Am. Dec. 521.

Act March 3, 1873, § 1, providing that an appeal shall be taken "within six months" after the date of the rendition of a decree, means that the time within which the appeal is to be taken is to be computed by excluding the first day and then beginning the full number of days or months to be computed. Where a decree was rendered February 21st, and transcript filed on August 22d, the transcript was filed one day too late. *Glore v. Hare*, 4 Neb. 131, 132.

"Within 10 days," as used in Laws 1854, p. 611, c. 282, § 7, rendering a railroad liable for a penalty for failing to ring a bell or sound a whistle on its locomotive before crossing highways, to be collected in an action to be brought within 10 days thereafter, construed to include 10 days in addition to the day on which the act giving rise to the penalty occurred. *People v. New York Cent. R. Co.* (N. Y.) 28 Barb. 284, 286.

As excluding first and last days.

Where a judgment was rendered on the 27th day of April, 1858, notice of appeal served on the 28th day of April, 1859, was not "within one year" from the date of the judgment. *State v. Jones*, 11 Iowa, 11, 15.

Notice of filing exceptions was insufficient, as not given "within 20 days," where the verdict was rendered June 5th, exceptions filed June 25th, and notice thereof given June 26th. *De Bang v. Scripture*, 46 N. E. 406, 168 Mass. 91.

As for the space of.

A notice to a sheriff of a claim against him for damages for "failure to return said execution within one month from the return day expressed in said execution" is equivalent to the phrase "for the space of one month after the return day thereof" as used in a statute making a sheriff liable for the failure to return the execution for the space of one month after the return day thereof. *Gore v. Hedges*, 23 Ky. (7 T. B. Mon.) 520, 521.

As from date.

A written guaranty providing that the guarantor will be responsible for the hotel bill of a certain person and will see it paid "within 20 days" means within 20 days from the date of such undertaking. *Patterson v. Gage*, 16 Pac. 560, 562, 11 Colo. 50.

As used in Rev. St. § 2931, providing that on the entry of any merchandise the decision of the collector as to the rate and amount of duties to be paid shall be final and conclusive, unless the importer shall "within 10 days after the ascertainment and liquidation of the duties" by the proper officers, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector if dissatisfied with his decision, cannot be construed as meaning that the ascertainment and liquidation of the duties should have been made at the date of the last final withdrawal of the merchandise covered by the bond, but the limitation of the right to complain or to appeal commences with the date of the liquidation, whenever that is made. *Merritt v. Cameron*, 11 Sup. Ct. 174, 176, 137 U. S. 542, 34 L. Ed. 772.

As in all parts of.

An averment by plaintiff in an action for not setting out tithes of hay, reciting that there was a certain immemorial custom as to setting out the tithe "within the parish," and the limit, bounds, and titheable places thereof, was satisfied by evidence that the custom prevailed in all parts of the parish where tithes of hay were set out, and that proof of a modus for hay in one township made no difference. *Pigott v. Bayley*, 6 Barn. & C. 16, 17.

As including first day.

St. 20 Geo. II, c. 37, § 2, enacting that no sheriff shall be liable to be called on to make a return of any writ, unless required to do so "within six months" after the expiration of his office, would include the day on which he went out of office in reckoning the time. *Rex v. Adderley*, 2 Doug. 463, 465.

"Within 20 days after," as used in the arbitration act, which provides that an appeal shall be entered within 20 days after entry of the award of arbitrators on the docket, includes the day on which the entry of award is made. *Boutlier v. Johnson* (Pa.) 2 Browne, 17, 19.

Gen. St. c. 44, art. 2, § 2, authorizing the setting aside of certain mortgages and transfers of property made in fraud of creditors, where the action therefor is brought "within six months" after the instrument is placed on record, means six months computed by including the day on which the instrument is placed on record. *Lebus v. Wayne-Ratterman Co.*, 21 S. W. 652, 14 Ky. Law Rep. 794.

As including last day.

Within a certain time embraces the last day of the time limited. *Union Trust Co. v. Chattanooga Electric Ry. Co.*, 47 S. W. 422, 101 Tenn. 297; *Miller v. Henshaw*, 34 Ky. (4 Dana) 325, 327.

"Within," as used in a guaranty of payment "within one year from the date hereof," includes the last day of the specified period. *Fifth Nat. Bank v. Woolsey*, 48 N. Y. Supp. 148, 150, 21 Misc. Rep. 757.

Rev. Code, p. 90, placing in the fifth class all claims against estates which shall be legally exhibited within one year after the granting of the first letters on the estate, will be construed to include the entire calendar day of the first succeeding anniversary, and hence a claim filed any time during said period is a claim of the fifth class. *Kimm v. Osgood's Adm'r*, 19 Mo. 60, 61.

As lower.

A contract providing that new tiles for fireplace fronts and hearths should be estimated at a certain sum each, the owner to have the privilege of selecting all these articles "within the above figures," means at lower figures. *Harrison v. Reeves*, 28 Atl. 653, 654, 160 Pa. 134.

As not beyond.

Code, § 374, requiring service of notice to be within five days if the person to be served reside "within" 50 miles of the place where the hearing is to be had, means not exceeding, not beyond. *Hovey v. McCrea* (N. Y.) 4 How. Prac. 31, 32.

"Within," as used in Act Dec. 12, 1888, prohibiting the selling of intoxicating liquors within three miles of a town, meant in the limits or compass of, not beyond, and prohibited the sale within the corporate limits, as well as within a three-mile radius outside of such limits. *Jennings v. Russell*, 9 South. 421, 423, 92 Ala. 608.

As not later than.

"Within," as used in a statute requiring claims against an insolvent estate to be filed

within a certain time, means that the claim can be filed within a time not "beyond the time fixed." The word "within," as defined by Webster, is "in the limit or compass of; not beyond; used to refer to place or time; not later than." *Lever v. Read*, 54 Ala. 529, 531; *Guerney v. Moore*, 32 S. W. 1132, 1136, 131 Mo. 650.

When time is spoken of, any act is "within" the time named that does not extend beyond it. *Sanborn v. Fireman's Ins. Co.*, 82 Mass. (16 Gray) 448, 455, 77 Am. Dec. 419.

Act 1864, providing that on the entry of any merchandise the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless the importer shall, "within 10 days after the ascertainment and liquidation of the duties," give notice in writing to the collector if dissatisfied with his decision, should be construed as fixing only the terminus ad quem, the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the terminus a quo, or the first point of time at which the notice may be given. *Davies v. Miller*, 9 Sup. Ct. 560, 562, 130 U. S. 284, 32 L. Ed. 932.

Act March 3, 1857, c. 98, § 5, providing that on the entry of any merchandise the decision of the collector of customs at the port of importation as to its liability to duty or exemption therefrom should be final and conclusive, unless the owner or agent should "within 10 days after such entry" give notice to the collector in writing of his dissatisfaction with such decision, should be construed as fixing a terminus ad quem, and not a terminus a quo, or, in other words, as limiting the time after which a protest should not be made, but permitting it to be made as early as it could have been made under the previous law. *Davies v. Miller*, 9 Sup. Ct. 560, 561, 130 U. S. 284, 32 L. Ed. 932.

"Within six months after probate of the will," as used in St. 1861, c. 164, which allows a waiver by a widow of the provisions for her benefit in her husband's will to be made at any time "within six months after the probate of the will," should be construed to fix a time when her right of election shall cease, and not to mean that a widow was not entitled to make such waiver before the probate of the will. *Atherton v. Corliss*, 101 Mass. 40, 44.

The primary meaning of the word "within" is "in the inner part or side of." Worcester gives as examples these: "Go shut thyself within thy house. Ezek. iii, 24." "That which is within the cups and platters. Matt. xxiii, 26." But such meaning is not applicable to the word as used in a statute requiring written exceptions to be filed with-

in 10 days, but the word is used in the sense of "beyond." *Chicago, S. F. & C. Ry. Co. v. Eubanks*, 32 Mo. App. 184, 189.

St. 1897, p. 201, requires every municipal contractor to file a bond providing that, if he fails to pay for the materials furnished or work done, then the sureties will pay, if the materialman or laborer shall, "within" 30 days from the time such work is completed, file with the council a verified statement that he has not been paid. It is held that the term "within" in this statute does not fix the beginning and the end of the time within which the claim must be filed, but that it merely states a limit beyond which a claim cannot be filed, but does not preclude the filing of the claim before the completion of the work. *French v. Powell*, 68 Pac. 92, 93, 135 Cal. 636.

Sundays excluded.

"Within six days," as used in a statute providing that appeals from justice court must be taken within six days from the rendition of judgment, is to be construed as requiring Sunday to be included in the computation of the six days. *Patchin v. Bonsack*, 52 Mo. 431, 434.

Sundays are excluded in computing the periods of 10 days under Const. Ill. art. 5, § 16, providing that any bill which shall not be returned by the Governor "within 10 days (Sundays excluded) after it shall have been presented" to him shall become a law in like manner as if he had signed it, etc. *People v. Rose*, 47 N. E. 547, 548, 167 Ill. 147.

Where an act is to be done within a certain time, and the last day falls on Sunday, Sunday must be excluded, and the act done on Saturday, or it will be insufficient. *Patrick v. Faulke*, 45 Mo. 312, 314; *Barcroft v. Roberts*, 92 N. C. 249.

29th of February excluded.

Rev. St. 1843, p. 889, requiring appeals to be taken "within 30 days" after rendition of judgment, is complied with by an appeal taken March 25, from a judgment rendered February 24, 1852, since the 28th and 29th days of February are accounted but as one day. *Swift v. Tousey*, 5 Ind. 196, 197.

As wholly within.

As used in Blackwall Railway Act (St. 6 & 7 William IV, c. 123) § 51, providing that, if any dwelling house "situate within 50 feet of the railway" should be deteriorated by it, the owner should require the company to purchase the same, applies to a house of which a very large proportion is within 50 feet, though the entire house is not within the required distance. *Walker v. London & Blackwall Ry. Co.*, 3 Adol. & E. (N. S.) 744, 752.

Act March 1, 1799, providing that, after a certain bridge was completed, no person should cross the lake "within three miles" of the bridge without paying the toll established by law, does not include a crossing where the person went on the ice six miles from the bridge, though he left the lake within three miles of it. To constitute a crossing of the lake "within three miles," within the meaning of the act, the place of entering on as well as leaving the lake on ice must be within three miles of the bridge, unless it appears that it was entered on or left at a greater distance for the manifest purpose of evading the act. *Cayuga Bridge Co. v. Stout* (N. Y.) 7 Cow. 33, 34.

WITHIN THE BOUNDS.

A statute provided that the condition of a bond to keep within the prison limits should be "that he will keep within said bounds." A bond drawn thereunder was conditioned "that he will keep within the bounds of the prison, and not walk off or depart the same." Held, that the condition of the bond added nothing to the condition required by statute, since, if he kept within the bounds of the prison, he could not walk off or depart the same. *Camp v. Allen*, 12 N. J. Law (7 Halst.) 1, 17.

"Within the bounds of the hemlock timber," as used in a receipt reciting that the signer had sold to a certain person and received payment in full for the hemlock, bark, timber, and wood on one acre, more or less, "within the bounds of the hemlock timber," are descriptive of the locality from which the acre should be selected, and should not be construed as meaning all the timber within the bounds of the hemlock timber. *Smith v. Rock*, 9 Atl. 551, 552, 59 Vt. 232.

WITHIN THE CITY.

A franchise of a gas company, authorizing it to supply heat to the public from gas within the city of P., is to be construed to mean any kind of gas within the city, and does not authorize the corporation to go outside the city to get its gas. *Emerson v. Commonwealth* (Pa.) 15 Pittsb. Leg. J. (N. S.) 273, 275.

Ferry boats of a corporation incorporated in one state, carrying passengers, etc., forward and back across a river to a city situated in another state, are not taxable under a law taxing boats "within the city," where the relation of the boats was simply that of contact with the city at one of the termini of the voyage. *City of St. Louis v. Wiggins Ferry Co.*, 78 U. S. (11 Wall.) 423, 431, 20 L. Ed. 192.

The expression "criminal cases within the city," in Laws 1882, c. 324, § 57, providing that justices of the peace elected in

such city shall not have jurisdiction to hear complaints or conduct examinations or trials in criminal cases within the city, means criminal offenses that are committed within the city, and has no application to such criminal offenses as are committed outside of the city limits, but within the county, even though they are prosecuted and tried before a justice of the peace residing, elected, and having office within the city. *State v. Bilder*, 62 N. W. 415, 416, 90 Wis. 10.

WITHIN HIS VIEW.

The statement that a sheriff must have the goods "within his view or under his control," in order to validate a levy thereon, means such actual possession of the goods or dominion over them as would make him a trespasser in the absence of the writ. A mere view of the goods, without control, is not sufficient; and hence, where a sheriff went to the defendant's factory and attempted to levy on defendant's goods, which were locked up within the warehouse, and, without effecting an entrance, made an incomplete inventory of them by partial view through a small opening in a window, the attempt to make a levy was a failure, and created no levy on the goods. *Nelson v. Van Gazelle Mfg. Co.*, 17 Atl. 943, 944, 45 N. J. Eq. (18 Stew.) 594.

WITHIN THE INCLOSURE.

Where plaintiff's horse, being in the street, was destroying the fence surrounding defendant's inclosure, he was liable to be distrained as doing damage "within the inclosure," under the provisions of Rev. St. c. 51, § 1. *Pettit v. May*, 34 Wis. 666, 673.

WITHIN THE JURISDICTION.

The phrase "within the jurisdiction of this state," as used in Rev. St. Ind. 1894, § 8410, providing that all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation, includes property in the hands of a receiver of a mutual benefit and assessment society organized under the laws of the state and having its principal office in the city of Indianapolis, but doing business without as well as within the limits of the state. *Schmidt v. Failey*, 47 N. E. 326, 327, 148 Ind. 150, 37 L. R. A. 442.

WITHIN LEASE.

An assignment, indorsed on a lease, that for value received the lessor did hereby assign, transfer, and set over the "within lease," etc., cannot be construed to convey the fee of the house and lot leased. If anything was intended more than the instrument, it is at least to be the lessor's inter-

est in the premises during the term. But until the term was ended the lessee could not be called on to surrender the possession of the premises in good repair. All the interest and authority of the lessor during the term was to collect the rent. *Demarest v. Willard* (N. Y.) 8 Cow. 206, 210.

WITHIN THE LIMITS.

A tract of ground within the exterior boundaries of a city is not necessarily "within the limits" of the city, so as to become a part thereof; so that as to an addition to a city, the exterior boundaries of which were marked "Reserved," such portion did not become a part of the city by reason of the acceptance of such addition. *Farlin v. Hill*, 69 Pac. 237, 239, 27 Mont. 27.

WITHIN NOTE.

An indorsement on a note of a promise to pay the amount of the "within note" is a valid obligation to pay to the payee therein named, although it does not name the person to whom payment is to be made. *Bullen v. McGillicuddy*, 32 Ky. (2 Dana) 90, 91.

WITHIN POLICY.

Where a policy of insurance, in which fire and ice are accepted perils, is renewed by an indorsement on the policy in which it is stated that it is understood that the assured is not entitled to claim for any loss or damage arising from ice, a second renewal by indorsement, in which it is stated that "the within policy is renewed," applies to the original policy, and not to the said policy as renewed by the first indorsement. *Honnick v. Phoenix Ins. Co.*, 22 Mo. 82, 85.

WITHIN THE POWER OF.

"Within the power of," as used in 1 Rev. Code 1855, p. 365, declaring that when it shall be shown to the court by the oath or affidavit of the party wishing to use a copy, or of any one knowing the fact, that such instrument is lost or not "within the power" of the party wishing to use the same, the record thereof or the transcript of such record may be used without further proof, means within the possession of the party wishing to use a copy; that is, the possession of the party, his agent, servant, or bailee, or other person under his control. *Barton v. Murrain*, 27 Mo. 235, 238, 72 Am. Dec. 259.

WITHIN A RADIUS.

A contract for the sale of a business bound the seller not to practice "within a radius of ten miles of L." Held, that such words, quoted as used in the contract, included a territory within a circle the center of which was the center of the village of L.

and the circumference 10 miles distant from such point in every direction. *Cook v. Johnson*, 47 Conn. 175, 177, 38 Am. Rep. 64.

WITHIN THE STATE.

See "Property Within the State."

Failure to pay a loss under a contract of a foreign insurance company with a non-resident, where the loss is payable in the state, creates a cause of action "within the state," under Code, § 423, giving circuit courts jurisdiction of actions by nonresidents against foreign corporations. *Carpenter v. American Acc. Co.*, 2 S. E. 500, 501, 46 S. C. 541.

The phrase "within the state," in Code Civ. Proc. § 432, subd. 3, providing that, in the absence of the principal officers of a foreign corporation, service may be made on a managing agent within the state, cannot be construed to only mean performing the function of their office within the state, but includes any temporary presence within the state. *Porter v. Sewell Safety Car Heating Co.*, 7 N. Y. Supp. 166, 167.

Commerce or transportation.

Rev. St. 1874, § 86, providing that, if any railroad corporation in the state shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for transportation of passengers or freight, or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad "within this state," it shall be deemed guilty of extortion and dealt with in a certain manner, refers to the roads which a railroad company may operate in the state. The use of the words "within this state" cannot by any fair construction be held to limit the unjust discrimination to charges for the transportation of freight wholly within the state. *People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476, 484.

A railroad earnings tax on all sums upon or charged for the business done "within the state" means "business begun and ended in the state, and includes only intrastate, and not interstate, commerce. Interstate commerce is not business done within the state. It is business done between two or more states." *Pacific Exp. Co. v. Selbert*, 44 Fed. 310, 316. The interjection of intensifying words, such as "wholly" and "entirely," would not alter the phrase or change its legal effect, since "within the state" means done entirely within the boundaries of the state. *Western Union Tel. Co. v. City of Fremont*, 58 N. W. 415, 423, 39 Neb. 692, 26 L. R. A. 698.

The words "within the state," in a statute authorizing the taxation of the gross earnings of a railroad company in the use of

certain cars between points within the state, "are not apt words to describe the crossing of the state from an adjoining state on one side into an adjoining state on another side; nor does it aptly describe the act of going from a point within the state to a point outside thereof, nor from a point outside to a point within the state." *State v. Pullman Palace Car Co.*, 23 N. W. 871, 64 Wis. 89.

Personal property.

The statute providing for the taxation of personal estate within this state was not intended to subject to taxation personal security actually in another state, held, managed, or controlled and under the protection of the laws of that state, and there subject to taxation and in the hands of agents. It cannot be supposed that the Legislature intended that our citizens should be subject to taxation here and in another state, also, upon the same property, or that it would tax, in the hands of agents here, securities belonging to nonresident owners, while it denied the right of other states to tax the securities in the hands of agents there. *People v. Smith*, 88 N. Y. 576, 582.

The Court of Appeals, in *People v. Commissioners of Taxes*, 23 N. Y. 224, 225, in construing 1 Rev. St. p. 387, § 1, requiring the taxation of property "within the state," has held that the personal property within the state which was taxable pursuant to the law was only that which had its actual situs in the state, and where the property was actually situated outside of the state, so that it might in fact be subject to taxation in another jurisdiction, it is not properly to be taxed in this state. But Judge Comstock, in delivering the opinion of the court, took pains to say that it was undoubtedly within the power of the Legislature to tax all personal property of residents of the state wherever found, but that it had clearly not intended to exercise that power, because, if it had, it would undoubtedly have said so, and, since it had not, it could not be inferred that any such intention existed. This case seems to have been received as the law of this state for many years. It was followed in 1882, in the case of *People v. Smith*, 88 N. Y. 576, but after that case *Laws 1896, c. 908, § 3*, was enacted, which declared that all personal property situated or owned "within the state" is taxable, under which statute money deposited without the state on bills receivable for goods sold to persons without the state, and bonds of a corporation of a foreign railroad kept without the state, are taxable within the state, as the statute at section 2, subd. 4, defines personal property as including all debts due from solvent debtors. *People v. Feitner*, 68 N. Y. Supp. 769, 771, 54 App. Div. 217.

Property which is in the state merely for a purpose which is essentially temporary in

its character cannot be considered as within the state for the purpose of taxation. *Robinson v. Longley*, 18 Nev. 71, 73, 1 Pac. 377.

WITHIN THEIR JURISDICTION.

The words "within their jurisdiction," as used in Bankr. Act July 1, 1898, c. 541, § 24b, 80 Stat. 553 [U. S. Comp. St. 1901, p. 8431], providing that the Circuit Court of Appeals has jurisdiction in equity to revise in matters of law proceedings of inferior courts in bankruptcy "within their jurisdiction," manifestly relates to territorial limits confining courts to the exercise of jurisdiction conferred to superintend and revise in matters of law the proceedings of civil courts in bankruptcy in a particular circuit; and therefore the Circuit Court of Appeals has jurisdiction of an appeal from a court of bankruptcy within its circuit, where, though objections to the jurisdiction of the court below were presented there by the appellee, other grounds of defense were also presented by him, and the court did not ground its decision in his favor on the question of jurisdiction. In *re Seebold* (U. S.) 105 Fed. 910, 914, 45 C. C. A. 117.

Bankr. Act July 1, 1898, c. 541, § 24, subd. "b," 80 Stat. 553 [U. S. Comp. St. 1901, p. 8432], providing that the several Circuit Courts of Appeals shall have jurisdiction to superintend and revise in matters of law the proceedings of the several inferior courts in bankruptcy within their jurisdiction, does not apply to the term "courts of the territories," as by the express provision of the section it is confined to the Circuit Courts of Appeals of the United States. In *re Stumppf*, 60 Pac. 96, 97, 9 Okl. 639.

The phrase "within their jurisdiction," as used in Bankr. Act July 1, 1898, c. 541, § 24b, 80 Stat. 553 [U. S. Comp. St. 1901, p. 8431], giving Circuit Courts of Appeals jurisdiction of the proceedings of courts of bankruptcy "within their jurisdiction," has reference to an existing jurisdiction and an existing appellate jurisdiction, and is to be construed the same as if it read "within their appellate jurisdiction." In other words, the phrase "within their jurisdiction" means jurisdiction over courts from which appeals lie to the United States Circuit Courts of Appeals. In *re Blair* (U. S.) 106 Fed. 662, 665, 45 C. C. A. 530.

WITHOUT.

"Without," as used in a complaint alleging that the defendant kept a dog, without such dog being licensed, is a word of sufficiently positive negation to make the allegation of the same legal import and effect as would be an allegation that he kept a dog not licensed or a dog not being licensed.

Commonwealth v. Thompson, 84 Mass. (2 Allen) 507, 508.

The phrase "without any cost, or expense, or other charges," as used in Gen. St. c. 58, § 13, providing that all the public schools in the state shall be open to the children of officers and soldiers of the United States during the late Rebellion, without any cost, or expense, or taxes, or other charges imposed for purposes of public education, does not exempt the estate of such officers or soldiers from taxes levied for school purposes; the intention of the Legislature merely being to relieve the children of the classes of persons named from the payment of rate bills, which, under the provisions of the law existing at the time of the enactment of the provision, were liable to be, and were in fact, assessed on scholars attending public schools. *Carpenter v. Hopkinton School Trustees*, 12 R. I. 574, 576.

WITHOUT ACCOUNTABILITY.

See "Accountability."

WITHOUT BEING MARRIED.

In a will leaving property to children, but providing that, in the case of the death of any of the children "without being married" or having children, the share of such child so dying should be divided among the survivors, the expression "without being married" must be construed as "without having ever been married." *Lord Alvanley*, in *Maberly v. Strode*, 3 Ves. 450, says that is the common acceptance of the word "married." *Bell v. Phyn*, 7 Ves. 453, 458.

WITHOUT BRAINS, CREDIT, OR CAPITAL.

To say of a citizen that he is "without brains, credit or capital" is libelous, for it impugns his business capacity and his business standing and character in the community. *Wood v. Boyle*, 35 Atl. 853, 854, 177 Pa. 620, 55 Am. St. Rep. 747.

WITHOUT BRIBE, THREAT, OR COM-PULSION.

"Without bribe, threat, or compulsion," as used in the certificate of acknowledgment of a deed by a married woman that she signed the deed without "bribe, threat, or compulsion" from her husband, is equivalent to "freely and willingly sign," as used in the form of the certificate as prescribed by the statute. *Belcher v. Weaver*, 46 Tex. 293, 294, 26 Am. Rep. 267.

WITHOUT CHILDREN.

See "Die Without Children."

WITHOUT CONSENT.

"Without her consent," as used in definitions of rape, means exactly the same thing as "against her will." *Commonwealth v. Burke*, 105 Mass. 376, 377, 7 Am. Rep. 531.

Where an ordinance of Congress providing that the lands of Indians should never be taken from them "without their consent" was construed to exempt such lands from taxation, the words "without their consent" should be construed to imply a parting with the privilege if consent be given to a conveyance of the lands, so that, where such lands are repurchased by an Indian without a former conveyance by an Indian to a white man, they are not exempt from taxation. *Revoir v. State*, 36 N. E. 1109, 1110, 187 Ind. 332.

WITHOUT CONTRADICTION.

A statement that a witness was allowed to give certain testimony, which was "without contradiction," is not equivalent to a statement that the court found his testimony to be true. *Birch v. Hutchings*, 12 N. E. 192, 194, 144 Mass. 561.

WITHOUT DEDUCTION FOR BENEFITS.

The Constitution of Ohio, when authorizing the condemnation of land for railroad purposes, requires that full compensation be paid, "irrespective of benefits." The Bill of Rights requires full compensation to be paid for land taken for public purposes, "without deduction for benefits." In construing these provisions, the court held that they were identical, and that they meant that in determining the consideration the jury have nothing to do but ascertain the fair market value of the property taken, and that nothing shall be deducted from that value on account of the benefits of the improvement. *Giesy v. Cincinnati, W. & Z. R. Co.*, 4 Ohio St. 308, 320.

WITHOUT DEFALCATION.

See "Defalcation."

WITHOUT DELAY.

A charter party providing that a vessel which was at Genoa should "proceed without delay to Baltimore to enter upon this charter, the vessel having permission to take cargo of coals as ballast out," means without such delay as would arise from taking cargo on board. *Antole v. Gill* (U. S.) 5 Fed. 128, 129.

"Without delay," in *Wood's Dig.* p. 183, § 125, directing that the sheriff shall execute a writ of attachment without delay, "does not mean that the sheriff shall, the instant

he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the Supreme Court of New York in *Hinman v. Borden*, 10 Wend. 367, 25 Am. Dec. 568, a sheriff is bound to use all reasonable endeavors to execute process." *Whitney v. Butterfield*, 13 Cal. 335, 339, 73 Am. Dec. 584.

WITHOUT DUE PROCESS OF LAW.

See "Due Process of Law."

WITHOUT FAULT.

"Without fault," within the meaning of Code, § 3066, authorizing an employé to recover from a railroad company for injuries he sustains by reason of the negligence of other employés when he is without fault or negligence, means that the party suing must not have done anything to contribute to his injury and must have done everything to prevent the consequences of the company's negligence. In other words, he must show that he did nothing he ought not to have done and neglected to do nothing he ought to have done. *Central R. & Banking Co. v. Lanier*, 10 S. E. 279, 280, 83 Ga. 587.

An averment that plaintiff was without fault or negligence is equivalent to saying that he was in exercise of due care. *Goldrick v. Union R. Co.*, 37 Atl. 635, 20 R. I. 128.

WITHOUT FEAR OR COMPULSION.

The use of the words "without fear or compulsion" from her husband, in a certificate of acknowledgment of the execution of a deed by a married woman, is a mode "of stating that the acknowledgment was freely made." If the wife executes the deed without fear or compulsion, she manifestly does it freely, and the object of the statute requiring a private examination apart from her husband in such cases is fully secured. *Dennis v. Tarpenny* (N. Y.) 20 Barb. 371, 376.

WITHOUT FURTHER PROOF.

See "Evidence Without Further Proof."

WITHOUT GRACE.

"Without grace," as used in the body or margin of a note, means that the note is due or shall be due on the day of its maturity according to its face, without the allowance of any days of grace. *Perkins v. President, etc., of Franklin Bank*, 38 Mass. (21 Pick.) 483, 485.

WITHOUT HEIRS.

See "Die Without Heirs."

WITHOUT INTEREST.

A promissory note, which recites that it is to be "without interest," only means "without interest" until maturity. After maturity the note will bear interest, unless there is a contract in plain terms to the contrary. *Roberts v. Smith*, 64 Tex. 94, 97, 53 Am. Rep. 744.

WITHOUT ISSUE.

See "Die Without Issue."

WITHOUT JUST COMPENSATION.

The phrase "taken without just compensation being made," in Const. 1816, art. 1, § 7, providing that no property shall be taken without just compensation being made therefor, was construed to preclude title to property taken from passing from the owner thereof till the payment of compensation; but it was held that possession of the property could be taken before such payment. *Kennedy v. Indianapolis*, 103 U. S. 599, 26 L. Ed. 550.

WITHOUT THE KNOWLEDGE OR PRIVACY.

A loss occasioned to passengers on an excursion barge from the inability of such barge to withstand a thunderstorm of no unusual severity cannot be said to occur "without the knowledge or privacy" of the corporation owning the barge, so as to limit its liability under Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], when it appears that the president thereof himself undertook to make an examination of the barge at the beginning of the season, but failed to discover weakness which a thorough examination would have disclosed. *The Republic* (U. S.) 61 Fed. 109, 113, 9 C. C. A. 386.

WITHOUT LEAVING CHILDREN.

See "Die Without Leaving Children."

WITHOUT LEAVING ISSUE.

See "Die Without Leaving Issue."

WITHOUT LIVING ISSUE.

See "Die Without Living Issue."

WITHOUT NEGLIGENCE.

An averment that plaintiff was without fault or negligence is equivalent to saying that he was in the exercise of due care. *Goldrick v. Union R. Co.*, 37 Atl. 635, 20 R. I. 128.

The phrase "without negligence," in Code, art. 77, § 1, providing that, where property is destroyed by fire from a locomotive,

the burden is on the company to show that the fire was occasioned without negligence, means the exercise of reasonable care and diligence on the part of the company to avoid so far as possible injury to property by having its engines properly constructed, in good condition, and in the care of skillful persons. *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, 254.

Where a bill of lading provides that the carrier shall not be liable for loss by fire, the law incorporates and makes a part of the contract the words "without negligence on the part of the carrier," and what the law inserts as an implied proviso of the bill is as much a part of the contract as what is expressly written in it. When, therefore, the plaintiff makes out a prima facie case of negligence by proving that the goods were not delivered, which was rebutted by proof that they were not delivered by reason of a fact which may have existed and the carrier still have been negligent, the carrier must still prove freedom from negligence, or that the act did not arise by reason of negligence. *Atchison, T. & S. F. Ry. Co. v. Lawler*, 58 N. W. 968, 976, 40 Neb. 358.

WITHOUT PREJUDICE.

"The words 'without waiver or prejudice' have in the legal profession and among business men a well-understood value. They import into any writing in which they appear that the parties have agreed that, as between themselves, the receipt of the money by one, and its enjoyment by the other, shall not, because of the facts of the receipt and payment, have any legal effect upon the rights of the parties in the premises; that such rights will be as open to settlement by negotiation or legal controversy as if the money had not been turned over by the one to the other." *Genet v. President, etc., of Delaware & H. Canal Co.*, 63 N. E. 350, 351, 170 N. Y. 278.

In adjournment of cause.

A stipulation entered into in justice court on the return day that the cause should "stand adjourned and without prejudice to either party" does not waive the requirement of the statute that, if the defendant interpose a counterclaim or set-off, "a copy of his account or statement of his demand intended to be set off shall be delivered to the justice on or before the day to which the hearing shall be first adjourned." The natural import of the words "without prejudice," as they were used in the stipulation, was that no harm should result to the rights of either party by reason of his consent to the adjournment at that time. As used, the words would probably save the right to make an objection to irregularity in the service of process, which would otherwise be waived by the appearance and consent, or would prevent the parties from raising the objection

that the cause was adjourned before the return day. The right of the defendant to file his set-off, and his duty to do so on the first adjourned day, existed without regard to whether the adjournment was made by the consent of the parties (as first adjournments usually are), or by the order of the court without consent. The defendant was in no way prejudiced in this respect, either by the adjournment or by the agreement to adjourn. An agreement which is intended to dispense with any statutory requirements, and permit an opposite party to disregard the rule of practice laid down by the statute for the guidance of the court, should be clear and unambiguous. The court is bound to conform strictly to the requirements of the statute. If it fails to do so, it is error. This is especially so if it permits a deviation from a statutory practice in favor of one party against the objection of the other party or his counsel. If the present agreement had stated that the adjournment therein provided for should not be regarded as an adjournment so far as it would affect the defendant's right to file a set-off, or if it had stated that it should be regarded as an extension of the return day, then it would have been plainly visible to the court that the agreement was a waiver of the statutory requirement that the plea should be filed on the day to which this adjournment was made. A mere agreement that the adjournment be without prejudice does not contain such an understanding, either expressly or impliedly. *State v. Taylor*, 17 Atl. 291, 292, 51 N. J. Law (22 Vroom) 307.

In denial of application.

Where a court denies an application "without prejudice" as to a renewal before another judge, it was not an extension of the time in which the application might have been made as authorized by statute, but simply relieved the person making the motion from the possibility of a charge of contempt in making a second application to another judge. *Wallace v. Lewis*, 24 Pac. 22, 23, 9 Mont. 399.

In dismissal of appeal.

Where, on appeal, it was discovered that the statement prepared was not settled by the judge below as required, and appellant moved for leave to withdraw it for the purpose of correcting the omission, and in conformity with the application an order was made dismissing the appeal "without prejudice," in view of such phrase, a contention that the dismissal operated as an affirmation of the judgment was error. *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116, 119, 8 Am. Rep. 705.

In dismissal of bill.

The purpose and effect of the words "without prejudice," in a decree dismissing a bill without prejudice, is to prevent the

defendants from availing themselves of the defense of *res judicata* in any subsequent proceeding by the same plaintiffs on the same subject-matter. This is the doctrine of Story, Eq. Pl. § 793, of 1 Daniell, Ch. Prac. p. 659, and of Beach, Eq. Prac. §§ 643, 644. *O'Keefe v. Irvington Real Estate Co.*, 39 Atl. 428, 87 Md. 196; *Taylor v. Slater*, 41 Atl. 1001, 1003, 21 R. I. 104.

The entry, "dismissed without prejudice," in an action of divorce brought by a husband on the ground of adultery, indicates that the libel was not dismissed upon the merits of the case, upon the ground that the evidence showed the libelee to be innocent of the charge made against her, but for some insufficiency in the allegations, or in the service of the libel, where it might be proper to allow the libelant to bring a new libel for the same cause. This would not be done in any case where the evidence showed the libelee to be free from fault and from suspicion. Therefore the fact of this entry shows that the libelant failed upon some technical point in the case, rather than that the libelee succeeded in proving her innocence of the charge made against her. *Ray v. Adden*, 50 N. H. 82, 84, 9 Am. Rep. 175.

The words "without prejudice," contained in a decree dismissing a bill, indicate a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be *res judicata* of the merits. *Seamster v. Blackstock*, 2 S. E. 36, 38, 83 Va. 232, 5 Am. St. Rep. 262.

"A dismissal without prejudice leaves the parties as if no action had been instituted. It gives to a complainant the right to state a new and proper cause, if he can; but it takes away no right of defense to such suit on any ground other than that of the judgment as a bar." *Taylor v. Slater*, 41 Atl. 1001, 1003, 21 R. I. 104.

A general entry of "Bill dismissed," with no words of qualification, such as "dismissed without prejudice," or "without prejudice to an action at law," or the like, is conclusively presumed to be on the merits, and is a final determination of the controversy. *Foote v. Gibbs*, 67 Mass. (1 Gray) 412, 413.

Where a libel for divorce is dismissed for want of jurisdiction, and the dismissal decree states that it is without prejudice, and there is no limitation upon the effect of such words, "they must be taken to have been used generally, and to mean without prejudice to the right of the libelant to bring a new suit, and to try it as if the questions involved were all presented for the first time." *Burton v. Burton*, 5 Atl. 281, 283, 58 Vt. 414.

A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought. *Newberry v. Ruffin*, 45 S. E. 733, 102 Va. 73.

The use of the term "without prejudice," in a decree dismissing a bill without prejudice, has reference to the effect and operation of the decree itself, and is equivalent to a permission to file another bill in the same cause of action. When the right is not so reserved, the decree of dismissal is conclusive, and another bill cannot be filed. *Cochran v. Couper*, 2 Del. Ch. 27, 81.

When a bill brought to obtain a divestiture of the legal title of defendants to real property is dismissed "without prejudice," the effect of the reservation is to prevent the decree from constituting a bar to another bill brought upon the same title; but it by no means compromises the court as a judicial determination in favor of such title. *Lang's Heirs v. Waring*, 25 Ala. 625, 639, 60 Am. Dec. 533.

A dismissal of a bill in equity without prejudice will not be reviewed, unless the error is very clear. Ordinarily an order dismissing a bill or petition is not considered final, and hence cannot be reviewed; but where the petition and answer properly submit a question to the court which should have been passed upon, and a party was entitled to relief on the facts, he was prejudiced by having the petition dismissed, and the mere addition of the words "without prejudice" cannot prevent him from prosecuting such appeal. *Yakel v. Yakel*, 53 Atl. 914, 916, 96 Md. 240.

In *Kempton v. Burgess*, 136 Mass. 192, it was said: "It is a matter of course to permit a plaintiff to dismiss his bill at any time before hearing, upon payment of the costs. Such an order of dismissal is in the nature of a nonsuit at law, and not a bar to another bill. When a bill is dismissed upon the motion of the plaintiff, it is a safe and convenient practice to dismiss it without prejudice." While the term "without prejudice" is properly inserted in a decree in which a bill is dismissed by plaintiff before hearing on the merits, the use of such term is not necessary, and the judgment or decree constitutes no bar to a new proceeding for the same cause of action between the same parties, even if the words are omitted. *Richards v. Lake Shore & M. S. Ry. Co.* (Ill.) 16 N. E. 909, 124 Ill. 516; *Chamberlain v. Sutherland*, 4 Ill. App. (4 Bradw.) 494. A refusal to dismiss a bill without prejudice at complainant's cost, on a motion made before any proof has been introduced, and where it has not been made manifest that defendant is entitled to a decree, is an abuse of discretion, and erroneous.

Bates v. Skidmore, 48 N. E. 962, 963, 170 Ill. 233.

A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not in direct terms without prejudice. *Bigelow v. Winsor*, 67 Mass. (1 Gray) 229, 301.

In publication of testimony.

The use of the words "without prejudice," in a consent by parties to the publication of testimony, operates by the common understanding of solicitors and chancellors as a reservation of the right to take additional testimony. *Dixon v. Higgins*, 2 South. 289, 291, 82 Ala. 284.

In withdrawal of appearance.

The term "without prejudice," in a leave to withdraw an appearance in the case without prejudice, means that the position of the withdrawing party is not to be unfavorably affected by the act of withdrawal. *Crelighton v. Kerr*, 87 U. S. (20 Wall.) 8, 12, 22 L. Ed. 309.

WITHOUT PREJUDICE TO THE CHARTER PARTY.

A charter party provided that the master might sign bills of lading at any rate of freight "without prejudice to the charter party," which provided for the payment of a lump sum for the whole voyage. It was held that an assignee of goods with notice of the terms of the charter party was not entitled to the goods merely upon payment of the amount of the freight specified in the bill of lading, but that the owner of the ship was entitled to a lien on such goods for the entire charter freight. *Kern v. Deslandes*, 10 O. B. (N. S.) 205, 224.

Where a vessel was chartered to G. by a charter party for a specified sum for a voyage to Cuba and return, and G., at Cuba, loaded the vessel with molasses, which he bought there from P., but the purchase was not absolute, the transfer of title to the molasses depending on the payment of drafts drawn by P. on G., and the molasses was shipped in the name of P., and a bill of lading was signed therefore by the master, which stated that the cargo was to be delivered to the order of P., at a specified rate of freight, to be paid by him or his assigns, but contained at its foot the words, "without prejudice to charter party," and afterwards R. advanced, on the security of the bill of lading, the money to take up the drafts and took an assignment of the bill of lading, held, on a libel filed by the owner of the vessel against the molasses for the charter money, that the molasses was liable only for the freight specified in the bill of lading; the words "without prejudice to the

charter party" being intended only to guard against any waiver of the charter money as between the charterers and the owner. In re 406 Hogsheads of Molasses (U. S.) 9 Fed. Cas. 591.

WITHOUT PROTEST.

The expression "without protest," as used in the following statement, signed on the back of a note: "I hereby guaranty the payment of the within note without protest"—has no other effect than to so qualify the contract as to exclude the specific defense that by not protesting the note the indorsers are released. If either of the indorsers continued liable to the payee, notwithstanding the note was not protested, he must still be considered the principal, and the guarantor has a right to insist that such principal shall be first exhausted before recourse is had to him on his guaranty. *Zahm v. First Nat. Bank of Lancaster*, 103 Pa. 576, 580.

An indorsement of a promissory note by the payee thereof, stating that he holds himself "responsible for the within note without notice or protest" is only "to be construed as a waiver of protest and notice as a necessary step to fix the payee's liability in case the drawer should fail to pay the note at maturity." *Halley v. Jackson*, 48 Md. 254, 261.

WITHOUT RECOURSE.

The words "without recourse," as used in an instrument by which a judgment creditor transfers his right, title, and interest in the judgment without recourse, "clearly indicate the absence of any intention to warrant the validity or value of the judgment, or that it was collectible." *Scofield v. Moore*, 31 Iowa, 241, 245.

The words "without recourse," in an assignment of a promissory note, without any express representations, do not release the seller from an implied warranty for a deficiency in the amount recoverable on the note, on account of its bearing usurious interest. *Drennan v. Bunn*, 16 N. E. 100, 102, 124 Ill. 175, 7 Am. St. Rep. 354.

The words "sans recours" or "without recourse" have no exact legal significance, except when employed by an indorser to limit his liability on a negotiable instrument which has been, by the act of indorsement by him, assigned to a third person. An indorsement followed by this phrase relieves the indorser of liability for the payment of such a paper in the event it is dishonored by the maker or acceptor. *Thompson v. First State Bank*, 29 S. E. 610, 611, 102 Ga. 696.

Many authorities say that the transfer of a note or bill without recourse is a sale.

Brittin v. Freeman, 17 N. J. Law (2 Har.) 191, 227.

When the indorsement of a note is "without recourse," the indorser specially declines to assume any responsibility for its payment. According to the meaning of the term in the law merchant, this is the express condition of the contract, as much as if stated in detail in so many words. *Youngberg v. Nelson*, 53 N. W. 629, 51 Minn. 172, 38 Am. St. Rep. 497; *Palmer v. Courtney*, 49 N. W. 754, 756, 32 Neb. 773.

The expression "without recourse," in the indorsement of a note, merely rebuts the insurer's liability to the indorsee and subsequent holders. The indorsement transfers the whole interest. *Richardson v. Lincoln*, 46 Mass. (5 Metc.) 201, 204.

The words "without recourse," in an indorsement on a promissory note, do not imply "without value," nor do they alter the effect of an assignment of the note. *Wilson v. Codman*, 7 U. S. (3 Cranch) 193, 203, 2 L. Ed. 408.

An indorsement of a promissory note "without recourse" is evidence of an unwillingness to be answerable for the solvency of the maker—a prudent precaution, particularly where the note has a long time to run before it matures. Such indorsement passes the note, with all its negotiable qualities. *Epler v. Funk*, 8 Pa. (8 Barr) 468, 469.

An indorsement on a bill of exchange "without recourse" negatives and repudiates any liability on the part of the indorser. *Watsan v. Chesire*, 18 Iowa, 202, 205, 87 Am. Dec. 382.

"Without recourse," as used in an indorsement of a note, means that the indorser is not to be liable for its payment in case of its dishonor at maturity, as he would be, by the law merchant, on an unqualified indorsement. *Charnley v. Dulles* (Pa.) 8 Watts & S. 353, 361.

An indorsement on a note of the words "without recourse" is an express declaration of the absence of responsibility. It is no more than the expression of the implication of the law from a transfer by delivery merely, and, except as passing the legal title to instruments which under the statute are made assignable, and are not by the law merchant negotiable by delivery, its obligations and effect, as between transferor and transferee, is that of a transfer by delivery. *Bankhead v. Owen*, 60 Ala. 457, 461.

Where the payee of a note agrees to deliver the notes of a corporation, such agreement is complied with by delivery of notes "without recourse." *Seeley v. Reed* (U. S.) 28 Fed. 164.

An assignment "without recourse" of a note executed for the purchase money of

land does not carry with it the vendor's lien. *Johnson v. Nunnerly*, 30 Ark. 153.

The indorsement of a negotiable certificate of deposit by the payee before due "without recourse" is not, of itself, sufficient to serve the purchaser with notice of defenses of the maker. *First Nat. Bank v. Security Nat. Bank*, 51 N. W. 305, 306, 34 Neb. 71, 15 L. R. A. 386, 33 Am. St. Rep. 618.

An indorsement of a note qualified by the words "without recourse" is not out of due course of trade, and does not throw any suspicion upon the character of the paper. A note continues negotiable notwithstanding the words "without recourse." *Hatch v. Barrett*, 8 Pac. 129, 134, 34 Kan. 223; *New York Security & Trust Co. v. Lombard Inv. Co.* (U. S.) 65 Fed. 271, 277. Such an indorsement does not indicate in any case that the parties to it are conscious of any defect in the security, or that the indorsee does not take on the credit of the other party or parties to the note. On the contrary, he takes it solely on their credit, and the indorser only shows thereby that he is unwilling to make himself responsible for the payment. *New York Security & Trust Co. v. Lombard Inv. Co.* (U. S.) 65 Fed. 271, 277.

An indorser may qualify his indorsement with the words "without recourse," or equivalent words, and upon such indorsement he is responsible only to the same extent as in the case of a transfer without indorsement. *Civ. Code Idaho 1901, § 2879.*

Warranty of genuineness.

Whilst the words "without recourse," accompanying an indorsement, clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity upon due demand, or even if all the parties to the papers should prove to be wholly insolvent, they cannot be construed as importing more than this. At least, they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liability arising from a transfer by delivery, where the note is capable of being thus transferred. He warrants by implication, unless otherwise agreed, that he is the lawful holder and has a just and valid title to the instrument, and a right to transfer it by delivery, also that the instrument is genuine, and not forged or fictitious. *Dumont v. Williamson*, 18 Ohio St. 515, 517, 98 Am. Dec. 186.

An indorsement "without recourse" is nevertheless an implied warranty of the genuineness of the signatures to the paper. *Challiss v. McCrum*, 22 Kan. 157, 164, 31 Am. Rep. 181; see, also, *Charnley v. Dulles* (Pa.) 8 Watts & S. 353, 361—unless it is expressly understood at the time of the sale that he refused to guaranty their genuine-

ness. *Brown v. Ames*, 61 N. W. 448, 449, 59 Minn. 476.

An "indorsement without recourse" of a past-due note impliedly warrants that the note is genuine, and that it is what it purports to be on its face—a living debt. *New York Security & Trust Co. v. Lombard Inv. Co.* (U. S.) 65 Fed. 271, 277.

"The indorser without recourse contracts that the bill or note is in every respect genuine, and neither forged, fictitious, nor altered. Undoubtedly, and by universal admission, this principle applies to the signatures of the drawer, acceptor, and maker of the bill or note, who are the original parties, and it is often expressed in language to the effect that the indorser warrants that it is a genuine instrument—citing many authorities." *Palmer v. Courtney*, 49 N. W. 754, 756, 82 Neb. 773.

An assignment of a negotiable instrument without recourse only relieves the assignee of the responsibility by reason of the insolvency of the obligors, but there is an implied warranty that the signatures are genuine, and the assignee is not required to use the same diligence in testing the genuineness of the paper as is required in testing the solvency of the obligors in case of a mere assignment for value. *Maze v. Owingsville Banking Co.*, 63 S. W. 428, 23 Ky. Law Rep. 574.

WITHOUT RELIEF.

The phrase "without relief," in any judgment, contract, execution, or other instrument of writing or record, shall be taken, held, and deemed to mean "without the benefit of valuation laws." *Horner's Rev. St. Ind.* 1901, § 1286.

WITHOUT THE STATE.

The phrase "without the state," in the eighth section of the limitation statute, does not characterize one who, having property outside the state, leaves the state for a period of eight months for the purpose of taking charge of a store, but intends at his departure and during his absence to return to the state, and that his absence shall only be of a temporary character. *Sage v. Hawley*, 16 Conn. 106, 118, 41 Am. Dec. 128.

WITHOUT TRANSFER.

See "Through Without Transfer."

WITHOUT VALID CAUSE.

"Without valid cause," as used in reference to the directors of a school district having neglected or refused to perform their duty without valid cause, does not import the same thing as "willfully neglected and

refused." If a duty be enjoined on an officer, his refusal to perform it is willful. He has no discretion as to its performance. But if he be commanded to do a certain act, unless he have a valid excuse for not doing it, and he then refuses for cause, the question is at once raised between him and his superior whether the cause is sufficient to excuse him in his disobedience. *In re Walker*, 36 Atl. 148, 150, 179 Pa. 24.

WITHOUT WARRANT OF LAW.

The term "without warrant of law," as used in a motion to vacate an attachment on such grounds, signifies the same thing as "irregular," and, where an affidavit for attachment fails to state the conditions on which the law authorized its issuance, it is irregularly issued and without warrant of law. *Addison v. Sujette* (S. C.) 27 S. E. 631, 634.

WITHOUT THE WRITTEN CONTRACT.

The words "without the written consent," in a contract for farming lands on shares, providing that none of the products of the farm shall be sold or removed until a division thereof, without the written consent of the owner of the farm, do not refer to a division of what may be produced, but simply prohibit a removal of the products or produce from the premises before they have been divided, unless the owner shall have consented in writing. *Smith v. Roberts*, 43 Minn. 342, 343, 46 N. W. 836.

WITNESS.

See "Adverse Witness"; "Attesting Witness"; "Competent Witness"; "County Witnesses"; "Credible Witness"; "Disinterested Witness"; "Nonresident Witness"; "Prosecuting Witness"; "State Witness."

Expert witness, see "Expert."

A witness is one who has knowledge of a fact. *State v. Desforages*, 17 South. 811, 820, 47 La. Ann. 1167 (citing *Webst. Dict.*).

A witness is one who has knowledge of a fact or occurrence sufficient to testify in respect to it. In the case of a will, a witness must have knowledge that the paper is a will by the declaration of the testator; that it has been signed by either seeing the signature written, or by seeing the signature with an accompanying acknowledgment by the testator that it is his signature. *In re Losee's Will*, 34 N. Y. Supp. 1120, 1121, 18 Misc. Rep. 298.

"Witness," in its strict legal sense, means one who gives evidence in a cause before a court. *Barker v. Colt* (Conn.) 1 Root. 224, 225.

A witness is one, who being sworn or affirmed according to law, deposes as to his knowledge of facts in issue between the parties in the case. 1 Bouv. Law Dict. 658. Johnson defined the word as "one who gives testimony." Richardson defines it as "one who witteth or knows; one who tells what he knows, sees, or has seen; to give evidence or testimony." The word "witness" is a most general term, including all persons from whose lips testimony is extracted to be used in any judicial proceeding. *Bliss v. Shuman*, 47 Me. 248, 251, 252.

A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit. Code Civ. Proc. Cal. 1903, § 1878; Ann. Codes & St. Or. 1901, § 721; Gen. St. Minn. 1894, § 5657; *People v. Lem Deo*, 64 Pac. 265, 266, 132 Cal. 199.

Affiant or deponent.

The word "witness" embraces deponents, as the term is used with us, and affiants equally with persons delivering testimony to a jury. The affiant or deponent is always a witness, but a witness is not necessarily an affiant or deponent. *Bliss v. Shuman*, 47 Me. 248, 251, 252.

Documentary evidence.

The word "witness," as used in Code 1873, § 4421, providing that no witness can be examined in support of an indictment who shall not be examined by the grand jury, unless written notice be given before the trial, refers to a person, and not to an inanimate object or thing. The signature of defendant to the application for a continuance is not a witness, therefore, and may be used as a standard of comparison. *State v. Farrington*, 57 N. W. 606, 609, 90 Iowa, 673.

Legal evidence is not confined to the human voice or oral testimony, but includes every tangible object capable of making a truthful statement, such evidence being roughly classified as "documentary evidence." In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent—that is, must be deemed competent to make a truthful statement—and in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony; and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency. *Curtis v. Bradley*, 31 Atl. 591, 594, 65 Conn. 99.

Evidence synonymous.

"Witnesses," in a technical sense, are persons sworn to testify, or offered to testify, in a cause. But in Act April 10, 1818, § 41, c. 90, § 18, requiring a justice, after an appeal has been made from his court to the court of common pleas, to return to that court the proceedings before him, and, among other things, the names of the witnesses sworn and examined and the names of those offered and rejected, the expression is used in a more comprehensive sense, and as synonymous with "evidence." The object of the statute is to confine the parties to the same evidence examined before the justice, with the single exception of testimony offered and improperly excluded by the justice. *McCheeney v. Lansing* (N. Y.) 18 Johns. 388, 389.

Identification of person.

Within the meaning of the Constitution declaring that no person shall be compelled in any criminal case to be a "witness against himself," these words would not include the compelling of the party to stand up during the trial for identification by one of the witnesses. *People v. Goldenson*, 19 Pac. 161, 170, 76 Cal. 328.

Party.

The word "witness," as used in Code Civ. Proc. § 2980, giving a justice court power to issue commissions to take the deposition of a witness, includes a party to the action. *Murphy v. Sullivan*, 77 N. Y. Supp. 950, 951.

Person summoned merely.

Abbott's Law Dictionary defines the word "witness" as a person who, being present before a court, magistrate, or examining officer, orally declares what he has seen or heard or done relative to a matter in question. The word as used in our statutes embraces more than simply those who actually testify, as is manifest from the reading of the sections, Rev. St. § 1301, providing, "all witnesses in civil cases shall be allowed the following fees, etc.," and section 1302 providing, "witnesses attending under recognition or subpoena issued by order of the prosecuting attorney or defendant," etc., and section 1303 reading, "each person summoned as a witness," etc. There would seem to be no doubt that in each of these sections there is included in the word "witness" each person either subpoenaed for the purpose of examination, or appearing to testify, whether actually examined or not. *Pennsylvania Fire Ins. Co. v. Carnahan*, 10 O. C. D. 225, 226.

Code Cr. Proc. art. 636, subd. 6, provides that a witness in the case is obnoxious to challenge for cause. Held, that a "witness" within the meaning of the statute is one who bears testimony or furnishes evidence

or proof, and not one who has been merely summoned to attend as a witness. *Seals v. State*, 32 S. W. 545, 35 Tex. Cr. R. 138.

Prosecutor distinguished.

A prosecutor is one who proffers an accusation against a party whom he suspects to be guilty. The party who appears in response to a subpoena is not a prosecutor, but only a witness. *State v. Millain*, 3 Nev. 409.

As witness duly sworn.

The word "witness," in Pub. Laws, c. 816, § 11, providing that any licensee may be summoned before the commissioners in certain instances, "when he and the witnesses for and against him may be heard," means a witness duly sworn. *Board of License Com'rs v. O'Connor*, 17 R. I. 40, 41, 19 Atl. 1080, 1081.

WITNESS FEES.

As costs, see "Cost."

WITTINGLY.

Webster defines the word "wittingly," as "knowingly, with knowledge, by design." As used in Gen. St. 1875, p. 489, § 5, giving a right of action against one who "shall wittingly and unlawfully throw down or leave open any bars, gate or fence," it means with knowledge and by design, excluding only cases which are the result of accident or forgetfulness, and including cases where one throws down another's fence through an erroneous belief that it obstructs his right of way. *Osborne v. Warren*, 44 Conn. 357, 359.

Willingly distinguished.

"Wittingly" and "willingly" are not synonymous words, and do not convey the same idea. The one relates to the wit or understanding, and means knowingly or designedly, while the other relates to the will, and means freely or voluntarily. *Harrington v. State*, 54 Miss. 490, 493.

WOE

The word "woe" is defined in the Century Dictionary as follows: "Grief, sorrow, misery, heavy calamity." As used in the Old and New Testaments, it is used sometimes as prophetic of calamity or affliction, and sometimes as denunciatory. A letter directing a person to deposit a sum of money in a certain place, and stating that "should you fail to comply with our request, woe be unto you and yours," does not contain a sufficient threat upon which to predicate an information under Rev. Cr. Code, art. 966,

making it criminal to send a letter threatening to kill or injure the person of another. *Hanson v. State*, 34 S. W. 929, 35 Tex. Cr. R. 593.

WOMAN.

See "Bad Girl or Woman."

Any woman, see "Any."

The word "woman," within St. 1874, c. 274, § 2, enacting that any woman of the age of 21 years who resides at any place in the state for five years without receiving relief as a pauper shall thereby gain a settlement in such place, denotes only an unmarried woman. *City of Somerville v. City of Boston*, 120 Mass. 574, 575.

In *Myers v. State*, 84 Ala. 11, 4 South. 291, it was held that the words "female" and "woman" were identical in meaning. *Jackson v. State*, 34 South. 611, 137 Ala. 80.

"Woman," as used in Ky. St. c. 36, § 1158, making unlawful taking any woman against her will, with intent to have carnal knowledge with her, a crime, is used generically, and embraces every female of the human race. It includes a girl of 12 years. *Couch v. Commonwealth*, 29 S. W. 29, 16 Ky. Law Rep. 477.

A "woman" is a female who has passed the age of puberty. Before that time she is a child. She may thus become a woman before attaining her majority. *Blackburn v. State*, 22 Ohio St. 102, 110.

The word "woman" or "women," as used in the statutory provisions relating to police matrons, shall mean any person or persons of the female sex. Rev. Laws Mass. 1902, p. 944, c. 108, § 35; Comp. Laws Mich. 1897, § 3497.

The expression "women," as used in the act relating to charities and charitable and reformatory institutions, means female persons of 18 years of age and upward. Gen. St. Kan. 1901, § 6650.

The term "woman," as used in all laws relative to the employment of labor, shall mean a woman 18 years of age or over. Rev. Laws Mass. 1902, p. 917, c. 103, § 8.

The expression "woman," as used in the article relating to factories, means a woman of the age of 18 years and upward. Rev. St. Mo. 1899, § 10,104.

The word "woman," as used in the Penal Code, is used to signify a female person of any age. Pen. Code Tex. 1895, art. 21.

As citizen.

See "Citizen."

WON.

Gen. St. c. 254, § 13, making a person who shall receive any "money or property won upon any bet or wager" liable in assumption to the person losing the same, does not include money paid to hire or procure another to make a bet or wager. *Johnson v. Ferris*, 49 N. H. 66, 67.

Pub. St. c. 246, § 16, providing that all bonds, notes, judgments, mortgages, deeds, or other securities, as well as promises given or made for "money won at any game," shall be utterly void, will be construed to include money won by betting on the game, as well as money won by playing it. *McGrath v. Kennedy*, 2 Atl. 438, 439, 15 R. I. 209.

WOOD.

See "Soft Wood."

"Wood," in vegetable anatomy, is that more or less hard and compact substance which makes up the bulk of the trunk and branches of a tree or shrub, and is concealed from view by the bark. When cut transversely, the wood is found to consist of numerous concentric layers, very distinct in the fir, and in trees of cold or temperate countries in general; less so in those appropriated to a tropical climate. *Patterson v. McCausland* (Md.) 3 Bland, 69, 75 (citing *Rees' Cyclo. v. "Wood,"* in "Vegetable Anatomy").

One definition of the word "wood" is the hard substance of a tree or shrub as cut for use. This is its most common meaning. The old maxim is, "Arbor dum crescit, lignum cum crescere nescit"—a tree while it grows, wood when it cannot grow—that is, when it is cut down. *Darling v. Clement*, 37 Atl. 779, 780, 69 Vt. 292.

In Acts 1868, c. 448, providing that no person shall throw into the Penobscot river any slab, board, or lath edgings, or "refuse wood," or timber of any sort, "wood" is used in its generic sense as the substance of trees or of the logs to be manufactured, and does not mean trees cut or sawed for fuel. *State v. Howard*, 72 Me. 459, 465. It does not include wood coming within the description of "timber." *Per Tenterden, J. Leigh v. Heald*, 1 Barn. & Adol. 622, 623.

Lumber and bark.

"Wood," as used in a deed providing that, if the grantee should cut from the land other wood than was necessary for sugar wood and for the making of fences on the premises, the avails thereof should be applied on the purchase note, comprehends lumber and bark, as it was used in a generic sense, including all the growing trees on the lot. *Hutchinson v. Ford*, 18 Atl. 1044, 62 Vt. 97.

Soil.

"Under a grant of 'wood,' used as synonymous with the Latin word 'boscus,' not only the trees, but the soil upon which they are, will pass; and where there was a lease of a manor, 'always excepting the wood and underwood,' it was held that the soil itself was excepted; but where the grant or exception is of timber trees, no soil passes or is excepted, save so much as is necessary for the nutriment of the granted trees." *Boults v. Mitchell*, 15 Pa. 371, 380 (quoting *Whistler v. Parslow*, Cro. Jac. 487; *Leigh v. Heald*, 1 Barn. & Adol. 622).

WOOD ALCOHOL.

"Wood alcohol" is obtained by the destructive distillation of wood, and is ranked as a narcotic poison, and if drank either pure, or adulterated or reduced many times its weight in water, other alcohol, or fluid, it kills the person drinking it. It was not intended to be used as a beverage, and is not included in the term "intoxicating liquors," as used in V. S. c. 187, prohibiting the sale of intoxicating liquor. *Fabor v. Green*, 47 Atl. 391, 72 Vt. 117.

WOOD HOUSE.

A policy of insurance on a dwelling house and "wood house" covers a building built at one time with a single frame and roof, and designed for one building, for a carriage house and wood house, of which the woodroom constitutes two-thirds, and is separated from the carriage room by a loose partition extending to the eaves on one side and halfway to the roof on the other. *White v. Mutual Fire Assur. Co.*, 74 Mass. (8 Gray) 566, 571.

WOOD LEAVE.

"Wood leave" is the right to cut down, remove, and use standing timber. *Osborne v. O'Reilly*, 9 Atl. 209, 212, 42 N. J. Eq. (15 Stew.) 467.

WOOD PULP.

Wood macerated with water against stones revolving vertically until it is converted into a soft coherent mass is commercially known as "wood pulp." *Goldman v. United States* (U. S.) 87 Fed. 193, 194.

WOODEN BUILDING.

A "wooden building," as used in an ordinance prohibiting the erection of a wooden building within a city, means a building constructed entirely of wood, and hence one composed in part of brick and in part of wood is not within the ordinance. *Stewart v. Commonwealth* (Pa.) 10 Watts, 306, 309.

WOODLAND.

Though in 1756, under a devise of woodland, 6 per cent. was allowed for roads, a devise in 1814 of 50 acres of the adjoining woodland carries but 50 acres, strict measure. *Blaine's Lessee v. Chambers* (Pa.) 1 Serg. & R. 169, 171.

"Woodland" is not synonymous with, and does not mean one and the same thing with, "prairie land." *Buxton v. St. Louis & L. M. R. R. Co.*, 58 Mo. 55, 56.

All lands now owned or controlled or which may be hereafter owned or controlled by the state, and which are now or shall hereafter be covered with forest growth or devoted to forest uses, are, for the purpose of the act relating to woodlands and forestry, declared to be "woodlands." *Mills' Ann. St. Colo.* 1891, § 1997.

WOODS.

Within the meaning of a statute imposing a penalty of \$50 for setting fire to "woods," the term "woods" means forest lands in their natural state, and is used in contradistinction to lands cleared and inclosed for cultivation. It does not include the burning of log heaps in one's own inclosed field. *Averitt v. Murrell*, 49 N. C. 322, 323.

An old field which had formerly been cleared, inclosed, and cultivated, but the fences surrounding which were down, and the land, in the common parlance of the county, said to be "turned out," and grown up in broom sedge and pine bushes, some of which was as tall as a man's waist and others as high as his head, was "woods" within the meaning of a statute imposing a penalty for setting fire to woods, etc. Such old fields are as properly contradistinguished from lands cleared and inclosed for cultivation as forest lands in their natural state. Each is a species of woods or woodland, and, as the mischief likely to result from burning the one is as great as that of the other, the statute never could have intended to make any difference between them. The word "woods" in the statute is not confined to lands never before cleared, inclosed, or cultivated. *Hall v. Cranford*, 50 N. C. 3, 5.

A field grown over with broom sedge and wire grass, surrounded by an old fence, and used as a pasture, cannot be construed to be "woods" within the meaning of Bat. Rev. c. 13, § 1, forbidding any one from setting fire to his woods unless two days' written notice is first given to all persons owning adjoining land. *Achenbach v. Johnston*, 84 N. C. 264, 265.

WOOL.

"Wools on the skin," as used in Tariff Act Oct. 1, 1890, c. 1244, par. 387, 28 Stat.

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595, do not include raw Angora goatskins with the hair on, being for all commercial purposes undressed fur skins, it being unprofitable to separate the hair from the skin and to use the hair as wool. *United States v. Bennet* (U. S.) 66 Fed. 299, 18 C. C. A. 446.

WOOL ELASTIC WEBBING.

"Wool elastic webbing" is webbing made of India rubber, wool, and cotton, as distinguished from union elastic webbing and cotton elastic webbing, and is used for gores and gussets in the manufacture of Congress boots, and without the rubber would not be adaptable to that use. In its manufacture it is not wrought by hand or braided by machinery, but is woven in a loom. *Beard v. Nichols*, 7 Sup. Ct. 548, 120 U. S. 260, 30 L. Ed. 652.

WOOL GREASE.

"Wool grease" is of a brown color and a viscous consistency. It is extracted from wool washings, and consists of cholesterin and other fats and volatile fatty acids. It contains from 15 to 30 per cent. of potash, and emits a rank, disagreeable odor. It resembles molasses and tar mixed together, and is imported in return petroleum barrels. As used in Tariff Act Oct. 1, 1890, c. 1244, par. 316, 26 Stat. 588, it does not include lanolin. *Movius v. United States* (U. S.) 66 Fed. 734, 735.

"Wool grease" is the recovered grease which is excreted by a sheep, and is recovered from the suds after the wool has been scoured. It is commonly brown, though sometimes of a lighter color. It has somewhat the consistency of molasses or soft lard. *United States v. Leonard* (U. S.) 100 Fed. 288.

"Brown grease," as used in Customs Act 1897, par. 279, is equivalent to what is known commercially as "wool grease." Wool fat is the natural grease contained in sheep's wool. In the course of preparing the raw wool for spinning, this grease is removed by means of dilute soap solutions or by extraction with volatile solvents. The suds from wool scouring are collected in large tanks, and by acidulating with mineral acids brown grease is obtained. *United States v. Leonard* (U. S.) 108 Fed. 42, 43, 47 C. C. A. 181.

WOOL MILLS.

Property insured as part of a manufactory of wool fabrics—carpets made of wool—is properly within the designation "wool mills," as used in a list of special rates. *Smith v. Mechanics' & Traders' Fire Ins. Co.*, 32 N. Y. 399, 403.

WOOL SORTER'S DISEASE.

The term "wool sorter's disease" has been used to designate the disease commonly

known as "malignant pustule," "charbon," or "anthrax," because it happens among people that handle wools and hides, such as tanners, butchers, and herdsmen, as those people are engaged in business where they come in contact with that sort of thing. It is a disease caused by the infliction upon the body of putrid animal matter containing poisonous bacillus anthrax. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 804, 9 L. R. A. 617, 20 Am. St. Rep. 748.

WOOL WASTE.

As employed in the tariff acts imposing a duty on wool waste, etc., "wool waste" signifies such parts or particles of wool as are thrown off in the several processes of manufacture of wool in wool or worsted fabrics, and does not include wool which has been prepared for spinning and artificially and intentionally made into a form like such parts or particles, even if sometimes called "waste" by the trade. *United States v. Patton* (U. S.) 46 Fed. 461, 464.

WOOLEN.

"Woollen flannel sheet," as used in an indictment charging a defendant with stealing one white "woolen flannel sheet," means a sheet composed of wool, and not one part cotton and part wool, called a "cotton and woollen blanket." *Alkenbrack v. People* (N. Y.) 1 Denio, 80.

The term, "woolen goods," within the meaning of Tariff Act Aug. 28, 1894, c. 349, par. 297, 26 Stat. 531, suspending till January 1, 1895, the reduction of duties on such goods, includes mohair braids made of hair of the Angora goat. *Wolff v. United States* (U. S.) 113 Fed. 1001.

WORD.

See "Actionable Words"; "In a Word"; "In Words and Figures as Follows, To Wit"; "Precatory Words." All words, see "All."

A "word" is a combination of articulate sounds by which men communicate with each other. It must exist in speech before it can be signified in letters or characters. The impulses by which a word extends itself from the usage of one people to that of another, the laws of comparative philology by which a transliteration—when the elemental sounds of one language are signified by written signs unknown in the other—is explained and held to be accurate, and the arrangement of English letters which reproduce the word, are subject to the exclusive dominion of no man. *Dadirrian v. Yacubian* (U. S.) 72 Fed. 1010, 1013.

"Words" are the common signs that mankind make use of to declare their inten-

tions to one another, and, when the words of a man express his meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation. *Lake County v. Rollins*, 9 Sup. Ct. 651, 653, 130 U. S. 662, 32 L. Ed. 1060.

Words are merely the symbols parties to a contract employ to manifest their purpose, that it may be carried into execution. *Morrison v. Baechtold*, 48 Atl. 926, 930, 93 Md. 319.

Where the meaning of words and phrases has been ascertained in a statute, they are to be construed in the same sense when used in a subsequent statute. *People v. Liscomb* (N. Y.) 8 Hun, 760, 769, 770.

Figures and letters.

In enrolling a summons in a plea in abatement, it was said to be in the "words following," and it was objected to the plea that the summons as so enrolled contained words, figures, and letters instead of merely words. The court said: "The allegation in the plea is in accordance with the general forms in such cases, and, we think, sufficient." *Smith v. Butler*, 25 N. H. (5 Post.) 521, 524.

Written or printed words.

"Words," in 2 Hill's Code, p. 648, § 17, providing that a libel is a defamation of a person made public by any words, etc., means either written or printed words, and does not include words spoken orally. *State v. McArthur*, 32 Pac. 367, 368, 5 Wash. 558.

WORDS OF ART.

The term "head of water," as occurring in a contract calling for water power to be used in propelling a mill, being a technical term in hydraulics, constitutes "words of art," and as such may be properly explained by an expert witness. *Cargill v. Thompson*, 59 N. W. 638, 640, 57 Minn. 534.

WORDS OF CONDITION.

In 4 Kent, 126, Chancellor Kent defines a distinction between "words of limitation" and "condition" as follows: "Words of limitations mark the period which is to determine the estate, but when words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation, the one specifies the utmost time of continuance, and the other marks some event which, if it takes place in the course of that time, will defeat the estate." *Summit v. Yount*, 9 N. E. 582, 583, 109 Ind. 506; *Ludlow v. New York & H. R. Co.* (N. Y.) 12 Barb. 440, 443.

WORDS OF DESCRIPTION.

As warranty, see "Warranty."

WORDS OF LIKE IMPORT.

Under a statute (Laws Ky. § 1540) providing that no nuncupative will shall be established when the value exceeds ten pounds, unless it be proved by two witnesses that the testator called on some person present to take notice or bear testimony that such was his will, or "words of like import," it was held that if the attention of the witnesses was so called to the subject by any form of words as to enable them to prove such purpose and intention, as well as the terms of the will, clearly and unequivocally, the requisitions of the statute embraced in the terms "or words of like import" were substantially complied with. *Portwood v. Hunter*, 46 Ky. (6 B. Mon.) 538, 539.

WORDS OF LIMITATION.

Words of condition distinguished, see "Words of Condition."

"Words of limitation" are such as do not give the estate imported by them originally to the heirs, etc., described, but only extend the ancestor's estate to an estate of inheritance descendible to the heirs described. *Ball v. Payne* (Va.) 6 Rand. 73, 75.

Words of limitation mark the period which is to determine the estate. It specifies the utmost time of continuance of the estate. In a devise of land by a husband to his wife so long as she remains his widow, the words "so long as she remains his widow" are used as "words of limitation," marking the duration of the estate, and not "words of condition." *Summit v. Yount*, 9 N. E. 582, 583, 109 Ind. 506.

WORDS OF PURCHASE.

"Words of purchase" are such as give the estate originally to the heirs, etc., and not through the inheritance of, or by descent from, the ancestor. *Ball v. Payne* (Va.) 6 Rand. 73, 75.

WORDS TO THAT EFFECT.

See "Effect."

WORK.

See "Additional Work"; "In Work"; "Iron Works"; "New Work"; "Ordinary Work"; "Team Work."
All work within the county, see "All."
Working the quarry, see "Quarry."

"Work," as used in Acts 23d Gen. Assem. c. 14, § 6, providing for the issue of bonds in payment of street improvements from time to time as the work progresses, will be held to designate labor, or the product of labor and material combined, required to

make the improvement, as separate and distinct from the acts of the agents of the city preliminary to, and which terminate in, the formal execution of the contract. *Eagle Mfg. Co. v. City of Davenport*, 70 N. W. 707, 708, 101 Iowa, 493, 38 L. R. A. 480.

A city charter providing that, whenever any of the above-mentioned work (referring to street improvements) shall have been fully completed under authority of the ordinance, the city engineer or other officer having charge of the "work" shall compute the cost thereof and assess it at a special tax against the adjoining property fronting on the improvement, includes all the work done under the contract, and hence the assessment could not be made and the special tax bills enforced until the entire contract was completed. *City of St. Louis, to the Use of McGrath, v. Clemens*, 49 Mo. 552, 555.

The word "work," as used in a personal injury action, permitting the plaintiff to prove what was the work of brakemen, meant nothing else than "duty," in which sense the words are convertible terms and mean the same thing. *Chicago & A. R. Co. v. Bragonier*, 7 N. E. 688, 693, 119 Ill. 51.

"Work," as used in Pen. Code, § 1039, providing that a misdemeanor is punishable by a fine not to exceed \$1,000, "imprisonment not to exceed six months, to work in the chain-gang on the public works, or such other works as the county authorities may employ the chain-gang," does not necessarily mean hard labor, and a sentence on a conviction under such section of the Code to work at hard labor is inappropriate. *Screen v. State*, 33 S. E. 393, 394, 107 Ga. 715.

"The word 'work' may comprehend all labor, whether corporeal or mental, but in its popular sense it is applied solely to bodily labor, or that in which such labor is the principal ingredient." It is so used in the provision of the New York City charter requiring the various departments to advertise for sealed proposals for contracts for all work involving an expenditure exceeding \$250; hence such provision does not apply to contracts for professional services. *People v. Flagg* (N. Y.) 5 Abb. Prac. 232, 235.

One who erects a shanty in which is put an illicit still, but who did not "work" in or about the distillery after the still was set up, does not come under U. S. Rev. St. § 3279, providing that "every person who works in any distillery" on which no sign is placed and kept shall be fined. *United States v. Burgess* (U. S.) 33 Fed. 833.

An application for insurance on a mill stated that no watch was kept in or about the building, but that the mill was examined "thirty minutes after work"; and to another question it was stated that the hours

of work extended from 5 o'clock a. m. to 8:30 p. m.; "sometimes extra work will be done in the night." Held, that the words "examined thirty minutes after work" related as well to the time succeeding the termination of "extra work" as the time at which the work was generally stopped in the evening, and hence assured was obligated to examine the building 30 minutes after the termination of such extra work, as well as after the general closing hour. *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 49 Mass (8 Metc.) 114, 125, 41 Am. Dec. 489.

"Work," within the meaning of a statute authorizing a municipal subscription to a railroad company, but requiring that corporate bonds shall not be delivered until an amount of work shall be done on the railroad in the town equal in value to the amount of the bonds, will be construed not as referring to earth work alone, but as embracing all that enters into the construction of the roadbed complete for cars. *Illinois Midland R. Co. v. Town of Barnett*, 85 Ill. 313, 316.

A contract to sell wheat, part of which was threshed and in the granary, and the remainder of which was in a course of preparation for the market, was a contract of sale within the meaning of the statute of frauds, rather than a contract for work and labor, though it was also agreed that the vendor should clean the wheat already threshed and thresh out the remainder, and within six days deliver the total amount. *Downs v. Ross* (N. Y.) 23 Wend. 270, 272.

The terms "work" and "working," as used in the chapter relating to road superintendents, includes the opening and laying out of new roads, widening, constructing, draining, repairing, and everything else that may be done in and about any road. *Rev. St. Tex.* 1895, art. 4784.

A power of attorney which, in consideration of a prescribed royalty, appoints a party sole agent for the purpose of "working and developing the business of said patents," does not authorize a sale of the patents. *Johnson R. Signal Co. v. Union Switch & Signal Co.* (U. S.) 59 Fed. 20, 23.

A power of attorney which, in consideration of a prescribed royalty, appointed a party sole agent to "work and develop" the business of such patents, does not give the agent power to grant an exclusive license which would transfer substantially the entire interest in the patent, but it does authorize him to grant nonexclusive licenses to manufacture and sell. *Union Switch & Signal Co. v. Johnson R. Signal Co.* (U. S.) 61 Fed. 940, 943, 10 C. C. A. 176.

In mechanic's lien laws.

The term "work," in a mechanic's lien statute authorizing liens for work, does not

include loss of time for men, or delay, risk, and inconvenience to contract work. *Lee v. Brayton*, 26 Atl. 256, 18 R. I. 232.

The word "work," as used in Gen. St. 1883, § 31, providing a lien for whoever shall do work or furnish material for the construction or repair of a building, includes labor of every kind, whether skilled or unskilled; and therefore a superintendent of the construction of a building performs work, and is therefore entitled to a lien therefor. *Fischer v. Hanna*, 47 Pac. 303, 309, 8 Colo. App. 471.

For the purpose of the act relating to mechanics' liens, the term "work" shall be deemed to include labor of every kind, whether skilled or unskilled. *Mills' Ann. St. Colo.* 1891, § 2867.

Same—Architect's services.

The statute giving all persons, who perform work for or about the construction of a building, a lien thereon for their services, cannot be construed to include the drawings and specifications for such building made by an architect. The drawing of plans or specifications of itself is not "work," within the meaning of the statutes, in the ordinary sense of the term. *Price v. Kirk* (Pa.) 13 Phila. 497, 498, 90 Pa. 47, 49.

Code, § 318, providing that a person who has done "work or labor" on a building or improved land may have a lien on the building and lot of land on which it is erected, should be construed to include the services of an architect in preparation of drawings, plans, and specifications for a building, and in superintending the erection thereof. *Hughes v. Torgerson*, 11 South. 209, 96 Ala. 346, 16 L. R. A. 600, 38 Am. St. Rep. 105.

"Work done," as used in Act June 15, 1836, giving a lien for work done or materials furnished for or about the construction of a building, means any work which contributed to the beauty, substance, and convenience of the edifice; and hence an architect making plans and drawings for a building, and who oversees and directs its erection, is entitled to a lien. *Bank of Pennsylvania v. Gries*, 35 Pa. (11 Casey) 423, 426.

In mining law.

"Work," within the meaning of a federal statute in reference to the assessment work requisite to hold a mine, includes work done outside of the claim, if done as a purpose or means of developing or prospecting the claim, as in the case of tunnels. *Harrington v. Chambers*, 1 Pac. 362, 3 Utah, 94.

A power to "manage and work" a mine will not be held to include power to mortgage it, and is inconsistent with the idea of imposing a personal charge on the principal, except for such expenses as may be

incurred in its management. *Golinsky v. Allison*, 46 Pac. 295, 296, 114 Cal. 458.

"Work," as used in Const. Choctaw Nation, art. 7, § 18, providing that any citizen of the nation who may find any mine shall have the exclusive right to work the same, means that the person who finds the mineral may extract it from the earth—may mine it. *McCurtain v. Grady*, 38 S. W. 65, 70, 1 Ind. T. 107.

A covenant in a lease of a mine to "work the mine" is to be construed to mean work the mine during the term of lease if minerals remain therein, although it cannot be profitably worked, but it cannot be construed to require a working thereof if the mine becomes entirely exhausted. *Walker v. Tucker*, 70 Ill. 527, 542.

"Work," within the meaning of a statute requiring a certain amount of work on a mining claim in order to hold it, does not include the services of a watchman looking after buildings erected to work a mine, though the mine is idle at the time. Not all expenditures made with a view of working a mine would be considered work expended upon the mine; for instance, work done at a distance from the mine in the construction of a mill. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 45 Pac. 1047, 1049, 114 Cal. 100.

The term "work or labor," in a statute giving a lien for work and labor in mines, includes the services of the foreman of a mine, who is employed to boss the men at work in the mine, keep their time, and give them orders for their pay. *Capron v. Strout*, 11 Nev. 304, 310.

Sess. Laws 1872, p. 147, § 4, which declares that all miners, laborers, and others who work or labor, to the amount of \$25 or more, in or upon any mine lode or deposit, shall have a lien, etc., includes the work of the superintendent in planning and superintending development work upon the mines, and in planning and supervising the erection of the mills and machinery, but it would not include the work of such superintendent in keeping the books and disbursing the funds of the mining company. *Rara Avis G. & S. Mining Co. v. Bouscher*, 12 Pac. 433, 434, 9 Colo. 385.

In Sunday laws.

In construing a statute declaring that "there shall be no servile labor or working on the Lord's Day, except works of necessity or charity," the court said: "I consider that this provision treats 'servile labor' as one distinct class of what is forbidden, and 'working,' without the adjective, as another; that it has adopted the latter phrase as the most comprehensive that the language can supply to cover the action and employment of

mind or body in the pursuits of business." *Campbell v. International Assur. Soc. of London*, 17 N. Y. Super. Ct. (4 Bosw.) 298, 316.

The terms "traveling," "servile labor," or "working," within the meaning of a statute prohibiting such acts on a Sabbath, do not include the act of arbitrators in making an award. *Story v. Elliot* (N. Y.) 8 Cow. 27, 30, 18 Am. Dec. 423.

The hiring of a horse on Sunday to attend a funeral is not a violation of a statute prohibiting work and business, except works of necessity or charity, on Sunday. *Horne v. Meakin*, 115 Mass. 326, 331.

Rev. St. c. 118, § 1, declares that no person shall do any "work, business, or labor of his secular calling, to the disturbance of others, on the first day of the week, commonly called the 'Lord's Day.'" Held, that the phrase "work, business, or labor of his secular calling" meant any secular labor, whether within one's regular, ordinary calling or not. *George v. George*, 47 N. H. 27, 38.

Same—Giving promissory note.

"Labor, business, or work," within the meaning of the statute prohibiting any labor, business, or work, except works of necessity and charity, on the Lord's Day, includes the giving of a promissory note on Sunday in consideration of articles purchased on that day. *Towle v. Larrabee*, 26 Me. (13 Shep.) 464, 466.

The making and delivery, on a secular day, of a promissory note dated and to take effect on a subsequent Lord's Day, is not "work or labor" prohibited by the Massachusetts Statutes for the observance of the Lord's Day. *Stacy v. Kemp*, 97 Mass. 166, 168.

WORK EVENLY.

A warranty that cattle will work evenly on the yoke is broken if they will not so work when driven by a person of ordinary skill in the management of oxen. *Woodruff v. Weeks*, 28 Conn. 328, 329.

WORK HORSE.

"Work horse," as used in the statutes exempting work horses and work beasts from execution, means "an animal of the horse kind which may be rendered fit for service, as well as one of mature age and in actual use." It is synonymous with "work beasts" as used in the section. *Winfrey v. Zimmerman*, 71 Ky. (8 Bush) 587, 588.

Code, § 2462, exempting from levy and sale a "work horse" belonging to the debtor, means one that "performs the common

drudgery of the homestead, as to haul wood, to draw the plow, to carry the family to church, etc., either under the saddle or in traces. It is not necessary that he shall have performed this service, if he has performed a part of it, and is intended as such a drudge. If the only horse belonging to the head of a family was used to ride to mill, to carry the children to school, or any other equally necessary or convenient service, it is a work horse. If a horse is kept in the prosecution of a business or livelihood outside of the comforts, the wants, and requirements of the family and of its several members, it is not a work horse. The statute does not withhold its protection unless the chief or main employment of the horse shall be in the service of the family; nor is it necessary that any service shall have been rendered to the family if there be a bona fide intention that the horse shall be put to such use." *Allman v. Gann*, 29 Ala. 240, 242.

A stallion kept by a farmer for breeding purposes is not exempt from forced sale under Code, § 3072, as one of a team by which the farmer habitually earns his living. *Smith v. Dayton*, 62 N. W. 650, 653, 94 Iowa, 102.

WORK IN PROGRESS.

See "In Progress."

WORK OF DRAINAGE.

The expression "work of drainage," as used in Act Feb. 14, 1871, § 9, relating to the draining and reclaiming of certain swamp lands, providing that all property, not money, so received, should be held in trust for the payment of a certain company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage, are not restricted to the property required for the work of drainage under the system of drainage contemplated by the act, so as to leave all property not in accordance with that system to be held in trust for the payment of the debts of the company named. *Peake v. City of New Orleans* (U. S.) 60 Fed. 127, 130, 8 C. C. A. 516.

WORK OF NECESSITY.

See "Necessity."

WORK OXEN.

The use of the word "work" in a statute exempting a yoke of work oxen does not operate to give the statute a different meaning than if it had been merely an exemption of a yoke of oxen. The exemption covers cattle which are being kept and intended by the owner for oxen, though only two years old and having never been worked, except yoked together. *Nelson v. Fightmaster*, 44 Pac. 213, 215, 4 Okl. 33.

WORK WELL.

The term "work well," in a contract warranting a harvest machine to work well, includes the draft of the machine, and a side draft or too great a draft may constitute a breach thereof. *McCormick Harvesting Mach. Co. v. Russell*, 53 N. W. 310, 311, 86 Iowa, 556.

WORKED.

The term "worked," as applied to marble, implies something more than the sawing of it into slabs. It implies that the thing is fashioned or prepared for some general or particular use. *Bancroft v. Peters*, 4 Mich. 619, 625.

The term "worked," as used in Rev. St. p. 520, providing that every public highway laid out, that shall not be opened and worked within six years after being laid out, shall cease to be a road, does not require the road to be worked in every part, but it must be worked sufficiently to be passable for public travel. *Beckwith v. Whalen*, 70 N. Y. 430, 435.

WORKHOUSE.

Workhouses and jails, being both used for the purpose of penal confinement, are not unfrequently regarded as identical, but they are entirely distinct in their origin, object, and government. Workhouses were originally designed for the relief and employment of the poor. They were maintained by the parishes and under the charge of the church wardens and overseers of the poor of the parish. *Jac. Law Dict. "Poor."* The first public institution of workhouses in the state of New Jersey, excepting those created by special acts for particular towns, was under the act of 1790. They were authorized to be built by the board of chosen freeholders of the several counties, and put under their superintendence and government. They were made a place of confinement for persons sentenced to imprisonment at hard labor, for disorderly persons, and for disobedient and intemperate slaves or servants. *State v. Ellis*, 26 N. J. Law (2 Dutch.) 219, 220.

As used in Sess. Laws 1868, c. 26, subc. 4, § 3, subsec. 36, authorizing the city to provide for punishment of offenders against city ordinances by imprisonment in any workhouse established by the city, the word "workhouse" has a well-defined, popular significance. It is a place or prison where persons convicted of minor offenses and misdemeanors may be confined and kept at labor. Hence an ordinance establishing a House of the Good Shepherd as a workhouse for female prisoners is void. *Farmer v. City of St. Paul*, 67 N. W. 990, 992, 65 Minn. 176, 83 L. R. A. 199.

A workhouse is a "public building," within the meaning of St. 34 Geo. III, c. 98, providing that public buildings shall be free from all parliamentary and parochial taxes, etc. *Justices of Bedfordshire v. Bedford Improvement Com'rs*, 14 Eng. Law & Eq. 424, 425.

WORKING CAPITAL.

The working capital of a corporation is a sum or fund to be devoted to the development of the corporate property, and usually raised by setting aside for sale, at some established price, a portion of the capital stock. *Kohler v. Agassiz*, 33 Pac. 741, 743, 99 Cal. 9.

WORKING CATTLE.

"Working cattle" is synonymous with "steers." *Wessels v. Territory*, 1 Kan. (Dass. Ed.) 525, 527.

A statute exempting from attachment one pair of working cattle includes a bull used by the owner as a beast of burden, when the owner has no other working cattle. *Bowzey v. Newbegin*, 48 Me. 410.

WORKING CONTRACTS.

The term "working contracts" is sometimes used to designate what is properly known as a "building contract"—that is, a contract for furnishing work or materials in erecting buildings, etc., which may become the basis of a mechanic's lien. *Carey-Lombard Lumber Co. v. Jones*, 58 N. E. 847, 849, 187 Ill. 203.

WORKING DAYS.

See "Weather Working Days."

The expression "working days" has "in commerce and jurisprudence a settled and definite meaning. It means days as they succeed each other, exclusive of Sundays and holidays." When such term is used in a charter party allowing so many working days for loading, it excludes holidays and Sundays. *Pedersen v. Eugster* (U. S.) 14 Fed. 422; *Field v. Chase* (N. Y.) *Lalor's Supp.* 50, 52.

The term "working days," as ordinarily used in charter parties, excludes Sundays and holidays, but not rainy nor stormy days. *Hagerman v. Norton* (U. S.) 105 Fed. 996, 997, 46 C. C. A. 1 (citing *Wood v. Keyser* [U. S.] 84 Fed. 688, 692); *Sorensen v. Keyser* (U. S.) 52 Fed. 163, 164, 2 C. C. A. 650; *The Cyprus* (U. S.) 20 Fed. 144, 145.

"Working days," within the usage of the salt trade, in reference to the number of working days to be allowed to unload a cargo of salt, does not include rainy days, as salt is not removable without damage during

such weather. *Houge v. Woodruff* (U. S.) 19 Fed. 186, 188.

WORKING HOURS.

A charter party providing that payment of hire should cease for any damage that prevents the working of the steamer for more than 24 "working hours" means those hours during which work was ordinarily done about the business to which the clause relates, and, if it was the usual practice of the port to work day and night consecutively during good weather, the words should be construed to mean consecutive hours during such weather. *The Principia* (U. S.) 34 Fed. 667, 668.

A contract which gave to one party the right to draw through the gate of a reservoir dam, at any and all times during "working hours," a certain amount of water per second, would entitle the party to draw water during the night if required for the purpose of running his mill. *Phoenix Cotton Mfg. Co. v. Hazen*, 118 Mass. 350, 354.

A contract between the separate owners of mills and of a dam and reservoir, built for the purpose of supplying water to the mills, providing that one of them might have the right to use water from the reservoir, but that he should not draw therefrom at other times than "during working hours," meant the usual working hours of the mill on that stream; and the party, having subsequently changed the mill from a cotton mill to a paper mill, which ran day and night, was not entitled to use water during the night. *Binney v. Phoenix Cotton Mfg. Co.*, 128 Mass. 496, 499.

WORKING LAY DAYS.

In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge of a vessel (*Brown v. Johnson*, 10 Mees. & W. 331); but, where a contract specifies "working lay days," Sundays and holidays are excluded in computation (2 Bouv. Law Dict. 663). *Brooks v. Minturn*, 1 Cal. 481, 483.

WORKING TEAM.

"Working team," as used in a statute exempting the working team of a debtor from execution, etc., includes a horse or other animal trained and used by the judgment debtor for his work or service, without its being associated with any harness or trappings or other articles of property. *Finnin v. Malloy*, 33 N. Y. Super. Ct. (1 Jones & S.) 382, 392.

WORKING TOOLS.

Laws 1859, p. 343, c. 134, exempting "working tools" from execution, means such

tools as are necessary to the debtor's business, and without the possession of which he is powerless to carry on his calling. As thus construed, the term "working tools" includes a net and boat, the property of a fisherman, who used such boat and net to support his family. *Sammis v. Smith* (N. Y.) 1 Thomp. & C. 444, 446.

A threshing machine is not exempt from execution, under Act 1842, as a working tool. *Ford v. Johnson* (N. Y.) 34 Barb. 364, 365.

Pub. St. c. 209, § 4, exempting from attachment the "working tools of a debtor," meant only such utensils as the debtor is accustomed to use in manual work or labor in his usual occupation. It would not extend to a library of lawbooks. *In re Church*, 9 Atl. 761, 15 R. L. 245.

"Working tools and team," within the meaning of the statute exempting from execution the working tools and team of a debtor, includes a buggy wagon used by a physician in visiting his patients. *Van Buren v. Loper* (N. Y.) 29 Barb. 388, 389.

The term "working tools," in a statute exempting working tools from execution, does not ordinarily include a watch, but, when the employment of the debtor is such that a watch is necessary to the prosecution of the business by which he earns a livelihood, it is included within the meaning of the term. *Bitting v. Vandenburg* (N. Y.) 17 How. Prac. 80, 83. See, also, *Serven v. Lowerre*, 23 N. Y. Supp. 1052, 1058, 3 Misc. Rep. 113.

WORKINGMAN.

The Century Dictionary defines "workingman" as a laboring man or one who earns his living by manual labor. A bookkeeper is not a "workingman," within Laws 1897, c. 415, § 8, preferring the wages of workingmen of insolvent corporations. *Cochran v. A. S. Baker Co.*, 61 N. Y. Supp. 724, 30 Misc. Rep. 48.

"Workingmen," as used in Gen. St. p. 3678, §§ 1, 2, 5, enacting that associations of workingmen may adopt, for their protection, labels and trade-marks announcing that goods manufactured by members thereof are so manufactured, has a very broad significance—a significance perhaps broader than fairly belongs to it—and, conceding it to include all who work, whether with their hands or their minds, cannot be held to embrace partnerships, some of whose members contributed capital only, or corporations, engaged in manufacturing or trading. *Schmalz v. Wooley*, 39 Atl. 539, 542, 56 N. J. Eq. 649.

WORKINGS.

The term "workings," as used in the act relating to mines and mining, includes all

the excavated parts of a mine, those abandoned as well as the places actually at work. *P. & L. Dig. Laws Pa.* 1894, vol. 2, col. 3110, § 193.

WORKMAN.

See "Day Workman"; "No Workman."
See, also, "Workingman."

A "workman" is defined by Webster to be a man employed in labor, whether in tillage or manufacture; a worker; hence, especially, a skillful artificer or laborer. The Century Dictionary gives the definition as a man who is employed in mental labor, whether skilled or unskilled; a worker; a toiler; specifically, an artificer; a mechanic or artisan; a handicraftsman. *Bouvier* defines a "workman," generally, as "one who labors; one who is employed in some business for another"; and that is the meaning of the word in Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according to priority of payment out of bankruptcy estates to wages due workmen. *In re Scanlan* (U. S.) 97 Fed. 26, 27, 3 Am. Bankr. R. 202.

The essential idea conveyed by the word "workman," as commonly used, is that of a subordinate whose occupation has nothing to do with correspondence or books of account, but requires him to use his hands to a suitable degree in manufacturing, or building, or in similar pursuits. He may be skilled or unskilled; he may or may not be aided by tools or machinery; but he does not belong to the same class as the man that is neither making goods nor erecting buildings nor accomplishing similar results, but is engaged exclusively in the sale of a finished product. *In re Greenwald* (U. S.) 99 Fed. 705.

The words "workman, clerk, or servant," as used in Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing as to priority of payment of certain claims, must be construed to mean what they are popularly understood to mean, and do not include a claim based upon the use of building, ground, machinery, furnishings, and the labor of employés. *In re Rose* (U. S.) 1 Am. Bankr. R. 68, 76.

Contractor.

A person contracting to do a certain amount of work for a certain sum of money cannot recover a greater sum for the reason that he has worked over eight hours a day in performing such work. *Billingsley v. Marshall County Oom'rs*, 49 Pac. 329, 5 Kan. App. 435.

General manager or president.

Ordinarily a "workman" is understood to be one who labors; one who is employed

to do business for another; a laborer; one who is employed in labor. As used in Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according to priority of payment out of bankrupt estates to wages due to workmen, it doubtless means a workman laboring for some person who sustains to him the relation of an employer or master, and does not include the general manager of a mercantile corporation, who has supreme authority in managing and directing its daily business affairs, and who is also a stockholder and director. In re Grubbs-Wiley Grocery Co. (U. S.) 96 Fed. 183, 184.

The president of a business corporation, who has supreme authority in managing its affairs, and receives a salary of \$700 a year, is not a "workman, clerk, or servant," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], giving priority of payment out of bankrupt estates to wages due to such persons. In re Carolina Cooperage Co. (U. S.) 96 Fed. 950, 953, 3 Am. Bankr. R. 154.

Miner.

"Workman," as used in Hurd's Rev. St. 1899, p. 1167, requiring every owner, agent, or operator of coal mines to keep a supply of timber for use as props and cap pieces, and deliver them as required, so that a workman may secure the workings for his safety, should be construed to include a miner opening an entry with a high and dangerous roof, for which he is being paid by reason thereof a price exceeding the scale fixed by the union to which he belongs. Mt. Olive & S. Coal Co. v. Herbeck, 60 N. E. 105, 106, 190 Ill. 39.

Officer or employé on salary.

"Workmen," as used in Sess. Laws 1891, c. 114, making it unlawful for laborers, workmen, mechanics, or other persons employed by the state of Kansas to work more than eight hours per day, does not include an officer or employé for whom an annual salary has been specifically named and appropriated by the Legislature. State v. Martindale, 27 Pac. 852, 853, 47 Kan. 147 (cited and approved in Billingsley v. Marshall County Com'rs, 49 Pac. 329, 5 Kan. App. 435).

Teamster.

The term "mechanics, workmen, and laborers employed by the company," in an act incorporating a slate company, which provides that the stockholders shall be individually liable for debts due mechanics, workmen, and laborers employed by the company, does not include a teamster using his own team and contributing his own time in hauling slate for the company for certain compensation, nor of a wagonmaker repairing wagons for the company, as the liability cast

on the stockholders was with a view to an additional security to the operatives of the establishment, who were the producers—the life of it. It is generally only to such that liens are extended in the mining districts. Moyer v. Pennsylvania Slate Co., 71 Pa. (21 P. F. Smith) 293, 298.

Traveling salesman.

A creditor of a bankrupt employed by the bankrupt as a traveling salesman at an annual salary is not a "workman," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], according to priority of payment out of bankrupt estates to wages due to workmen. In re Scanlan (U. S.) 97 Fed. 26, 27; In re Greenwald (U. S.) 99 Fed. 705.

WORKMANLIKE MANNER.

See "Good and Workmanlike Manner."

The court in instructing the jury, in an action against a county for injuries received on a highway, that the law puts on the county commissioners "the duty of constructing bridges on the public highways across streams in a reasonably safe and workmanlike manner," and "it was the duty of the defendant, in constructing the bridge, to do so in a workmanlike manner, and so maintain it that persons might drive over it with safety, and, if necessary to make it ordinarily safe, to put up guard rails," did not impose on the county a higher degree of care or diligence than does the law, and it was evident that the court meant that the duty imposed on the county was that of constructing and maintaining the bridge in a reasonably safe condition for travelers to pass over it with safety, and was not error. Bibb County v. Ham, 35 S. E. 656, 657, 110 Ga. 340.

"Workmanlike manner," in a contract requiring timber to be cut in a workmanlike manner, means the customary way of cutting timber in the locality where the contract is to be performed. Shores Lumber Co. v. Stitt, 78 N. W. 562, 564, 102 Wis. 450.

"Workmanlike manner," in a lease providing that the tenant should cultivate the farm in a workmanlike manner, means in a farmerlike manner, or as good farmers usually do. Auginbaugh v. Coppenheffer, 55 Pa. (5 P. F. Smith) 347, 349.

"Workmanlike manner," in a contract providing that lumber shall be manufactured in a good and workmanlike manner, includes lumber manufactured by a portable mill. Grice v. Noble, 26 N. W. 688, 689, 59 Mich. 515.

A building contract reciting that the work shall be done in a "plain, substantial, and workmanlike manner" implies that the

work shall be done perfectly for the character of the job contemplated. *Smith v. Clark*, 58 Mo. 145, 146.

A contract to construct a house in a workmanlike manner is in legal effect a contract that the work shall be done with sufficient skill to conform to the received rules of the art, and so as to proximately effect the desired end. *Somerby v. Tappan* (Ohio) *Wright*, 229, 230.

A condition in a lease of a coal mine requiring the lessee to work the mine in a sound, safe, and workmanlike manner is broken by allowing the mine to fill with water and remain in that condition for months, if the result is injurious to the mine. *Consolidated Coal Co. v. Schaefer*, 25 N. E. 788, 135 Ill. 210.

WORKS.

See "Wagon Work."

A contract for the sale of a lot, one-half the price to be paid one year after a specified manufacturing company shall have its main building under roof, and the balance in two years from that time, contained a condition avoiding the contract if the vendor should fail to cause the company to transfer its works from another city and locate them in the addition in which the lot was situated. Held, that the contract did not depend for its validity on the condition that the factory should be put in actual operation as a going concern, but only on the removal of the plant and the erection of the building specified. In discussing the meaning of the word "works" used in the contract, the court says: "The word 'works' is often used as meaning an establishment for manufacturing or for performing industrial labor of any sort, generally in the plural, including all the buildings, machinery, etc., used in the required operations, as ironworks. The word was, we think, used in this sense here; that is to say, meaning the buildings and machines of the plant." *South St. Joseph Land Co. v. Pitt*, 21 S. W. 449, 450, 114 Mo. 135.

The words "works, mines, and manufacturing," in the statute preferring claims of laborers against the owners, etc., of any works, mines, or manufacturing, import, *ex vi termini*, complete and independent branches of business and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to any particular branch of business. The business of cutting sawlogs and driving them to the place of manufacture is not such as is contemplated by the act. *Appeal of Pardee*, 100 Pa. 408, 412, 13 Wkly. Notes Cas. 201, 203.

"Works," as used in St. 1888, c. 270, § 1, authorizing actions for the death of em-

ployés, caused "by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer," means existing and completed works, and not those in the course of construction. *Conroy v. Inhabitants of Clinton*, 33 N. E. 525, 158 Mass. 318.

The word "works," as used to describe the works of a manufacturing company, means an establishment for manufacturing or for performing industrial labor. *Hanna v. South St. Joseph Land Co.*, 128 Mo. 1, 12, 28 S. W. 652.

Insurance.

Dubuque City Charter, c. 210, § 7, par. 18, authorizes the city to license, tax, and regulate auctioneers, traveling merchants, sporting houses, bankers, dealers in money, and other evidences of indebtedness, and works of all kinds. Held, that the words "works of all kinds" did not include the business of insurance agents or insurance brokers, and hence an ordinance prohibiting persons from soliciting insurance without payment of the license tax was not authorized under such charter by such provision. *State v. Smith*, 31 Iowa, 493, 496.

Railroad, rolling stock, etc.

"Works," as used in St. 6 Geo. IV, c. 77, § 34, imposing rates for the lighting of the town of Chesterfield with gas, on the tenants or occupiers of all houses, warehouses, shops, cellars, vaults, stables, coachhouses, counting houses, brewhouses and all buildings, erections, works, tenements, etc., applies to a line of railway within the limits of the town, although such a work was not contemplated at the passing of the act. *Reg. v. Midland Ry. Co.*, 30 Eng. Law & Eq. 399, 400.

The word "works" is one of very extensive signification. In military engineering it means fortress, fortifications, ramparts, bastion, and the like. In civil engineering it is often applied to depots, engine houses, bridges, embankments, and other structures essential to the franchise and the proper conduct of a railway or other work of public improvement. *City of Richmond v. Richmond & D. R. Co. (Va.)* 21 Gratt. 604, 608.

The term "works," as used in a contract, referring to all works, materials, and plant in use in or about the construction or operation of a railroad, etc., does not necessarily include rolling stock; in fact, rolling stock is not usually referred to as "works." *Central Trust Co. v. Condon* (U. S.) 67 Fed. 84, 92, 14 C. C. A. 314.

WORKS OF ART.

Works of art may be divided into four classes: (1) The "fine arts," properly so

called, intended solely for ornamental purposes, and including paintings in oil and water upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze. (2) Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of "bric-a-brac," and are susceptible of an indefinite reproduction from the original. (3) Objects of art which serve primarily an ornamental, and incidentally a useful, purpose, such as painted or stained glass windows, tapestry, paper hangings, etc. (4) Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas fixtures, and household and table furniture. *United States v. Perry*, 13 Sup. Ct. 28, 28, 146 U. S. 71, 36 L. Ed. 890.

WORKS OF INTERNAL IMPROVEMENT.

See "Internal Improvement."

WORKSHOP.

As shop, see "Shop."

Under the express provisions of Laws 1893, p. 99, the words "manufacturing establishment, factory, or workshop," wherever used in such act, which declares that no female shall be employed in any manufacturing establishment, factory, or workshop, etc., more than eight hours in any one day, etc., shall be construed to mean any place where goods or products are manufactured, or repaired, cleaned, or sorted, in whole or in part, for sale or for wages. *Ritchie v. People*, 40 N. E. 454, 455, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

The term "workshop," in the charter of a railroad company providing that the real estate held by the company for workshop location should be exempt from taxation, was construed to embrace foundries, engine houses, depots, machine shops, necessary offices, and all the usual appliances for the manufacture and repair of engines and other stock required for the operation of the road. *Richmond & D. R. Co. v. Commissioners of Alabama*, 84 N. C. 504, 506.

80 Ohio Laws, p. 188, making it the duty of the owner of any factory or workshop more than two stories high to provide a convenient exit from the upper stories of the building, refers to the owner of the factory or workshop, and not the owner of the building in which such business is carried on. *Lee v. Smith*, 42 Ohio St. 458, 460, 51 Am. Rep. 839.

The term "workshop," as used in all laws relative to the employment of labor, shall

mean any premises, room, or place, which is not a factory, wherein manual labor is exercised by way of trade or for purposes of gain in or incidental to a process of making, altering, repairing, ornamenting, finishing, or adapting for sale any article or part of an article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control; but the exercise of such manual labor in a dwelling house or private room by the family dwelling therein, or by any of them, or, if a majority of the persons therein employed are members of such family, shall not of itself constitute such house or room a workshop within this definition. *Rev. Laws Mass.* 1902, p. 917, c. 106, § 8; *Gen. St. Kan.* 1901, § 6650; *Gen. St. Minn.* 1894, § 2264; *Rev. St. Mo.* 1899, § 10,104.

WORLDLY.

The word "worldly," in statutes prohibiting worldly employment or business, is contrasted with "religious." *Commonwealth v. Nesbit*, 34 Pa. (10 Casey) 398, 409.

WORLDLY BUSINESS OR EMPLOYMENT.

In a statute prohibiting worldly employment or business, the word "worldly" is contrasted with "religious," and the worldly employments are prohibited for the sake of religious ones. Of course, therefore, no religious employments are forbidden. Hence funerals, as religious rites, are allowed on Sundays, and all the functions of undertakers, grave diggers, hearse and carriage drivers, and others, though such persons use such employment as a means of livelihood. Hence, also, while purely civil contracts are forbidden on Sundays, marriage is not so, because it is not purely a civil, but also a religious, contract. *Commonwealth v. Nesbit*, 34 Pa. (10 Casey) 398, 409.

The phrase "worldly employment or business," in a statute forbidding such employment on Sunday, renders void any transaction which, if performed on a week day, would be enforceable in a court of justice. *Reeves v. Butcher*, 31 N. J. Law (2 Vroom) 224, 226.

A statute forbidding the exercise of any worldly employment or business on Sunday includes driving an omnibus as a public conveyance. *Johnston v. Commonwealth*, 22 Pa. (10 Harris) 102, 108; *Commonwealth v. Jandell* (Pa.) 2 Grant, Cas. 506, 511.

In construing an Alabama statute prohibiting worldly business or employment, it was held in *O'Donnell v. Sweeney*, 5 Ala. 467, 468, 39 Am. Dec. 336, that the sale of a horse or any other chattel on Sunday, whether public or private, was "worldly business or employment," within the meaning of the statute. *Tucker v. West*, 29 Ark. 386, 390.

"Worldly employment or business," within the meaning of a statute prohibiting worldly employment or business on Sunday, includes the collection of a compulsory admission fee at the entrance gate on camp meeting grounds on Sunday. *Commonwealth v. Weidner*, 4 Pa. Co. Ct. R. 437.

"Worldly business or employment," in the statute prohibiting worldly business or employment on Sunday, includes the hiring on Sunday of horses to be used on an excursion of pleasure, either on that or any other day. *Berrill v. Smith* (Pa.) 2 Miles, 402, 403.

WORLDLY ESTATE.

The words "worldly estate," as used in a will in which the testator said as to all his worldly estate he devised, bequeathed, and disposed of it in the manner following, though not of themselves sufficient to pass a fee, are always carried down to the devising clause to show the intention. *Appeal of Miller*, 6 Atl. 715, 716, 113 Pa. 459.

WORLDLY GOODS.

A will providing that testator's wife should enjoy all his "worldly goods" during her life, and that the testator's "worldly goods" consisted of household furniture, clothing, beds, bedding, money, and cattle, also debts to him, and likewise the house and lot which the testator occupied, cannot be construed to include the testator's real property other than the house and lot occupied by him, and the words must be restricted to mean personal property. *Farish v. Cook*, 78 Mo. 212, 219, 47 Am. Rep. 107.

Where testator gave his worldly goods in trust, his wife to have possession of all while she lived, until she married, and then gave to his eldest son, his heirs and assigns, £20 and a close of land, and to the rest of his children the residue of his worldly goods, the words "worldly goods" passed all the lands not specifically devised. *Wright v. Shelton*, 23 Eng. Law & Eq. 509, 510.

WORLDLY LABOR.

"Worldly labor," as used in a statute prohibiting persons from pursuing their ordinary callings or performing any worldly labor on Sunday, is not confined to a man's ordinary calling, but applies to any business he may carry on, whether it is his ordinary calling or not. *Smith v. Sparrow*, 4 Bing. 84.

WORN.

Tariff Act Aug. 30, 1842 (5 Stat. 549), levying a duty of 40 per cent. on articles "worn" by men, women, and children, means some article of clothing or some garment

used or worn upon the person, as distinguished from an article carried or used about the person for convenience or ornament. "A hat, coat, or shoe is an article 'worn' in the proper sense of the word, and a cane, snuff-box, or a lady's fan is an article not worn, but carried." *Richardson v. Lawrence* (U. S.) 20 Fed. Cas. 717, 718.

WORRY.

"Worry," as used in statutes providing that any one finding a dog, not on the premises of its owner, worrying, wounding, or killing any sheep, may kill the dog, means, "to run after; to chase; to bark at." *Johnson v. McConnell*, 22 Pac. 219, 221, 80 Cal. 545.

"Worrying" implies chasing or barking. It is impossible to conceive how a dog can worry chickens in any other way than by running after, chasing, or barking at them. *Marshall v. Blackshire*, 44 Iowa, 475, 477.

"Worrying" does not imply tearing with the teeth, and, if a dog pursues and barks at the sheep, it is a "worrying," under the statute. *Campbell v. Brown* (Pa.) 1 Grant, Cas. 82, 83.

WORSHIP.

See "Place of Worship"; "Public Worship"; "Religious Worship"; "Stated Worship."

"Worship" is defined by Webster as "the act of paying honor to the Supreme Being; religious reverence or homage; adoration paid to God, or a being viewed as God." Worship may be that of an individual, and for that reason, if not for others, the definition of the word is not sufficiently comprehensive to be accepted as the definition of the words "public worship," as used in a statute exempting property used for public worship from taxation; and an association formed to promote growth in grace and Christian fellowship expressly by and for young men, and to seek out and aid worthy poor, was not an association formed for purposes of religious worship. *In re Walker*, 66 N. E. 144, 146, 200 Ill. 566 (citing *Hamsher v. Hamsher*, 132 Ill. 273, 22 N. E. 1123, 8 L. R. A. 556).

"Worship" includes any and every mode of worshipping Almighty God. Webster has defined it as "the act of paying divine homage to the Supreme Being; religious reverence and homage; adoration paid to God, or a being viewed as God. Worship of God is an eminent part of religion, and prayer is the chief part of religious worship." Worcester defines it as "adoration; a religious act of reverence; homage paid to the Supreme Being, or by heathen nations to their deities. Worship consists in the performance of all

those external acts and observance of all those rites and ceremonies in which men engage with a professed and sole view of honoring God. Honor; respect; civil deference." The Imperial Dictionary defines it as "chiefly and eminently an act of paying divine honors to the Supreme Being; reverence and homage paid to Him in religious exercises, consisting in adoration, confession, prayer, thanksgiving, and the like." The reading of the Bible in the public schools is an act of "worship," as such term is used in the Constitution. *State v. District Board*, 44 N. W. 967, 979, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41.

The term "worship," in Const. art. 1, § 4, providing that all persons have the natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, and also in the second provision of section 4 of the Enabling Act, which provides that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship, does not apply to the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity. *State v. Buswell*, 58 N. W. 728, 729, 40 Neb. 158, 24 L. R. A. 68.

WORSHIPPING ASSEMBLY.

An assemblage of persons for the organization and conduct of a Sunday school where the Bible and the precepts of religion are taught is a "worshipping assembly," in the sense of the Tennessee statute which makes the willful disturbance of public worship indictable. *Martin v. State*, 65 Tenn. (6 Baxt.) 234. See, also, *State v. Stuth*, 39 Pac. 665, 666, 11 Wash. 423, sustaining a conviction for disturbing a Salvation Army meeting.

WORSTED.

Worsted is material made out of wool by combing, whereby it becomes a distinct article, and one well known in commerce. *Elliott v. Swartwout*, 85 U. S. (10 Pet.) 137, 150, 9 L. Ed. 373.

"Worsted stuff goods," as used in Tariff Act May 22, 1824, c. 136 (4 Stat. 25), includes only the lighter sort of goods composed wholly of worsted, such as bombazettes, plaids, bindings, etc. *United States v. Clarke* (U. S.) 25 Fed. Cas. 456, 457.

By the tariff acts of 1890 and 1894, the distinction made in the previous tariff laws between "woolens" and "worsteds" was no longer recognized; and, as worsteds are in fact made of wool, the provision in paragraph 297 of the act of 1894, declaring that the reduction of rates therein provided for on "manufactures of wool" should not take ef-

fect until January 1, 1895, included worsted goods. *United States v. Klumpp*, 169 U. S. 209, 212, 18 Sup. Ct. 311, 42 L. Ed. 720.

WORTH.

All I am worth, see "All."

In an instruction in an action on a contract for the construction of a school building, requiring the jury to determine what the building was worth, "worth" is synonymous with the value of the work done and materials furnished. *School Dist. No. 46 v. Lund*, 33 Pac. 595, 596, 51 Kan. 731.

The worth of anything is just so much money as it will bring. *Commonwealth v. Edgerton Coal Co.*, 30 Atl. 125, 126, 164 Pa. 284.

An instruction telling the jury that, if insured items were each worth the amount of insurance thereon, their verdict should be so and so, is equivalent to telling them that, if they believed the cash value of the property at the time of the loss equaled the amount of the insurance, their verdict should be as directed. *Snappington v. St. Joseph Town Mut. Fire Ins. Co.*, 77 Mo. App. 270, 271.

Where a horse was to be paid for, "\$10 in cash and a buggy wagon worth \$60," the value of the wagon was a part of the express contract, and an essential part of it, and not simply matter of description. The contract could not be performed by the delivery of a wagon worth only \$25. *Brown v. Sayles*, 27 Vt. (1 Williams) 227, 232.

"Worth not less than nine hundred dollars," as used in a contract by which a certain party covenanted to buy a slave, "to be worth not less than nine hundred dollars," etc., should be construed as words descriptive of the property, and not the sum to be laid out in its purchase. *Anders v. Ellis*, 87 N. C. 207, 208.

WORTHY.

A will bequeathing property to selectmen in trust for the special benefit of a "worthy, deserving poor" of a certain town was not an indeterminate and uncertain phrase, but one which the selectmen might well determine. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. 557, 558, 53 Conn. 489, 55 Am. Rep. 152.

WOULD.

In an instruction that the care required in certain circumstances is such as men of ordinary prudence and caution would have exercised under similar circumstances, "would," imports the same meaning as the

word "should," the best authorities using them interchangeably. The measure of care exacted is in accordance with what prudent and cautious men usually do in like circumstances, and upon failure to do which they are no longer entitled to be called prudent and cautious. Hence it may be said that they would or should not do something which the particular exigency required. *Blyth v. Birmingham Waterworks*, 11 Exch. 781.

WOULD SEE.

See "See."

WOUND.

See "Mortal Wound."

The definition of "wound" in criminal cases is an injury to the person by which the skin is broken. *Moriarty v. Brooks*, 6 Car. & P. 684, 686; *State v. Leonard*, 22 Mo. 449, 451.

The word "wound," as used in a declaration for personal injuries, means any injury breaking or cutting the skin. *Montgomery v. Lansing City Electric Ry. Co.*, 61 N. W. 543, 548, 103 Mich. 46, 29 L. R. A. 287.

To constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle or upper skin only is not sufficient, within St. 1 Vict. c. 85, § 2. *Reg. v. McLoughlin*, 8 Car. & P. 635.

As used in Rev. St. c. 125, § 13, enacting that if any robber shall wound or strike the person robbed he shall suffer punishment, etc., the word "wound" does not include a slight scratch on such robbed person's face, by rupturing the cuticle only, without separating the whole skin. *Commonwealth v. Gallagher*, 47 Mass. (6 Metc.) 565, 568.

The term "wound," as used in an application for a life policy, in which the applicant states that he has never received any wound, hurt, or serious bodily injury, means an injury to the body causing an impairment of the health or strength, or rendering the person more liable to contract disease or less able to resist its effects. *Bancroft v. Home Ben. Ass'n*, 23 N. E. 997, 999, 120 N. Y. 14, 8 L. R. A. 68.

As hurt or bruise.

Dr. Johnson defines "wound" to be a hurt by violence. *State v. Leonard*, 22 Mo. 449, 451.

A "wound" is a hurt given by violence, and includes a bruise. It is not a technical word, but one of common parlance. *State v. Owen*, 5 N. C. 452, 455, 4 Am. Dec. 571.

A "wound" is any injury, breaking, or cutting of the skin; and a declaration stat-

ing that the plaintiff was "hurt, bruised, and wounded" is no more definite than one using the words "hurt and bruised." *Shaddock v. Alpine Plank Road Co.*, 44 N. W. 158, 159, 79 Mich. 7.

Nature of instrument used.

A wound is a hurt by violence, no matter with what kind of a weapon. *State v. Owen*, 5 N. C. 452, 455, 4 Am. Dec. 571.

A blow with a blunt instrument, which broke through the skin, would be properly described in an indictment either as a bruise or an incised wound. *Commonwealth v. Woodward*, 102 Mass. 155, 160.

If a person strike another with a bludgeon and break the skin and draw blood, it is a "wound," within St. 7 & 8 Geo. IV, c. 31, § 11. *Rex v. Payne*, 4 Car. & P. 558.

St. 9 Geo. IV, c. 81, § 11, for the punishment of any one who shall stab, cut, or wound any person with intent to maim, disfigure, or disable such person, includes a wounding of a person by throwing a sledgehammer at him, though it was not an instrument calculated to inflict a wound. *Rex v. Withers*, 4 Car. & P. 446.

St. 9 Geo. IV, c. 81, § 12, for the punishment of any person who shall stab, cut, or wound any person, would not include injuries made with a hammer and other blunt iron instruments, whereby the person assaulted had his collarbone broken and his head and back bruised. *Rex v. Wood*, 4 Car. & P. 381.

St. 9 Geo. IV, c. 81, § 12, relating to stabbing, shooting, cutting, or wounding, was intended to apply to wounding produced by some instrument. Biting off the end of a person's nose is not a "wounding," within the meaning of the statute, nor is biting off a joint of a person's finger. *Rex v. Harris*, 7 Car. & P. 446.

WRAPPER.

"Wrapper," within the meaning of 25 Stat. 496, c. 1039, § 3, making it criminal to mail any matter with an outside cover or wrapper, containing any indecent, defamatory, or threatening language, and making such matter unmailable, means the package wrapper which for convenience and mailing surrounds all the copies of newspapers, etc., sent to one office, rolled or wrapper together in one package. *United States v. Burnell* (U. S.) 75 Fed. 824, 829.

Where a notice or other paper occupies only one of the halves of the sheet, the other half, on which the letter is directed, if the sheet remain entire, is a sufficient "wrapper," within the meaning of the fourth rule of May term, 1840, requiring such notice or paper, when served by mail, to be enclosed in a

wrapper. *Chautauqua County Bank v. Risley* (N. Y.) 6 Hill, 375, 376.

"Wrappers," when used with reference to leaf tobacco, are leaves suitable for the outside finish of a cigar. *Falk v. Robertson*, 137 U. S. 225, 231, 11 Sup. Ct. 41, 84 L. Ed. 645.

WRECK.

See "Shipwreck."

In *Johnson v. Chapman*, 19 C. B. (N. S.) 578, it is said that the term "wreck" properly means that which has been rendered useless or irrecoverable by peril of the seas. *Gibson v. Jessup & Moore Paper Co.* (Pa.) 15 Phila. 447, 449, 450. A vessel's spars and sails blown overboard by a gale, and lying alongside of the vessel, is not a "wreck." *The Margarethe Blanca* (U. S.) 12 Fed. 728, 732.

Distinguished from lost.

There is a difference in the words "lost" and "wrecked" in their marine signification. A vessel lost is one that has totally gone from the owners against their will, so that they know nothing concerning it, either whether still existing or not, or one which they do know is to them no longer within their use and control, either from capture by enemies or pirates, or by unknown foundering, or by a sinking by a known storm or collision, or by a total destruction by shipwreck. But a vessel is wrecked by being stranded or cast upon the shores, snags, and rocks. The consequence may be a total loss, or a partial loss, or a temporary disability. A loss, then, is consistent with the fact that a vessel, raft, or other property, being still in existence, though its location be unknown to the owner, and therefore as to him it is lost, may be found and become the subject of salvage under our statute, providing that "when any boat, vessel, raft, or other property shall be lost or wrecked, and in a perishable condition, upon any river, any person may take up and secure the same at or near the place where found." So, that a wreck may be within the statute, its condition must be such as its owner is ignorant of at the time the person claiming salvage saves it; otherwise, it could not be said to be found. A steamboat lying at the levee, having no person on board it, which breaks loose from her moorings in broad daylight, but is not secured before it had drifted over 60 feet without injury, is not lost or wrecked, within the meaning of the statute. *Collard v. Eddy*, 17 Mo. 354, 355.

Goods.

The words "wrecks and shipwrecked goods," in their ordinary legal meaning, are confined to ships and goods cast on shore

by the sea, and cannot be extended to a boat or other property afloat, not appearing to have ever been cast ashore or thrown overboard or lost from a vessel in distress. *Chase v. Corcoran*, 106 Mass. 286, 288.

A "wreck" is defined to be such goods as after a shipwreck are cast upon land by the sea and left there, for they are not wrecks so long as they remain in the sea in the jurisdiction of admiralty. By the common law all wrecks belong to the crown, and the property in them was lost to the owner. *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 558, 59 Am. Dec. 431.

"Wreck," in its legal significance, is confined to such goods as shall be wrecked at sea, and are by the sea cast upon the land, and none of the goods coming under the definition of flotsam, jetsam, or ligan can be called or deemed wrecks so long as they remain on or in the sea, but if they are cast on the land by the sea they can then become wrecks, and are then subject to common-law jurisdiction only; but if they are taken up at sea, and brought on shore, they are subject to admiralty jurisdiction. *Lacaze v. State* (Pa.) 1 Add. 59, 64.

Ship.

A ship becomes a "wreck" when, in consequence of the injury she has received, she is rendered absolutely unnavigable or unable to pursue her voyage without repairs exceeding half of her value. *Peele v. Merchants' Ins. Co.* (U. S.) 19 Fed. Cas. 98, 104.

A ship becomes a wreck when, in consequence of the injury she received, she is absolutely unnavigable or unable to pursue her voyage without repairs exceeding the half of her value. The condition of the ship must be by reason of injury received from some peril, and not the result of age or natural decay; and although the material of which she is composed may remain, yet if the ship is so disabled that she can no longer retain her character as a navigable vessel she is a wreck. A vessel which was driven on the rocks and overturned, and was filled with water and sunk, but soon after was righted and made navigable, and was carried to the port of her destination, and made fast to a wharf, was not a wreck. *Wood v. Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479, 482, 4 Am. Dec. 163.

In answer to a contention that money taken out of a vessel by her captain while she was cast away in the bay, a mile away from the shore, was "wreck," the court said, "the word 'wreck' in the proceedings must be taken in its common and natural sense. 'Wreck' is defined to be the ruins of a ship which has been stranded or dashed to pieces on a sharp rock or driven ashore by tempestuous weather." It appears by the whole proceedings that it could not be a wreck in

the legal sense if the captain and mariners were safe, and therefore by this circumstance the legal import of the term "wreck" is controlled. *Repubblica v. Lecaze* (Pa.) 1 Yeates, 55, 59 (citing *Weskett*, Ins. 606; 1 Bl. Comm. 292, 293).

WRECK OF THE SEA.

The term "wreck of the sea," as used in the common law excluding the jurisdiction of admiralty over a "wreck of the sea," does not mean what in the sense of the maritime and commercial law is deemed wrecked or shipwrecked property, but wreck of the sea in the purely technical sense of the common-law, constituting a royal franchise and a part of the revenue of the crown in England, and often granted as a royal franchise to lords of manors. *United States v. Coombs*, 37 U. S. (12 Pet.) 72, 77.

"Wreck," or "wreck of the sea," in the strict technical sense of wrecked goods which the sea casts upon land, is excluded from admiralty jurisdiction, but there is another more lax sense in which it is used for shipwrecked or wrecked goods in general, and in this sense it includes jetson, flotsam, and ligan, which are subjects of admiralty jurisdiction. *Lacaze v. State* (Pa.) 1 Add. 58, 99.

WRECKED IN THE UNITED STATES.

A Swedish vessel abandoned at sea, picked up by a steamer and towed into New York, is not a "vessel wrecked in the United States," so as to be entitled to an American register, under the act of December 23, 1852. In order for a vessel to be considered as wrecked in the United States, it must be actually wrecked within the waters of the United States. Such has long been the construction put upon the act by the department of the treasury, and this construction appears in the treasury regulations. *United States v. The Victoria Perez* (U. S.) 28 Fed. Cas. 374, 375.

WRECKED PROPERTY.

"Wrecked property," as used in 1 Rev. St. 8690, declaring that no vessel that shall be cast by the sea upon the land shall be deemed to belong to the people of the state as wrecked property, but may be recovered by the owner on the payment of salvage, relates exclusively to such property as in the common law is known as "wrecks," and the charges on such property are salvage. Whatever was wrecked property at common law is wrecked property under the statute. *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431, 7 Barb. 113, 115. It included only such goods as after the shipwreck are cast upon the land by the sea, and did not include property found sunk in the channel of a naviga-

ble river. *Baker v. Hoag* (N. Y.) 7 Barb. 113, 115.

WRECKING.

One who stated in his application therefor and who was insured as a farmer, and who was drowned by the capsizing of a boat while rescuing the crew of a shipwrecked schooner, was not employed in "wrecking," within the insurance policy providing that the benefit should not extend to death caused while employed in "wrecking." *Tucker v. Mutual Ben. Life Co.*, 4 N. Y. Supp. 505, 506, 50 Hun, 50.

WRIT.

See "Alias Writ"; "Alternative Writ"; "Judicial Writ"; "Original Writ"; "Prerogative Writs"; "Unexecuted Writ."

Any writ, see "Any."

Every writ, see "Every."

The word "writ" has application to civil proceedings. *State v. McCann*, 67 Me. 372, 374.

A "writ" is the judicial notice to a debtor that his creditor demands justice. *Hyams v. Boyce* (S. C.) 1 McMul. 95, 98.

A "writ" may be defined to be a mandatory direction to the officer to which it is addressed, requiring him to perform a particular act, as to summon the defendant, or to sell property under the decree of the court. In every case the writ itself contains the directions as to what is required to be done. *Moore v. Fedawa*, 14 N. W. 170, 13 Neb. 379.

The term "writ," as used in the Connecticut statutes, generally means process in a civil suit, while that in a criminal case is usually denominated a "warrant." *Stoddard v. Couch*, 23 Conn. 238, 240.

The word "writ," as used in the Penal Code, signifies any order or precept in writing issued in the name of the state or of a court or judicial officer. Pen Code Mont. 1895, § 7, subd. 15; Code Civ. Proc. Mont. 1895, § 3463, subd. 5; Pol. Code Mont. 1895, § 16, subd. 6; Pen. Code Ariz. 1901, par. 7, subd. 15; Pol. Code Cal. 1903, § 17, subd. 6; Pen. Code Cal. 1903, § 7, subd. 15; Code Civ. Proc. Cal. 1903, § 17, subd. 6; Rev. Codes N. D. 1899, § 5152; Code Civ. Proc. S. D. 1903, § 8; Rev. St. Utah 1898, § 2498; Sand. & H. Dig. Ark. 1893, § 7221; *Gowdy v. Sanders*, 11 S. W. 82, 88 Ky. 846.

Writs and processes of the courts may be divided into two classes: First, those which point out specifically the property or thing to be seized; second, those in which the officer is directed to levy the process up-

on property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. *Phillips v. Spotts*, 15 N. W. 332, 334, 14 Neb. 139.

Complaint distinguished.

See "Complaint."

Execution.

The term "writ," in Act April 4, 1873, as amended by Act June 20, 1883, prohibiting foreign insurance companies from doing business unless a stipulation is filed that any and every writ may be served on the agent of the company in the state, includes execution process. *Kennedy v. Agricultural Ins. Co.*, 30 Atl. 724, 725, 165 Pa. 179.

Act 1777, c. 8, § 5, providing a penalty against a sheriff if he fails to execute all "writs and other process" legally issued and directed to him within his county, should be construed to include executions as well as original writs, for the language includes every description of process which by law could come into the hands of the sheriff to be executed. *Harman v. Childress*, 11 Tenn. (3 Yerg.) 321, 329.

Fee bill.

The term "writ" in Const. art. 4, § 7, providing that all process, writs, and other proceedings shall run in the name of the people of the state of Illinois, includes a fee bill. *Reddick v. Cloud's Adm'r*, 7 Ill. (2 Gilm.) 670, 678.

Rule to show cause.

The term "writ" or "process," within the meaning of a statute requiring writs and processes to have a teste and to be under the seal of the court, does not include a rule to show cause. *Taylor v. Henry*, 19 Mass. (2 Pick.) 397, 398.

Summons.

By the common-law definition a "writ" requires a sale, but independently of this it is held that, under a federal statute requiring writs or other original process in courts of record to be stamped, a summons issued by a justice of the peace is not a writ within the meaning of the statute. *Baird v. Pridmore* (N. Y.) 29 How. Prac. 253, 254.

WRIT DE COMMUNICATO CAPIENDO.

To excommunication, in England, certain civil disabilities are attached. To aid in carrying into effect a sentence of excommunication, a "writ de excommunicato capiendo" may issue out of chancery, which has been said by some to be a writ grantable *ex debito justitiæ*, by others *ex gratia*. This writ is said to be a privilege peculiar to the Church of England, above all the realms of

Christendom, as being more sure and effectual than any other aid of the secular power afforded elsewhere. When a person was taken in custody on such a writ, the regularity of the proceedings of the court passing such sentence might be inquired into on habeas corpus (1 Salk. 293), and the party be relieved if the proceedings were irregular. *Smith v. Nelson*, 18 Vt. 511, 555, 556.

WRIT DE RATIONABILI PARTE BONORUM.

The "writ de rationabili parte bonorum" was a writ used in the ancient common law, by which the wife and children could recover their reasonable parts in the goods of the husband and father, which he had bequeathed away without regard to their rights. *Hopkins v. Wright*, 17 Tex. 30, 36; *Crain v. Crain*, 17 Tex. 80, 93.

WRIT OF ASSISTANCE.

As process, see "Process."

A writ of assistance is a summary proceeding, its object being to put a person who purchases at a judicial sale into the possession of the premises. *Emerick v. Miller* (Ind.) 62 N. E. 284, 285; *Jones v. Hooper*, 50 Miss. 510; *Kerr v. Brawley*, 61 N. E. 1057, 1058, 193 Ill. 205.

The writ of assistance is the ordinary process used by a court of chancery to put a party, receiver, sequestrator, or other person into possession of property when he is entitled thereto, either on a decree or interlocutory order. The most familiar instance of its use is where land has been sold under a decree for foreclosure and mortgage, but it is also employed wherever a court of equity having jurisdiction of the persons and property has determined title or possessory rights to real estate. *Hagerman v. Heltzel*, 58 Pac. 580, 21 Wash. 444.

The writ of assistance, so far as foreclosures are concerned, is an old chancery writ which exists independent of the statute. It may be had to enforce any judgment or order awarding the possession of real property other than a common judgment in a direct action for land. A writ of assistance is in ordinary cases the process for giving possession of land under an adjudication, and will be granted on the sale being confirmed and proof that the purchaser has received a deed of conveyance from the master, which has been shown to the party in possession, accompanied by a demand of possession which has been refused. *O'Connor v. Shaeffel*, 19 Civ. Proc. R. 378, 379, 11 N. Y. Supp. 737.

"A writ of assistance may be termed an equitable *habere facias possessionem*, for it is only issued from courts of chancery, and

only in these cases when the courts have by their decree caused lands to be sold, in which case they will complete the sale by putting the purchaser in possession when it is withheld by the defendant or any one who has come in possession *pendente lite*, and is never issued except when the case is clear and upon notice to the person in possession, and it is held to be the appropriate remedy to place the purchaser of mortgaged premises under a decree of foreclosure in possession after he has obtained a sheriff's deed." *Knight v. Houghtalling*, 94 N. C. 408, 410. It will never be issued where there is any real prospect that the party in possession may make a successful defense of his possession, either in law or by aid of a court of equity. *Kerr v. Brawley*, 61 N. E. 1057, 1058, 193 Ill. 205 (citing *Flowers v. Brown*, 21 Ill. [11 Peck] 270).

A writ of assistance is an appropriate process to issue from a court of equity to place a purchaser of mortgaged property under its decree in possession after he has received the master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or to the order of the court. *Daggs v. Wilson* (Ariz.) 59 Pac. 150, 153 (citing *Terrell v. Allison*, 88 U. S. [21 Wall.] 289, 22 L. Ed. 634).

A writ of assistance is used to place in possession parties who have obtained judicial title to real estate. *State v. Superior Court of Thurston County*, 58 Pac. 572, 21 Wash. 469. The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties and to subject to sale the property mortgaged. It is a rule of that court to do complete justice when that is practicable, not merely by declaring the right, but by affording a remedy for its enjoyment. *Terrell v. Allison*, 88 U. S. (21 Wall.) 289, 291, 22 L. Ed. 634.

Discretionary writ.

The issuance of a writ of assistance rests in the sound discretion of the court, and will be issued only when the right is clear or there is no bona fide contest as to the possession. *Hagerman v. Heltzel*, 58 Pac. 580, 21 Wash. 444.

Issued against parties only.

The writ of assistance can only issue against parties bound by the decree, and the owner of the property mortgaged which is directed to be sold can only be bound when he has had notice of the proceedings for its sale, if he acquired his interest previous to their institution. *Terrell v. Allison*, 88 U. S. (21 Wall.) 289, 291, 22 L. Ed. 634. It will only issue against a party to a suit, or one who has come into possession *pendente lite*. *Gilcreest v. Magill*, 37 Ill. 300, 301; *Kerr v. Brawley*, 61 N. E. 1057, 1058, 193 Ill. 205.

The writ of assistance is issued only against parties to a suit, or persons in privity with them, who have been concluded by a decree, and yet refuse to permit the purchaser at judicial sale under such decree to take possession. It is error to award a writ of assistance against a person who entered upon the land *pendente lite* claiming an independent title not derived from or in succession to any of the parties to the suit or their privies. *Merrill v. Wright*, 91 N. W. 697, 698, 65 Neb. 794.

Kinds.

There are various kinds of writs of assistance: First, there are the writs of assistance most usually called "writs of aid," issuing from the Court of Exchequer, addressed to the sheriff, and commanding him to aid; second, writs to the sheriff to assist a receiver, sequestrator, or other party to a suit in chancery to get possession under a decree of the court of lands withheld from him by another party to a suit; third, writs of assistance to seize unaccustomed goods. 1 Quincy (Mass.) Append. 401.

Possessory writ.

A writ of assistance is only issued when the question of the right to possession arises, and the question of title cannot be tried under it. *Kerr v. Brawley*, 61 N. E. 1057, 1058, 193 Ill. 205.

WRIT OF ASSIZE.

The writ of assize is a writ calculated to try the mere possessory title to an estate in lands, tenements, or hereditaments, which has succeeded to such real actions as had previously existed for the trial of title to real estate. The writ was a remedy which the law provided to recover the freehold of land when it had been unjustly taken away. Thus, if A. grants land charged to B. and his heirs, not only the grantee, but his heirs in infinitum, in case of a disseisin, may forever pursue their assize by writs of disseisin. *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262, 272 (citing *Gilb. Rents*, 125).

WRIT OF ATTACHMENT.

See "Attachment."

WRIT OF AUDITA QUERELA.

See "Audita Querela."

WRIT OF CERTIORARI.

See "Certiorari."

WRIT OF DEBT.

A writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold,

or by contract, etc. *Lacaze v. State* (Pa.) 1 Add. 58, 85, 86, 89.

WRIT OF ERROR.

A writ of error is a proceeding prosecuted to reverse a judgment of an inferior court. *Longworth v. Sturges*, 4 Ohio St. 690, 708.

A writ of error is a commission by which the judges of one court are authorized to examine a record upon which a judgment is given in another court, and upon such examination to affirm or reverse the same according to law. *Chipman v. City of Waterbury*, 22 Atl. 289, 59 Conn. 496; *Comstock v. Van Schoonhoven* (N. Y.) 3 How. Prac. 258, 259; *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 409, 5 L. Ed. 257; *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 326.

A writ of error, under our law, is a writ debito justitie, wherever, by reason of error, a judgment of a court of record ought not to stand, and an appeal is not provided by statute. *Ex parte Thistleton*, 52 Cal. 220, 224.

A writ of error is a writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them to send the record to the court of competent and appellate jurisdiction therein named, to be examined in order that some alleged error in the proceedings may be corrected. *MacLachlan v. McLaughlin*, 18 N. E. 544, 545, 126 Ill. 427; *Allen v. City of Savannah*, 9 Ga. 286, 292; *Comstock v. Van Schoonhoven* (N. Y.) 3 How. Prac. 258, 259.

A writ of error is in the nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record on which the judgment was given, and on such examination to affirm or reverse the same according to law. *Gauldin v. Shehee*, 20 Ga. 531, 535.

A writ of error is a writ issued from a superior court to an inferior court, commanding it to send up the record, and is a writ allowable at common law. *Reece v. Knott*, 24 Pac. 759, 3 Utah, 436.

Under the common law the writ of error was the method by which a judgment in a criminal cause could be reviewed, and a criminal cause could be reviewed in no other way. The remedy by writ of error is now concurrent with the remedy by appeal. *Borrego v. Territory*, 46 Pac. 349, 351, 8 N. M. 448.

A writ of error is an original writ. *Allen v. City of Savannah*, 9 Ga. 286, 292; *Lynes v. State* (Ala.) 5 Port. 236, 239, 30 Am. Dec. 557; *Gauldin v. Shehee*, 20 Ga. 531, 535.

A writ of error is a legal remedy, nothing more. *Sayres v. Commonwealth*, 88 Pa. 291, 308.

Const. art. 3, § 1, providing that the Supreme Court has jurisdiction alone for the trial and correction of errors in law and equity from the superior courts of the several circuits brought before it by writs of error, contemplates the writ of error as known to the common law, without regard to the specific form thereof, which Blackstone defines to be "a writ which lies for some supposed mistake in the proceedings of a court of record, and which only lies on matter of law arising on the face of the proceedings." Mr. Sergeant Williams, in a note to *Jaques v. Sesar*, 2 Saunders, R. 101, note 1, said: "A writ of error is an original writ issuing out of the Court of Chancery, in the nature as well of a certiorari to remove a record from an inferior into a superior court, as of a commission to the judges of such superior court to examine the record, and to affirm or reverse it according to law." *Lowe v. Morris*, 13 Ga. 147, 148.

The object of a writ of error is not to try the question between the parties; it is rather to try the judgment of the court below. Its object is to review and correct an error of law which is not amendable at common law or cured by any of the statutes of jeofails. It is considered a new suit, and it is less an action between the original parties than a question between the judgment and the law. *Kelly v. Strouse & Bros.*, 43 S. E. 280, 285, 116 Ga. 872 (citing *Allen v. City of Savannah*, 9 Ga. 293).

The words "appeal" and "writ of error," in section 5 of Court of Appeals Act, which provides that appeals or writs of error may be taken from the district court or from the existing circuit court to the Supreme Court in any case in which the jurisdiction of the court is an issue, are understood to be within the meaning of those terms as used in a prior act of Congress relating to the appellate power of the Supreme Court, and in the long-standing rules of practice and proceedings of the federal court. Taken in that sense, these terms mean the proceedings by which a cause for which there must be a final settlement is removed from a court below the appellate court for review, reversal, or confirmation. *MacLeod v. Graven* (U. S.) 79 Fed. 84, 85, 24 C. C. A. 449 (citing *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 18, 35 L. Ed. 893). It lies where a party is aggrieved by any error in the foundation, proceedings, judgment, or execution of a suit in a court of record. *Lynes v. State* (Ala.) 5 Port. 236, 239, 30 Am. Dec. 557; *Lowe v. Morris*, 13 Ga. 147, 148; *Gauldin v. Shehee*, 20 Ga. 531, 535.

"A writ of error lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called 'breve de errore corrigendo'; but without a judgment, or an award

In nature of a judgment, no writ of error doth lie, if the words of the writ be, 'Si iudicium redditum sit.' Therefore, to maintain a writ of error, there must have been an action and judgment, and no writ of error lies to an order punishing a contempt. *Johnston v. Commonwealth*, 4 Ky. (1 Bibb) 598, 599.

A writ of error lies only after judgment. *Downe v. Stimpson*, 2 Mass. 441, 445.

As action or suit.

See "Action"; "Suit (Noun)"; "Cause of Action."

Appeal distinguished.

See "Appeal."

Bill of review distinguished.

See "Bill of Review."

Certiorari distinguished.

The writ of error is the appropriate writ for the removal of a cause after judgment, while certiorari is the appropriate writ for a removal before judgment. *Commonwealth v. Simpson* (Pa.) 2 Grant, Cas. 438, 439.

A writ of certiorari is in some respects similar to a writ of error, and in others dissimilar. The former, unlike the latter, is not a writ of right, and it lies where the proceedings sought to be revised are not according to the course of common law. *Inhabitants of Levant v. Penobscot County Com'rs*, 67 Me. 429, 433.

In some respects there is a difference between a writ of error and a writ of certiorari, and in some respects there is a strong resemblance. The former lies where the proceedings are according to the course of common law; in other cases a writ of certiorari is the proper writ. A writ of error is a writ of right; a writ of certiorari is not; it is a matter of sound discretion to grant or refuse it. They are alike in this: that no one but a party to the record, or one who has a direct and immediate interest in it or is privy thereto, can maintain either of the writs. *Bath Bridge & Turnpike Co. v. Magoun*, 8 Me. (8 Greenl.) 292, 293.

The difference between writs of error and certiorari is not well defined in our practice, but, so far as there is any general rule on the subject, the former is the appropriate remedy where the proceedings are according to the course of the common law, the latter where the proceedings are of a different character. In either case there must have been, however, what is equivalent to a final order or judgment of the inferior tribunal, before the writ can be issued. *Ewing v. Hollister*, 7 Ohio, pt. 2 (7 Ham.) 138, 140.

A certiorari is a writ of error within the meaning of Const. art. 6, § 20, providing that no writ of error shall be brought upon any

judgment but within five years after the rendering of the same, unless the person entitled to the writ shall be an infant. *King v. Wright* (Del.) 2 Har. 135.

As method of appeal.

"A writ of error is but a cumulative method of invoking the appellate jurisdiction of this court, and of seeking revision of the same cause and same question as could be adjudged if the appellate jurisdiction was invoked by means of an appeal." *Gainesville, H. & W. Ry. Co. v. Lacy*, 28 S. W. 413, 414, 7 Tex. Civ. App. 63.

As a new suit.

A writ of error is considered a new action. *International Bank v. Jenkins*, 104 Ill. 143, 151; *Fitzpatrick v. Graham*, 119 Fed. 353, 354, 56 C. C. A. 95. But it is not the action which is to be judged, but the judgment. *Allen v. City of Savannah*, 9 Ga. 286, 292.

A writ of error is a continuation of the original litigation, and not the commencement of a new action. *Westervelt v. Jones*, 52 Pac. 194, 195, 7 Kan. App. 70.

A writ of error "is a new action brought in a superior court, founded upon a judgment of an inferior court, for the purpose of supervising it and correcting any error there may have been in the proceedings of the court below." *Gibbs v. Belcher*, 30 Tex. 79, 84.

A writ of error is in the nature of a new suit brought to obtain redress against an erroneous adjudication or proceeding, and is commenced by a writ which, after suggesting in the most general terms that in the record and rendition of judgment manifest error hath intervened, commands the court below to send that record, with all things touching the same, to the court of review. *Hinchman v. Cook*, 20 N. J. Law (Spencer) 271, 273.

A writ of error is a new suit, in which an original process is issued and new pleadings are made up. The assignment of error stands in the place of the declaration, and it is still necessary, in the form of a motion, to allege and show an error in fact, and for the opposite party to have notice. An issue is made up, and there must be a finding and a judgment. *Mitchell v. King*, 55 N. E. 637, 638, 187 Ill. 452.

A writ of error is not such a new and original suit as to require the same strictness and rigidity in the service upon defendant therein of notice of its institution as is required at the institution of a new and original action, but it is rather a continuation of the original suit. A statute, therefore, providing for constructive notice only of its institution and pendency, does not violate the provision of the Constitution prohibiting

the deprivation of property without due process of law. *State v. Canfield*, 23 South. 591, 594, 40 Fla. 36, 42 L. R. A. 72.

Parties.

It was not restricted as an appeal to the parties to an action. It might be brought by any one privy to the record, or any one injured by the judgment or who would be benefited by its reversal; and, now that by statute a right to a writ of error was extended to suits in chancery, the common-law rules, as to who is entitled to the writ, are applicable. *Anderson v. Steger*, 50 N. E. 665, 666, 173 Ill. 112.

Questions examined.

A writ of error is of common-law origin, and removes nothing for re-examination but the law. *Lyles v. Barnes*, 40 Miss. 608, 610; *United States v. Murphy* (U. S.) 84 Fed. 609, 621; *United States v. Goodwin*, 11 U. S. (7 Cranch) 108, 111, 3 L. Ed. 284. It does not raise questions of fact. *United States v. Goodwin*, 11 U. S. (7 Cranch) 108, 111, 3 L. Ed. 284.

The object of the writ of error is to review and correct an error of law not amendable at common law, or barred by any of the statutes in jeofails. *Allen v. City of Savannah*, 9 Ga. 286, 292.

The writ of error was the common-law method of reviewing judgments at common law, and brought up for review only errors of law excepted to at the trial. *Anderson v. Steger*, 50 N. E. 665, 666, 173 Ill. 112.

"On this writ the judgment is reviewed with reference to alleged errors which are pointed out by exceptions taken to the action of the trial court at the time when the rulings are made, and, as a general rule, the power of the Supreme Court is limited to the questions so raised." *Rand v. King*, 19 Atl. 806, 807, 134 Pa. 641.

A writ of error embraces all matters which the judgment brought up for review covers, and great care must be observed in determining what is independent and distinct matter not embraced within the adjudication. *State v. Hull*, 20 South. 762, 764, 37 Fla. 579.

Laws 1899, c. 139, providing that, whenever a writ of error shall be issued out of the Court of Errors and Appeals to review a judgment founded upon the verdict of a jury, the plaintiff in error may assign for error that the verdict is against the clear weight of evidence and is excessive, and directing said court to consider the grounds so assigned as fully as like grounds are considered in the Supreme Court on a rule to show cause why a new trial should be granted, does not authorize the Court of Errors and Appeals, on writ of error to a judgment of the Supreme Court in a civil action founded on the verdict of a jury, to weigh the evi-

dence and consider whether the amount of the verdict is excessive. For the Court of Errors and Appeals to consider and adjudicate upon such assignments of error in such a case would impair the jurisdiction of a constitutional court by depriving its judgment of the attribute of finality as to fact. *Flanigan v. Guggenheim Smelting Co.*, 44 Atl. 762, 763, 63 N. J. Law, 647.

As supersedeas or reversal.

At common law a writ of error operated as a supersedeas, and no security was required for the prosecution of the writ. *Lum v. Reed*, 53 Miss. 71, 72.

At common law a writ of error was a supersedeas by implication, but since the judiciary act of 1879, providing that such a writ shall be a supersedeas only where it is served, a service of the writ is essential. *McCarley v. McGhee* (U. S.) 108 Fed. 494, 495. The writ does not of itself reverse the judgment, and, until its propriety is finally determined by the appellate court, no proceedings can be had in the trial that will undo what is there adjudicated. *State v. Hull*, 20 South. 762, 764, 37 Fla. 579. It does not vacate the judgment below; that continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. *United States v. Murphy* (U. S.) 84 Fed. 609, 621.

"Pending a writ of error, a judgment in reversal of the judgment of the trial court remains and is a subsisting, valid, and binding judgment in that court, and may be resorted to and used as evidence of a present indebtedness." In re *Sheehan* (U. S.) 21 Fed. Cas. 1219, 1220.

As writ of right.

"A writ of error is a writ of right, both by the common law and statute, as to any one who is a party to a record, or who is shown by the record to be prejudiced by the judgment." *Singer & Talcott Stone Co. v. Hutchinson*, 51 N. E. 622, 623, 176 Ill. 48. See, also, *Drowne v. Stimpson*, 2 Mass. 441, 445.

In Nebraska, a writ of error is a writ of right, which is available to any person convicted of crime, for the purpose of having the case reviewed in the Supreme Court. *Green v. State*, 10 Neb. 102, 104, 4 N. W. 422.

A writ of error was a writ of right at the common law, and, as a general rule, may be prosecuted as a matter of right in all civil cases. *Unknown Heirs of Langworthy v. Baker*, 23 Ill. (13 Peck) 484, 487; *Hammond v. People*, 32 Ill. 446, 464, 83 Am. Dec. 286; *Haines v. People*, 97 Ill. 161, 166; *McIntyre v. Sholty*, 29 N. E. 43, 44, 139 Ill. 171; *Anderson v. Steger*, 50 N. E. 665, 666, 173 Ill. 112.

WRIT OF ERROR CORAM NOBIS.

Bouvier says: "It is a writ of error issued out of a court of competent jurisdiction, directed to the judges of a court of record, and commanding them, in some cases themselves to examine the record, in others to send it to another court to be examined. The first is called a 'writ of error coram nobis.'" *Comstock v. Van Schoonhoven* (N. Y.) 3 How. Prac. 258, 259. See, also, *Allen v. City of Savannah*, 9 Ga. 286, 292.

The writ of error coram nobis is now but little in use. In practice the same end is generally accomplished by motion. The office of the writ is to correct an error of fact in respect to a matter affecting the validity and regularity of the proceedings in the same court in which the judgment was rendered, and where the record is, when the error assigned is not for any fault of the court; those errors which precede the judgment—as error in the process or through default of the clerk; where an infant appears by attorney, and not by guardian; where the defendant was insane at the time of the trial, or died before judgment. *Howard v. State*, 24 S. W. 8, 58 Ark. 229.

"The office of the ancient remedy of the writ of coram nobis was to have a judgment corrected by an examination, by the court rendering it, into some question of fact affecting the validity and regularity of the proceedings, such as the death of one of the parties before verdict or judgment, or the infancy or insanity or coverture of the defendant, and which was not made an issue and determined in the action. * * * The writ has become obsolete, having been superseded by the modern practice of applying to the court by motion for the relief sought." *Billups v. Freeman* (Ariz.) 52 Pac. 367.

The writ of error coram nobis lies only to correct the record of the trial itself in matters of fact existing at the time of the pronouncement of the judgment, but in respect of which the court was unadvised, but of which, had it been advised, the judgment would not have been pronounced. The unvarying test of the writ is mistake, the lack of knowledge of facts inhering in the judgment itself. It has never been granted to relieve from consequences arising subsequently to the judgment. In *Asbell v. State*, 62 Kan. 209, 61 Pac. 690, it was denied for the reason that the facts on which the application was predicated were known during the progress of the trial, or were available on motion for new trial, and it was held that the office of the writ is to bring to the attention of the court, for correction, an error of fact, one not appearing on the face of the record, unknown to the court or the party affected, and which, if known in season, would have prevented the judgment challenged; so that the writ will not lie to va-

cate a judgment of conviction because of the inability of the accused within the statutory time to prepare a record on appeal, showing the errors of which complaint was made. *Collins v. State*, 71 Pac. 251, 66 Kan. 201, 60 L. R. A. 572, 97 Am. St. Rep. 361.

A right to maintain a proceeding in the nature of a writ coram nobis is not abolished by the statute in the state of Indiana, says *Cowan, J.*, in *Smith v. Kingsley* (N. Y.) 19 Wend. 620. There is no statute expressly and in terms repealing this power, nor any which does so by necessary implication. The power, therefore, remains as at common law, except as to the mere form coram nobis resident, because the fiction of the record remaining before the King himself is gone. We have therefore lost the name of the writ, but nothing more. *Sanders v. State*, 85 Ind. 318, 327, 44 Am. Rep. 29.

WRIT OF EXECUTION.

See "Execution (Writ of)."

WRIT OF EXTENT.

See "Extent."

WRIT OF FALSE JUDGMENT.

A writ of false judgment is one issuing where the complaint is of a false judgment rendered in the court below, and commands the sheriff to go to the court below and record the plaint, etc., if in a court where he did not preside. *Anonymous*, 2 N. C. 469, 470.

WRIT OF FORMEDON.

Coke says: "The writ of formedon, a forma donationis, is so called because the writ doth comprehend the form of the gift." It has no reference to the nature of the estate which it seeks to recover, for it is applied as well to the recovery of estates in fee simple as of estates in fee tail. *Orndoff v. Turman* (Va.) 2 Leigh, 200, 241, 21 Am. Dec. 608.

WRIT OF GARNISHMENT.

See "Garnishment."

WRIT OF HABEAS CORPUS.

See "Habeas Corpus."

WRIT OF INJUNCTION.

See "Injunction."

WRIT OF INQUIRY.

A writ of inquiry is a writ issued by the court to the sheriff, after default by defend-

ant, commanding him by 12 men to inquire into the damages and make return into court. *Lennon v. Rawitzer*, 19 Atl. 334, 335, 57 Conn. 533.

A writ of inquiry is a judicial writ directed to the sheriff, stating the former proceedings, and then saying, "Because it is unknown what damages the plaintiff has sustained, you are commanded, by the oath of 12 honest and lawful men of your county, diligently to inquire after the same and return the inquisition into court." *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69, 70.

WRIT OF MANDAMUS.

See "Mandamus (Writ of)"; "Peremptory Mandamus."

WRIT OF NE EXEAT.

See "Ne Exeat."

WRIT OF PARTITION.

See "Partition."

WRIT OF PONE.

A writ of pone is to remove a plaint commenced by writ in the county court, which is a court not of record, into the superior court, when it is apprehended a fair trial will not be had in the court below. *Anonymous*, 2 N. C. 469, 470, note.

WRIT OF PROHIBITION.

See "Prohibition (Writ of)."

WRIT OF QUOD PERMITTAT PROSTERNERE.

See "Quod Permittat Prosternere."

WRIT OF QUO WARRANTO.

See "Quo Warranto."

WRIT OF REPLEVIN.

See "Replevin."

WRIT OF REVIEW.

Petition for, as civil action, see "Civil Action—Case—Suit—Etc."

"A writ of review is a writ of right to hear errors in a record or process remaining with the court. * * * It is sometimes used in the form of a capias and attachment, and with the same efficacy, and seems, therefore, to be to some purposes an original writ." *Burrell v. Burrell*, 10 Mass. 221, 222.

"A writ of review in civil actions is provided by statute to correct errors in judg-

ments rendered on verdicts, and is unknown to the common law. Either party against whom two verdicts have not been found may sue his writ of review as of right." *Swett v. Sullivan*, 7 Mass. 342, 346.

A writ of review is issued by an order of the court applied to, after a hearing, upon a petition; a process is made and served upon the other party, and entered in court; and thereon the parties are heard, and a judgment rendered. The object is to revise and correct or restrain the proceedings of courts or individuals, claiming to have therefor legal authority, but which are alleged to be erroneous or defective. *Hopkins v. Benson*, 21 Me. 399, 401.

The provisions of the Constitution of Louisiana relating to the writ of review confer upon the Supreme Court the discretion as to whether to grant or withhold the writ. Article 101 of the Constitution does not invest the Supreme Court with appellate jurisdiction over the courts of appeals, or grant to litigants a further and additional right of appeal. And the writ of review will issue only in exceptional cases, mainly to secure uniformity of jurisprudence. *West v. De Moss*, 24 South. 325, 326, 50 La. Ann. 1349.

Certiorari.

The writ of certiorari is essentially a writ of review, and its function in matters of taxation is to review the action or refusal to act of the tax commissioners. Consequently, no objections are brought up for review except such as were presented to the commissioners on the application for correction. *People v. Feitner*, 80 N. Y. Supp. 140, 141, 39 Misc. Rep. 463 (citing *In re Winegard*, 78 Hun, 58, 28 N. Y. Supp. 1039).

A writ of certiorari is undoubtedly designed to be a writ of review. Its undoubted and only legitimate purpose is to enable a party who has been aggrieved by an action of some inferior tribunal to secure a reconsideration of the judgment and a reversal of the findings. It cannot be issued, however, according to the express limitation of Code Civ. Proc. § 323, except where the inferior tribunal is entirely without jurisdiction, and there is no appeal or other plain, adequate, and speedy remedy. *Union Pac. Ry. Co. v. Bowler*, 34 Pac. 940, 941, 4 Colo. App. 25.

The term "writ of review," as used in Comp. Laws 1887, c. 585, providing that the writ of review shall issue from the circuit court to an inferior court, officer, or tribunal in the exercise of judicial functions where the same appears to have exercised such functions erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the plaintiff, is the equivalent of the common-law writ of certiorari, which is defined as a writ issuing from a superior court to an inferior court, tribunal,

or officer exercising judicial powers whose proceedings are summary or in course differing from the common law, commanding the latter to return the records of a cause pending before it to the superior court. *California & O. Land Co. v. Gowen* (U. S.) 48 Fed. 771, 775.

The office of the writ of review, which, under the Oregon Code, is a special proceeding and sustains the same relation to the Code of Civil Procedure that the writ of certiorari sustains to the common-law practice, is to review the records and proceedings of inferior courts, officers, or tribunals acting in a judicial capacity, and in no other. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. *Burnett v. Douglas County*, 4 Or. 388, 389.

Under Comp. Laws 1888, § 3778, it is provided that a writ of certiorari may be denominated a writ of review. It is apparent that the writ here designated is the common-law certiorari, and hence the power of the court under it is the same as at common law, except as narrowed or enlarged by statute. *Gilbert v. Board of Police & Fire Com'rs*, 40 Pac. 264, 268, 11 Utah, 378.

The writ of certiorari may be denominated the writ of review. Code Civ. Proc. Cal. 1903, § 1067; Comp. Laws Nev. 1900, § 3530.

WRIT OF RIGHT.

Certiorari as, see "Certiorari."
Habeas corpus as, see "Habeas Corpus."
Injunction as, see "Injunction."
Mandamus as, see "Mandamus."
Writ of error as, see "Writ of Error."

WRIT OF SCIRE FACIAS.

See "Scire Facias."

WRIT OF SEIZURE AND SALE.

The writ of seizure and sale is the final process to enforce payment of a claim by the sale of property antecedently mortgaged to secure the debt, and operates only on the property hypothecated. *American Nat. Bank v. Childs*, 22 South. 384, 386, 49 La. Ann. 1359.

WRIT OF SEQUESTRATION.

See "Sequestration."

WRIT OF SUBPŒNA.

See "Subpœna."

WRIT OF SUMMONS.

See "Summons."

WRIT OF SUPERSEDEAS.

See "Supersedeas."

WRITE—WRITING.

See "Indorse in Writing."

To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of "writing." *Clason v. Bailey* (N. Y.) 14 Johns. 484, 491.

"Writing is the method of originally developing a composition, and of adding copies made singly, letter by letter." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

An averment, in a libel suit, that defendant "composed, uttered, wrote, and sent" to a third person certain libelous words concerning the plaintiff, is a sufficient allegation of publication. *Benedict v. Westover*, 44 Wis. 404.

The provision of Comp. St. p. 274, § 10, that no agent or attorney shall "write" or draw up the deposition of any witness, etc., does not prohibit a writing or drawing up of a deposition which is a mere copy, but has reference to the composing or inditing of it. *Moulton v. Hall*, 27 Vt. 233.

A person paying a tax stated orally to the clerk of the treasurer of a city that he paid it under protest, and wished the clerk to make a note of it. The clerk, acting under instructions from the treasurer to make a note of all protests, written or oral, wrote upon the receipt given for the tax that it was paid under protest, and made a memorandum to that effect on the books of the treasurer. Held, that there was not "a protest in writing" by the person paying, within Gen. St. c. 12, § 58. *Knowles v. City of Boston*, 129 Mass. 551, 554.

An order, signed by a judge, to the clerk of the court, for its adjournment to a time mentioned, by telegraph, is a "written order" for such adjournment, within the meaning of the statute requiring such orders to be in writing. In this connection the court says that it makes no difference if the writing is done with a steel pen an inch long attached to an ordinary penholder, or whether the pen be a copper wire a thousand miles long. *State v. Holmes*, 56 Iowa, 588, 592, 9 N. W. 894, 41 Am. Rep. 121.

Marks.

Perpendicular marks drawn across the letters of the signature of a testator to his will were not "writings," within Laws 1890, c. 36, and Laws 1888, c. 555, permitting the comparison of writings by experts. In re *Hopkins' Will*, 65 N. E. 173, 174, 172 N. Y. 360, 65 L. R. A. 95, 92 Am. St. Rep. 746 (re-

versing 73 App. Div. 550, 77 N. Y. Supp. 178, and 35 Misc. Rep. 702, 72 N. Y. Supp. 415).

Pencil.

A will written and signed with lead pencil is "in writing," within Act April 8, 1833, requiring wills to be in writing, to be valid. *Myers v. Vanderbelt*, 84 Pa. 510, 513, 24 Am. Rep. 227; *In re Tomlinson's Estate*, 19 Atl. 482, 133 Pa. 245, 19 Am. St. Rep. 137.

A writing in pencil is "writing" within the common law and within the custom of merchants, and a statute requiring a contract to be in writing does not require that the same be written in ink. *Geary v. Physic*, 5 Barn. & C. 234, 238; *Olason v. Bailey* (N. Y.) 14 Johns. 484, 491.

The word "writing" embraces writing with a pencil, and hence an indorsement on a note with pencil is valid. *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245.

The word "writing" does not necessarily mean a writing with ink, and hence, where a book of original entries is offered in evidence, the fact that the entries are written in lead pencil is not a valid ground of objection. *Hill v. Scott*, 12 Pa. (2 Jones) 168, 169.

Printing, typewriting, engraving, or lithographing.

The term "written words" includes printed words. *Chaffin v. Lynch*, 1 S. E. 803, 807, 83 Va. 106.

Printed votes are "written votes," within the meaning of Const. art. 3, c. 1, § 3, providing that "every member of the House of Representatives shall be chosen by written votes." *Henshaw v. Foster*, 26 Mass. (9 Pick.) 312, 319. See, also, *Opinion of Justices*, 7 Me. (7 Greenl.) 492, 495; *Temple v. Mead*, 4 Vt. 535, 541; *Fritts v. Kuhl*, 17 Atl. 102, 107, 51 N. J. Law (22 Vroom) 191.

In the requirement that an olographic will must be in the writing of testator, "writing" does not include printing, but must be taken in its ordinary sense, as meaning to set down legible characters with pen and ink. *Succession of Robertson*, 21 South. 586, 587, 49 La. Ann. 868, 62 Am. St. Rep. 672; *In re Rand's Estate*, 61 Cal. 468, 473, 44 Am. Rep. 555. Hence a will partly printed and partly written is not a compliance with the statute. *In re Rand's Estate*, 61 Cal. 468, 473, 44 Am. Rep. 555.

A writing which is the subject of forgery may include instruments printed or engraved, as well as those traced by the pen. *Commonwealth v. Ray*, 69 Mass. (3 Gray) 441, 447. See, also, *In re Benson* (U. S.) 34 Fed. 649, 652.

Where deeds, bonds, tickets, and the like are required to be in writing, the term "writing" should be held to include printing as

well as script. *Benson v. McMahon*, 8 Sup. Ct. 1240, 1246, 127 U. S. 457, 32 L. Ed. 234.

1 Comp. Laws, p. 235, § 15, requiring notice in "writing" to be posted prior to an application for changing township boundaries, "may be construed to include printing, engraving, and lithographing." *Pelton v. Ottawa County Sup'rs*, 18 N. W. 245, 246, 52 Mich. 517.

"Written," as used in Code 1876, § 4354, providing that any person who sells or conveys any personal property upon which he has a written mortgage, lien, or a deed of trust, and which is then unsatisfied in whole or in part, is guilty of a misdemeanor, will be construed to mean written or printed. *Johnson v. State*, 69 Ala. 593, 596.

The word "writing," in Election Law 1891, § 23, authorizing a voter to prepare his ballot by writing in the name of the candidate in the blank space on the ticket, and making a cross opposite thereto, does not include the act of inserting the name of the candidate by using a paster upon which the name of the candidate is printed. *McSorley v. Schroeder*, 63 N. E. 697, 700, 196 Ill. 99.

A forged order requiring the person to whom it was addressed to pay another for corn, partly printed and partly written, the signature for which was not completed until the blank for the attestation of the weigher was filled in by him with his initials, is a "written instrument," within section 129 of the act relating to crimes and punishments. *State v. Lee*, 4 Pac. 653, 656, 32 Kan. 360.

A written statement includes a printed form with its blanks properly filled in in writing. *Winn v. State*, 5 Tex. App. 621, 623.

"Writing," as used in Gen. St. § 1094, providing that in actions against the representatives of deceased persons no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby, is not limited to words traced with a pen or pencil, but may include typewriting. *In re Deep River Nat. Bank*, 47 Atl. 675, 677, 73 Conn. 341.

The word "writing" or "written" includes printing. *Rev. St. Wyo.* 1899, §§ 2724, 5190; *Code Civ. Proc. Mont.* 1895, § 3463; *Pen. Code Mont.* 1895, § 7; *Pol. Code Mont.* 1895, § 16; *Civ. Code Mont.* 1895, § 4662; *Bates' Ann. St. Ohio* 1904, §§ 1536-907, 3178, 4947, 6794; *Rev. St. Okl.* 1903, §§ 2696, 5147; *Pen. Code Tex.* 1895, art. 30; *Rev. St. Fla.* 1892, § 1; *Gen. St. Minn.* 1894, § 6842, subd. 8; *Pen. Code Cal.* 1903, § 7; *Negotiable Instruments Law N. D.* § 191; *Rev. Codes N. D.* 1899, § 1060; *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Civ. Code Ala.* 1896, § 1; *Code Supp. Va.* 1898, § 2841a [*Va. Code* 1904, p. 1455]; *Ann. Codes & Sta. Or.* 1901, §§ 2184, 4592; *Pen.*

Code N. Y. 1903, § 718; Cobbey's Ann. St. Neb. 1903, § 2376; O'Bryan v. State, 11 S. W. 443, 444, 27 Tex. App. 339.

The word "writing" includes printing and typewriting. Code Civ. Proc. Cal. 1903, § 17; Rev. Codes N. D. 1899, §§ 7723, 8506; Code Cr. Proc. S. D. 1903, § 639; Pen. Code S. D. 1903, § 818; Civ. Code Cal. 1903, § 14.

The word "writing" includes printing, writing, and typewriting. Rev. St. Utah 1898, § 2498.

In the construction of statutes the words "written" and "in writing" may include printing, engraving, lithographing, and any other mode of representing words and letters; but, when the written signature of a person is required by law, it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark. Gen. St. Minn. 1894, § 255, subd. 16. See, also, Rev. Code Del. 1893, c. 5, § 1, subd. 14; Rev. Laws Mass. 1902, p. 89, c. 8, § 5, subd. 25; Code N. C. 1883, § 3765, subd. 10; Rev. St. Wyo. 1899, § 2724; Code Miss. 1892, § 1520; Gen. St. Kan. 1901, § 7342, subd. 18; Comp. Laws Mich. 1897, § 50, subd. 17; Mills' Ann. St. Colo. 1891, § 4185, cl. 11; Horner's Ann. St. Ind. 1901, § 240, subd. 9; Rev. St. Mo. 1899, § 4160; Shannon's Code Tenn. 1896, § 62; Comp. Laws N. M. 1897, § 2900; V. S. 1894, 20; Pub. St. N. H. 1901, p. 64, c. 2, § 23; Code Iowa 1897, § 48, subd. 18; Code W. Va. 1899, p. 133, c. 13, § 17; Pub. St. R. I. 1882, p. 78, c. 24, § 20; Hurd's Rev. St. Ill. 1901, p. 1720, c. 131, § 1, subd. 15; Fletcher v. Wall, 50 N. E. 230, 233, 172 Ill. 426, 40 L. R. A. 617; Ames v. Schurmeier, 9 Minn. 221, 222 (Gil. 206, 208); Brown v. McCormick, 28 Mich. 215, 217.

The terms "writing" and "written" include every legible representation of letters upon a material substance, except when applied to the signature of an instrument. Laws N. Y. 1892, c. 677, § 12.

The words "written" and "in writing" shall be construed to include any representation of words, letters, or figures, whether by printing or otherwise. Code Va. 1887, § 5 [Va. Code 1904, p. 7]; Rev. St. Tex. 1895, art. 3270.

The words "writing" and "written" include "printing" and "printed," except in the case of signatures, and where the words are used by way of contrast to printing. Writing may be made in any manner, except that, when a person entitled to require the execution of a writing demands that it be made with ink, it must be so made. Rev. St. Okl. 1903, § 2810. See, also, Rev. Codes N. D. 1899, § 5137; Civ. Code S. D. 1903, § 2471; Rev. St. Okl. 1903, § 2810.

In the construction of statutes, the word "writing" includes printing and numerals. Pen. Code Ga. 1895, § 2.

The words "written" and "in writing" may be construed to include printing, engraving, lithographing; and any other mode of representing words and letters; but in all cases where the written signature of any person is required by law it shall always be the proper handwriting of such person, or, in case he is unable to write, his proper mark, or his name written by some person at his request and in his presence. Rev. St. Wis. 1898, § 4971.

An instrument partly written and partly printed, or wholly printed, with a written signature thereto, and any signature or writing purporting to be a signature of or intended to bind an individual, a partnership, or corporation, or association, or an officer thereof, is a written instrument or a "writing," within the provisions of this chapter (Pen. Code, c. 92a). Gen. St. Minn. 1894, § 6694.

Reading written notice.

The word "writing," within the meaning of the act of Rhode Island (Dig. 1822, p. 246, § 3) providing that "no guardian shall be appointed or removed under this act unless all persons interested have had reasonable notice in writing, signed by the clerk and served by the town sergeant or constable," imports more than the mere rendering of the order of the court. "I understand that the notice must be a notice in writing, and that the officer must leave with the party a written notice from the clerk, or at least a certified copy in writing thereof." Hart v. Gray (U. S.) 11 Fed. Cas. 686, 687.

Shorthand.

"Writing," as used in Act 1876, No. 94, relating to the jurisdiction of the Supreme Court when the depositions of witnesses have not been taken in writing in the inferior court, embraces testimony taken on the trial of a case by a phonographer, though the phonographic notes of the officer may never afterwards have been transcribed or translated into ordinary writing owing to some accident. Nichols v. Harris, 82 La. Ann. 646, 648.

Stamp.

The word "writing," in law, not only means words traced with a pen or stamped, but printed or engraved or made legible by any other device. Haven v. Foster, 26 Mass. (9 Pick.) 112, 19 Am. Dec. 353. A stamped indorsement of an assignment of a bill of lading held a sufficient compliance with the Arkansas statute requiring such assignments to be in writing. Horner v. Missouri Pac. Ry. Co., 70 Mo. App. 285, 291.

Rev. St. § 1140, providing that the county clerk or treasurer may assign tax certificates "by writing his name in blank on the back thereof," cannot be construed to re-

quire that such writing be the "written signature" of the official, but the statute is complied with by a stamped signature. *Dreutzer v. Smith*, 14 N. W. 465, 467, 56 Wis. 292.

Writing on slate.

The term "writing," within the meaning of the statute requiring wills to be in writing, does not include a writing on a slate, although, strictly speaking, the term "writing" is broad enough to include such a writing, as a writing on a slate would not accomplish the purposes intended to be accomplished by the statute, which was to avoid the uncertainty attending proof of nuncupative wills. *Reed v. Woodward* (Pa.) 11 Phila. 541, 542.

WRITING—WRITINGS.

See "False Writing"; "Public Writing." Affidavit as, see "Affidavit." Other writing, see "Other."

Worcester defines "writing" to mean anything written; a written paper of any kind. *Thomas v. State*, 2 N. E. 808, 811, 103 Ind. 419.

Memorandum books containing entries of one's experiences and observations at different times and places in the line of his business, valuable to him for reference, are "writings," within Rev. St. § 4281 [U. S. Comp. St. 1901, p. 2042], providing that, if a shipper shall lade writings as freight on any vessel without giving notice of the true character and value thereof, the owner of the vessel shall not be liable therefor. *The St. Cuthbert* (U. S.) 97 Fed. 340, 341.

In construing the statute providing "that when a declaration or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue," the court said: "I see no reason why the broad words 'any person made any writing' should not be interpreted to include a letter concerning the matter in controversy, alleged in any pleading to have been written by any person"; and held that where a defendant in a chancery suit in his answer alleged that a third person wrote a letter touching the matter in controversy, and filed with his answer what purported to be the original letter, such letter would be regarded by the court as genuine, without any proof of the handwriting, unless the fact of the writing of such letter by the person by whom it is purported to have been written is denied by an affidavit. *Robinson v. Dix*, 18 W. Va. 528, 542.

The rule that a writing itself is the best evidence thereof, as applied to a telegraph message, is indicative of the original mes-

sage written by the sender and filed with the telegraph company. *Howley v. Whipple*, 48 N. E. 487, 489.

In criminal law.

The first question to be determined in considering whether a forgery has been committed is the legal signification of the term "writing," which appears in the definition of forgery as the making or alteration of a writing to the prejudice of another man's rights. To say that any writing may be the subject of a forgery, disconnected from the effect which this writing is to produce upon others, is simply an absurdity, and therefore the definitions restrict the meaning of the word, and define the various writings, the fraudulent making or alteration of which will amount to forgery. To make or alter a writing which either at common law or by statute was the subject of forgery, with intent to defraud another or to the prejudice of another man's right, or which, if genuine, would operate as the foundation of another's liability or the evidence of his right, is forgery. Therefore, for a clerk or bookkeeper to alter figures in journal entries so as to conceal his defalcation or abstraction of his employer's funds in his charge is forgery. *Commonwealth v. Biles* (Pa.) 3 Phila. 350, 351.

"Writing," as used in Pen. Code, §§ 514, 515, providing that an officer of a corporation who falsifies or unlawfully alters any writing appertaining to its business, or any other person who alters any writing with fraudulent intent, etc., belonging or appertaining to the business of a corporation, is guilty of forgery, etc., means an executed instrument under the express provisions of section 513, and does not include a written instrument of a claim for loss, falsified before it was signed by the claimant, and passed off on the company as the true settlement. *People v. Underhill*, 86 N. E. 1049, 1051, 142 N. Y. 38.

"Writing," as used in a statute providing for the punishment of every person who, with intent to cheat or defraud another, shall by color of any false writing obtain the signature of any person to a written instrument, or obtain any valuable thing, means some instrument, or at least letter—something in writing, purporting to be the act of another, or certainly of some person. It cannot mean anything written on paper, not purporting to be of any force or efficacy, but some instrument in writing or written paper purporting to have been signed by some person. *People v. Gates* (N. Y.) 13 Wend. 311, 320.

The word "writing" includes a bill of costs of a justice of the peace, as used in Code, § 5492, defining forgery as the fraudulent making or alteration of any writing to the prejudice of another's rights. It is a writing authorized, and in fact required, by law, to entitle a justice to receive payment

of his costs. If it is genuine, it has undoubted legal efficacy, and is the foundation of legal liability; and if it be in due form, though not genuine, it may and will, if used, operate to the prejudice of another's rights. *Luttrell v. State*, 1 S. W. 886, 887, 85 Tenn. (1 Pickle) 232, 4 Am. St. Rep. 760.

The words "writing" or "instrument," as used in the Code of Criminal Procedure relating to passing, uttering, and publishing forged instruments, covers every instrument or writing not within the special definition and scope of prior sections; and a draft is an instrument or writing within the statute. *State v. Foster*, 2 Pac. 628, 629, 30 Kan. 365.

In copyright law.

"Writings," as used in Const. art. 1, § 8, conferring on Congress power to secure for limited times, to authors, the right to their respective writings, means the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. *Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. Ed. 550.

By the word "writings" in a statute relative to copyrights is meant the literary productions of authors. *Burrow-Giles Lithographic Co. v. Sarony*, 4 Sup. Ct. 279, 281, 111 U. S. 53, 28 L. Ed. 349.

A musical composition is a "writing," within St. 8, Anne, vesting the copyright of printed books and writings in the authors. *Bach v. Longman*, 2 Cowp. 623, 624.

"Writing," as applied to a literary composition, is a method of originally developing the composition and of adding copies made simply letter by letter, as opposed to printing, which is a process of multiplying the copies by sheets. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

Same—Label or trade-mark.

"Writings," as used in the federal Constitution, securing to authors and inventors for a limited time the exclusive right to their respective writings, etc., does not include mere labels, whose object is only to indicate the contents of the package to which they are affixed. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 732, 140 U. S. 428, 35 L. Ed. 470.

The term "writing," within the meaning of Const. art. 1, § 8, cl. 8, which confers on Congress the power to secure for a limited time, to authors and inventors, the exclusive right to their respective writings, inventions, and discoveries, does not include a trade-mark. *Trade-Mark Cases*, 100 U. S. 82, 93, 25 L. Ed. 550.

In postal laws.

In construing the statute prohibiting the mailing of obscene books, pamphlets, pictures, papers, writings, prints, or other pub-

lications, etc., the United States Supreme Court say: "In the statute under consideration the word 'writing' is used as one of a group or class of words—'book,' 'pamphlet,' 'picture,' 'paper,' 'writing,' 'print'—each of which is ordinarily and prima facie understood to be a publication, and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and defines each with the common quality indicated. It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter on the outside of which there is nothing but the name and address of the person to whom it is written." *United States v. Chase*, 10 Sup. Ct. 756, 757, 135 U. S. 255, 34 L. Ed. 117; *United States v. Warner* (U. S.) 59 Fed. 355.

The term "writing," in the act of 1825 forbidding a writing or memorandum from being written on a newspaper or other printed paper, pamphlet, or magazine transmitted by mail, does not include a single letter or initial on the wrapper of a newspaper. *Teal v. Felton*, 53 U. S. (12 How.) 284, 291, 13 L. Ed. 990.

Same—Letter.

The term "writing," in the federal statute prohibiting the mailing of obscene writings, includes a letter or any writing, sealed or unsealed, having in it or upon it any obscene, etc., thing, sign, or suggestion. *United States v. Morris* (U. S.) 18 Fed. 900, 901; *United States v. Hanover* (U. S.) 17 Fed. 444; *Thomas v. State*, 2 N. E. 803, 811, 103 Ind. 419; *United States v. Thomas* (U. S.) 27 Fed. 682.

In construing Rev. St. § 3893, as amended by Act July 12, 1876, c. 186 [U. S. Comp. St. 1901, p. 2658], making it criminal to mail lewd, lascivious, and obscene writings, it was said that because the context contains the word "letter" in another connection is no reason for argument that the word "writing," as used in the statute, refers to some other form of literature than a letter. The word "letter" means anything written or expressed in letters. A "letter" is defined as a written or printed message. *United States v. Britton* (U. S.) 17 Fed. 731, 732.

The word "writing," in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], means a writing that is not sealed, but exposed to public view, and does not include a sealed letter, on the envelope of which no indication is made of its indecent contents. *United States v. Comerford* (U. S.) 25 Fed. 902, 903.

The term "writing," in the postal laws, does not include a private letter on the outside of which there is nothing but the name and address of the person to whom it is written. The word "writing," as used in this statute, does not include the word "letter."

United States v. Chase, 10 Sup. Ct. 756, 757, 135 U. S. 255, 34 L. Ed. 117.

WRITINGS FOR PAYMENT OF MONEY.

Wag. St. p. 917, § 9, prescribing a limitation of 10 years for an action on any "writing, whether sealed or unsealed, for the payment of money or property," embraced all kinds of written instruments, without regard to their form or phraseology, which implied a promise or an agreement to pay money, and did not mean merely such as had the requisites of promissory notes, or such as contained an express promise or agreement to pay. **Shelton v. Wyman**, 1 Mo. App. 130, 133 (citing **Reyburn v. Casey**, 29 Mo. 129).

Doubts have arisen as to what writings ought to be interpreted to create obligations for the payment of money or property, within the meaning of **Rev. St. 1899, § 4272**, providing that no action shall be barred on a writing for the payment of money or property under 10 years. In **Reyburn v. Casey**, 29 Mo. 129, it was said that the broad and comprehensive language of the statute evidently embraces all kinds of written instruments, without regard to their form and phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes, or to such as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed. **Howe v. Mittelberg**, 70 S. W. 396, 397, 96 Mo. App. 490.

A rule of court requiring an affidavit of defense in actions on bills, records, and other "writings for the payment of money" cannot be construed to include a sheriff's recognizance, for it is for the performance of a collateral condition. **Commonwealth v. Hoffman**, 74 Pa. (24 P. F. Smith) 105, 109.

WRITING OBLIGATORY.

The words "writing obligatory" are technical, and imply a written instrument under seal. **Clark v. Phillips** (U. S.) 5 Fed. Cas. 908; **Stull v. Wilcox**, 2 Ohio St. 569, 573.

"Writing obligatory" is practically synonymous with "bond," and implies and includes the ideas of signing and sealing. **Denton v. Adams**, 6 Vt. 40, 42.

A writing obligatory is a bond, or some written obligation under seal. It is a term that is never applied to simple contracts, though they may be in writing. **Luna v. Mohr**, 1 Pac. 860, 864, 3 N. M. (Johns.) 56.

The word "deed" or "writing obligatory" was said, in **Jackson v. Perkins** (N. Y.) 2 Wend. 308, 317, to imply the sealing and delivery of the deed, and therefore all that is

necessary in a pleading is to allege the execution of the deed or writing obligatory, and it is not necessary to allege sealing or delivery. **Egan v. Horrigan**, 51 Atl. 246, 248, 96 Me. 46.

"Writing obligatory" has not come into common use in a sense different from its technical one. The expression is rarely used, even by the profession, except in pleading, and then always as signifying a writing under seal. **Watson v. Hoge**, 15 Tenn. (7 Yerg.) 344, 351.

In **Denton v. Adams**, 6 Vt. 40, the court held that the words "writing obligatory," in a declaration for a jail bond, imported that the instrument was signed and sealed, since it would not become a writing obligatory without signing and sealing. These words are of the same import as "deed in writing," which clearly imports both signing and sealing. **Ide v. Passumpsic & C. R. R. Co.**, 82 Vt. 297, 298.

WRITING THE RISK.

"Writing the risk," as used in a policy of fire insurance providing that it might be terminated at the request of the insured by repaying the company the customary short rates, together with the expenses of "writing the risk," is not synonymous with, and does not in insurance parlance mean the same thing as, "writing the policy." **State Ins. Co. v. Horner**, 23 Pac. 788, 14 Colo. 391.

WRITTEN BALLOTS.

Chief Justice Parker, in **Henshaw v. Foster**, 26 Mass. (9 Pick.) 312, declared that, if an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as the convenient exercise of a fundamental right, such sense should be attributed to it, and in that view was lead to hold that the words "written votes" in the Massachusetts Constitution included both written and printed votes. **Fritts v. Kuhl**, 17 Atl. 102, 107, 51 N. J. Law (22 Vroom) 191.

"Written," as used in **Const. art. 2, § 2**, providing that elections for governor, senators, and representatives shall be by written ballots, means expressed by letters, and hence a printed ballot is within the provision. **Opinion of Justices**, 7 Me. (7 Greenl.) 492, 495. So, also, under the Constitution of Vermont. **Temple v. Mead**, 4 Vt. 535, 541.

WRITTEN CONSENT.

Where a statute chartering a water-power company gave it a right to divert the water of a river on the "written consent" of those owning lands or water privileges, the "written consents" were substituted for, and were equivalent to, the deeds required by

common law in order to create incorporeal hereditaments. *Raritan Water-Power Co. v. Veghte*, 21 N. J. Eq. (6 C. E. Green) 463, 469.

WRITTEN CONSTITUTION.

A written constitution is in every instance a limitation upon the powers of government in the hands of agents, though there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition. *State v. Ah Chuey*, 14 Nev. 79, 101, 33 Am. Rep. 530 (citing *Cooley*, Const. Lim. [3d Ed.] marg. p. 37).

A written constitution marks the only degree of restraint which, to promote stable government, the people put upon themselves. They resolve, in such an instrument, in substance: We will not do certain things, and we will do certain things; and generally in the same instrument any change in the course of government thus marked out is rendered difficult by the formalities and lapse of time which must attend an amendment of it. *Commonwealth v. Reeder*, 33 Atl. 67, 68, 171 Pa. 505, 33 L. R. A. 141.

WRITTEN CONTRACT.

A written contract is one which in all its terms is in writing. *Bishop*, Cont. § 163. *Railway Passenger & Freight Conductors' Mut. Aid & Ben. Ass'n v. Loomis*, 32 N. E. 424, 426, 142 Ill. 560 (*Bishop*, Cont. § 163); *Ames v. Moir*, 22 N. E. 535, 130 Ill. 582; *Wood v. Williams*, 40 Ill. App. 115, 117.

A contract in writing is none the less so because it expresses, and its operation depends upon, a contingency. When the contingency happens, the minds of the parties meet as to all the terms which the contract expresses, and to write them over again would be one of those useless acts which the law does not require. *Insurance Law Bldg. Co. v. National Bank of Missouri*, 5 Mo. App. 333, 336.

Code 1852, § 211, requiring suits on contracts in writing to be brought within 20 years, means a contract in which "the parties thereto, as well as its entire terms and stipulations, can be gathered from the instrument itself, or some other written instrument referred to therein, without the aid of parol evidence to ascertain either." *Board of Com'rs of Marion County v. Shipley*, 77 Ind. 553, 555.

The term "obligation or written contract," in the provision of the statute declaring that an obligation or written contract of several persons shall be joint and several, unless otherwise expressed, held not to embrace or apply to promissory notes or bills of

exchange. *Gale v. Myers* (Del.) 4 *Houst.* 546, 547. The term includes a contract stating that one person has bought goods from another, describing the goods and giving the price and condition of the sale, though signed only by the purchaser. *Ames v. Moir*, 22 N. E. 535, 130 Ill. 582.

Whether parties have committed their entire contract to writing is a question for the determination of the court. In this determination the writing itself is the guide. If, on its face, it imports to be complete—that is, if it contains such language as imports a complete legal obligation between the parties—it is complete, so that parol evidence will never be admitted to extend its obligations to cover matters upon which the writing is silent. *Ehrsam v. Brown*, 67 Pac. 867, 869, 64 Kan. 468.

An appeal bond conditioned to pay a money judgment is a "written contract for the payment of money," within *Horner's Ann. St.* 1897, § 293, cl. 5, barring actions on written contracts for the payment of money in ten years. *Taylor v. Smith*, 53 N. E. 1048, 1049, 22 Ind. App. 418.

A written contract creates a specified relation between the parties, and, when the duties of that relation are not fully defined in the contract, the law defines them according to the circumstances. In a carrier case it defines the duty in part by implying the exception against inevitable accident. *Morrison v. Davis*, 20 Pa. (8 Harris) 171, 177, 57 Am. Dec. 695.

Oral contracts compared.

There is no difference between the character of a written and verbal contract; the only difference being that in the one case the evidence of the terms of the contract is in writing, while in the other they are not. *Musgrove v. City of Jackson*, 59 Miss. 390, 392.

WRITTEN EVIDENCE.

As the term is used with reference to a contract, it does not mean everything which is in writing relating to the contract, but that only which is of a documentary nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of the final intentions. *Cohen v. Jacobolice*, 59 N. W. 665, 667, 101 Mich. 409 (citing 1 Greenl. Ev. c. 15).

WRITTEN INSTRUMENT.

See, also, "Instrument."

An "instrument of writing" is defined to be something reduced to writing as a means of evidence. *Abb. Law Dict.* Webster defines it to be a writing expressive of some act, contract, process, or proceeding, as a

deed, contract, writ, etc. *Webst. Dict. State v. Kelsey*, 44 N. J. Law (15 Vroom) 1, 34.

An instrument of writing, "ecritura," is every deed that is made by the hand of a public "escribano," or notary of a corporation, or counsel, "concejo," or sealed with the seal of the king or other authorized person. *United States v. King*, 48 U. S. (7 How.) 833, 887, 12 L. Ed. 934.

Code Civ. Proc. § 339, requiring actions on a contract, obligation, or liability not founded on an "instrument of writing" to be commenced within two years, refers to contracts, obligations, or liabilities arising in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. *Lattin v. Gillette*, 30 Pac. 545, 547, 95 Cal. 317, 29 Am. St. Rep. 115.

An instrument partly written and partly printed, or wholly printed, with a written signature thereto, and any signature or writing purporting to be a signature of or intended to bind an individual, partnership, corporation, or association, or an officer thereof, is a "written instrument," or a writing, within the provisions of the Penal Code. *Gen. St. Minn. 1894*, § 6694.

The words "instrument in writing," as used in the article defining and punishing forgery and other offenses affecting written instruments, include every writing purporting to make known or declare the will or intention of the party whose acts it purports to be, whether the same be of record or under seal or private signature, or whatever other form it may have. It must be upon paper or parchment, or some substance made to resemble either of them. The words may be written, printed, stamped, or made in any other way or by any other device; and the words "in writing," "write," or "written" include all these modes of making. An instrument partly printed or stamped and partly written is an instrument in writing. *Pen. Code Tex. 1895*, art. 533.

By "instrument in writing," as used in the chapter defining and punishing false certificate, authentication, or entry by an officer, is meant any deed, conveyance, transfer, release, obligation, or other written instrument, of any kind or description whatever, which such commissioner is by law authorized to authenticate for record. *Pen. Code Tex. 1895*, art. 247.

Abstracter's certificate of title.

In Code Civ. Proc. § 339, limiting the commencement of an action upon a contract not founded on such an instrument to two years, the expression "instrument of writing"

does not include an abstracter's certificate of title. *Lattin v. Gillette*, 30 Pac. 545, 95 Cal. 317, 29 Am. St. Rep. 115.

Accounts.

The term "instrument in writing" is said by Bouvier to include bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters, or memoranda. To the same effect see *And. Law Dict.* So that, under a statute making it forgery to falsely make, etc., any promissory note and other enumerated instruments, "or any other instrument in writing," an account is not subject to forgery. *State v. Heaton*, 49 Pac. 493, 495, 17 Wash. 310.

Agreement for assignment of contract.

Comp. Laws, § 3450, providing that interest shall be allowed on all moneys after they become due on any bond, bill, promissory note, or "other instrument in writing," includes a written agreement for the assignment of a contract for the construction of railroad tunnels. *Simms v. Hampson*, 12 Pac. 686, 687, 2 Ariz. 233.

Certificate of notary.

The expression "instrument in writing," as used in *Pasch. Dig. art. 2093*, providing that he is guilty of forgery who, without lawful authority and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, etc., does not include the certificate of a notary public purporting to authenticate the acknowledgment of a conveyance or transfer. *Rogers v. State*, 8 Tex. App. 401, 403.

Check.

See "Check."

County warrant.

Rev. Code 1845, p. 371, providing that every person who shall forge, etc., any "instrument in writing" purporting to be the act of another, shall be punished, etc., should be construed to include a county warrant. *State v. Fenly*, 18 Mo. 445, 449.

Indorsement on note.

The phrase "written instrument," as used in *Comp. Laws Dak. § 3538*, subd. 2, providing that a written instrument is presumptive evidence of a consideration, embraces the writing, "Extended to December 1, 1891," placed by the payee thereof on a promissory note pursuant to the agreement with the maker to extend the time of payment. *Corbett v. Clough*, 65 N. W. 1074, 1075, 8 S. D. 176.

Interest coupons.

Coupons for installments of interest on a mortgage will not draw interest after they become due as "written instruments," within

the meaning of Rev. St. Ill. c. 74, § 2, providing that creditors shall be allowed interest at 6 per cent. on instruments in writing after due. *United States Mortgage Co. v. Sperry* (U. S.) 26 Fed. 727, 729.

Judgment.

It has been repeatedly and uniformly held by our courts that a judgment is not a written instrument, within Rev. St. 1894, § 365, permitting an exhibit to be filed with a pleading founded upon a written instrument, and a copy of a judgment so filed does not become a part of the pleadings by reference. *First Nat. Bank of Indianapolis v. Hanna*, 39 N. E. 1054, 1056, 12 Ind. App. 240; *Morrison v. Fishel*, 64 Ind. 177, 180; *Wilson v. Vance*, 55 Ind. 584, 588; *Dumbould v. Rowley*, 15 N. E. 463, 465, 113 Ind. 353; *Lytle v. Lytle*, 37 Ind. 281, 283; *Wyant v. Wyant*, 38 Ind. 48, 49.

Act 1823, which, after enumerating several descriptions of claims that shall be entitled to a preference in the distribution of an intestate's estate where the same is insufficient to pay all the debts, provides that the executors, etc., shall then pay a balance on the legal demands in equal proportions according to their amount, without regard to the nature of such claims, not giving preference to any debts on account of the "instruments of writing" on which the same may be found, does not include a judgment recovered previous to the passage of the act; hence the judgment will be entitled to preference the same as before. *Woodworth v. Payne's Adm'r*, 1 Ill. (Breese) 374, 376.

The phrase "written instrument for the payment of money only," as used in St. Minn. 1856, which provides that when a pleading is verified by the attorney or other person, except the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party, except when the action or defense is founded upon a "written statement for the payment of money only," and such instrument is in the possession of the agent or attorney, refers to and includes bills of exchange, notes, bonds, contracts, or any instrument, the creature of contracting parties, containing a stipulation for the payment of money only, but does not include judgments. *Smith v. Mulliken*, 2 Minn. 319, 322 (Gil. 273, 276).

Mechanic's lien.

Burns' Ann. St. 1894, § 8006, requiring the recorder to record all deeds, bonds, etc., and other "instruments of writing" delivered to him which by law he is bound to record, should be construed to include a mechanic's lien. *State v. Phillips*, 62 N. E. 12, 14, 157 Ind. 481.

The term "written instrument," as used in Code Kan. § 108, which provides that, "in

all actions, allegations of the execution of written instruments, and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, shall be taken as true," etc., includes a mechanic's lien. *Hayner v. Eberhardt*, 15 Pac. 168, 169, 37 Kan. 308.

Memorandum of tax receipts.

Memoranda of the receipt of taxes made in the margin of the assessment books, with the name of the defendant signed to them, are not "written instruments," within the meaning of Laws 1867, c. 64, and are not admissible to charge him with such taxes, unless in some way authenticated as his entries. *Board of Mower County Com'rs v. Smith*, 22 Minn. 97, 115.

Note, mortgage, etc.

In *Gale v. Myers* (Del.) 4 Houst. 546, the Supreme Court of Delaware declined to consider promissory notes as included in the statutory expression "obligation or written instrument." *Exchange Bank v. Streeter* (Colo.) 4 Pac. 746, 750.

"Written instrument," as used in 2 Gav. & H. St. p. 104, § 78, which provides that, when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleadings, includes deeds, mortgages, bonds, written contracts, promissory notes, bills of exchange, etc. *Lytle v. Lytle*, 37 Ind. 281, 283; *Wyant v. Wyant*, 38 Ind. 48, 49.

A mortgage not under seal is within the meaning of *McCl. Dig. p. 733, § 10*, providing that actions "upon any contract, obligation, or liability, founded upon an instrument of writing not under seal," must be commenced within five years after the cause of action accrued. *Hope v. Johnston*, 9 South. 830, 832, 28 Fla. 55.

Receipt.

A receipted voucher, showing the amount agreed upon as due and an acknowledgment of its payment, is a "written instrument" by which a pecuniary obligation is not only created and acknowledged, but is defeated and discharged. It is a proof of the debt, an obligation conceded, and is personal property, within Gen. St. 1894, § 6842, providing that "personal property," as used in the Penal Code, shall embrace the written instruments by which any pecuniary obligation or right is created, acknowledged, or transferred. *State v. Scanlon*, 94 N. W. 686, 89 Minn. 244.

Returns of marriages, births, and deaths.

Within Act Feb. 6, 1817, providing that the Secretary of State is entitled to receive for the filing of every bond or instrument of writing of a public nature a certain sum, the returns of marriages, births, and deaths.

which are required by law to be filed by the Secretary of State, are not instruments of writing. *State v. Kelsey*, 44 N. J. Law (15 Vroom) 1, 34.

Stenographer's report of testimony.

The stenographer's report of oral testimony, though filed in court, is not a written instrument, within the meaning of the Code, allowing written instruments to be brought into the record by reference in a skeleton bill of exceptions. *Patterson v. Churchman*, 122 Ind. 379, 22 N. E. 662, 23 N. E. 1082; *Doyal v. Landes*, 20 N. E. 719, 119 Ind. 479. The words have reference rather to bills, bonds, conveyances, leases, etc. They have a restrictive connotation, from being associated with the words "documentary evidence," and mean papers of that class. *Patterson v. Churchman*, 23 N. E. 1082, 1083, 122 Ind. 379.

Tax duplicate.

A tax duplicate is not a written instrument. *Hazzard v. Heacock*, 39 Ind. 172-174.

WRITTEN LAWS.

"The written laws of a kingdom are statutes, acts, or edicts." *People v. Tiphaine* (N. Y.) 3 Parker, Cr. R. 241, 244 (quoting 1 Bl. Comm. 85).

Los Angeles City Charter, p. 506, § 1889, declared by Const. art. 11, § 8, to be the organic law of the city, is a "written law." *Frick v. City of Los Angeles*, 47 Pac. 250, 251, 115 Cal. 512.

A "written law" is that which is promulgated in writing and of which a record is in existence. *Code Civ. Proc. Cal.* 1903, § 1896; *Ann. Codes & Sts. Or.* 1901, § 733.

WRITTEN OPINION.

Prac. Act, § 340, relating to any "written opinion" placed on file in rendering judgment, does not refer to findings of fact, but probably refers to the reason or argument for any decision, judgment, or order, and is not synonymous with "written decision." *Corbett v. Job*, 5 Nev. 201, 205.

WRITTEN STATEMENT.

"A written statement is a series of facts or particulars expressed on paper." *State v. Laughton*, 8 Pac. 344, 350, 19 Nev. 202.

"Written statement," within the meaning of the statute defining an indictment to be the written statement of a grand jury, etc., includes a printed form with its blanks properly filled in writing. *Winn v. State*, 5 Tex. App. 621, 623.

The "written statement" mentioned in *Township Organization Act*, art. 7, § 7, requiring the judges of an election to make a

written statement or certificate of the number of votes cast, is equivalent in meaning to the word "certificate," as used in the act. The term does not include a written statement not signed by the judges of election. *People v. Nordheim*, 99 Ill. 553, 560.

WRITTEN VOTES.

See "Written Ballots."

WRONG.

See "Contributing Wrong"; "Malicious Wrong"; "Private Wrong"; "Public Wrong."

Personal wrong, see "Personal Injury."

In *Cooley, Torts*, 98, the learned author says: "A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive. The question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of a party injured and the extent of his injury, and makes what he suffers the measure of compensation. In its most usual sense, according to Mr. Blackstone (3 Bl. Comm. 158), wrong signifies an injury committed to the person or property of another, or to his relative rights, unconnected with contract; and these are committed with or without force. *McDonald v. Brown*, 51 Atl. 213, 214, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659.

The fathers of the common law, in saying that for every wrong there should be a remedy, by wrong meant a violation of the municipal law, the law of civil conduct, not a transgression of the divine law, as such, nor a breach of etiquette. *Western Union Tel. Co. v. Ferguson*, 60 N. E. 674, 676, 157 Ind. 64, 54 L. R. A. 846.

A wrong is a violation of one's right, and for the redress of every wrong there is a remedy. Want of right and want of remedy are justly said to be reciprocal. When, therefore, there has been a violation of right, the person injured is entitled to an action. *Parker v. Griswold*, 17 Conn. 288, 303, 42 Am. Dec. 739.

A wrong is a breach of a legal duty, and where there is no wrong there is no cause of action. *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 69 Pac. 241, 243, 27 Mont. 44.

"Wrong" means any deprivation of right, breach of contract, or injury done by one person to another. *O'Connor v. Dils*, 26 S. E. 354, 355, 43 W. Va. 54.

"Wrong" and "injury" are generally used as synonymous terms in the law. *People v.*

Quanstrom, 53 N. W. 165, 166, 93 Mich. 254, 17 L. R. A. 723.

"Wrongs" are divided into two sorts: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to the individuals, considered as individuals, and are therefore frequently termed "civil injuries." The latter are a breach and violation of public rights and duties, which affect the whole community considered as a community, and are distinguished by the harsher appellation of "crimes and misdemeanors." *Cullinan v. Burkhard*, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321; *McDonald v. Brown*, 51 Atl. 213, 214, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659.

Clearly, the word "wrong," in its broad sense, includes every injury to another, independent of the motives causing the injury; yet, taken as used in an instruction that, if the jury find from the evidence that the defendant has done wrong and caused an injury thereby, a prima facie case of compensation is made out, unless they further find that the negligence of the plaintiff contributed directly to the injury complained of, it meant and could mean nothing but the kind of wrong the court was defining to the jury. In defining "negligence" as the failure to exercise great or extraordinary care, or as a want of that care which an ordinarily prudent man would ordinarily exercise, or as the want of slight diligence, and the failure to take this kind of care, where others are liable to injury, was the wrong, the court was charging the jury that as to an injury caused thereby there was a prima facie case of compensation made out. *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565.

WRONGDOER.

The term "wrongdoer" embraces every one who violates an express statute. In *re Long*, 15 N. Y. Supp. 657, 659, 60 Hun, 585.

WRONGFUL—WRONGFULLY.

Where one heedlessly, recklessly, and carelessly injures trees of another, the act is wrongful, within the meaning of the statute allowing prosecution for wrongful injury to property. *Daily v. State*, 37 N. E. 710, 713, 51 Ohio St. 348, 24 L. R. A. 724, 46 Am. St. Rep. 578.

An allegation that an arrest was "wrongful" states but a conclusion of law. *Connolly v. American Bonding & Trust Co.*, 69 S. W. 959, 961, 113 Ky. 903.

Three things are necessary to constitute a "wrongful attachment," viz.: want of proper cause, malice in the defendant, and damage to the plaintiff. *Parmer v. Keith*, 20 N. W. 103, 16 Neb. 91.

Dishonesty.

The word "wrongfully," as used in an entry upon the records of a society which was printed and sent to its subordinate lodges, ordering that a claim for the balance of salary be rejected, and that, if the claimant should institute suit therefor, a cross-action be brought against him to recover the amount "wrongfully" obtained by him upon a claim of salary for a time subsequent to the termination of his office, does not impute dishonesty, so as to make the matter libelous. The words "wrongfully obtained" import no more than the words "illegally obtained" or "obtained without right." The substance of the statement is that after the termination of his office the person in question obtained money on a claim of salary that should not have been paid to him. *Keyer v. Rives* (Ky.) 56 S. W. 4.

Knowledge and intention.

The phrase "wrongfully and illegally conveyed away a slave" is not of the same import as the phrase "guilty of conveying away such slave," as it lacks the essential ingredients of knowledge and intention. *Boice v. Gibbons*, 8 N. J. Law (3 Halst.) 324, 330.

Negligence.

"Wrongful" is a more comprehensive term than the word "negligence." As used in Const. § 241, giving a right to recover damages whenever the death of a person shall result from an injury inflicted by negligence or "wrongful act," the words denote or embrace all acts, other than those constituting mere negligence, which are wrong and inflict an injury resulting in death. *Clarke's Adm'r v. Louisville & N. R. Co.*, 39 S. W. 840, 841, 101 Ky. 34.

Unauthorized.

Where the board of equalization increases an assessment without authority, such unauthorized interference was wrongful, within the meaning of Rev. St. 1881, § 3813, providing that, where a person shall make it appear to the board of commissioners that any taxes were assessed wrongfully, the board shall order the same refunded. *Cleveland, C., C. & St. L. Ry. Co. v. Marion County Com'rs*, 49 N. E. 51, 53, 19 Ind. App. 58.

Laws 1873, c. 263, § 1, fixing the rule of damages in actions brought to recover the value of logs "wrongfully" cut from the lands of another at the highest market value of such logs or timber between the time of such cutting and the trial of the action, means any unlawful or unauthorized cutting of logs or timber on the lands of another, or by any act of this description which is a civil wrong or without right. Such cutting may be wrongful, and yet done by mistake. *Webber v. Quaw*, 49 N. W. 830, 831, 46 Wis. 118.

Unlawfully.

The words "wrongfully" and "unlawfully" are not synonyms or equivalents of each other, nor convertible terms; so that, under a statute authorizing an action for personal property which has been wrongfully taken or unlawfully detained, it is held that an allegation that the property was wrongfully detained was not sufficient. *Louisville, E. & St. L. Ry. Co. v. Payne*, 2 N. E. 582, 584, 103 Ind. 188.

The phrase "wrongfully detained," as used in Gen. St. 1875, § 1, providing that an action of replevin may be maintained to recover goods "wrongfully detained in any manner," is of a more extensive meaning than the phrase "unlawfully detained," which phrase would only imply a detention contrary to law, while the phrase "wrongfully detained in any manner" would include any detention which does wrong to another, whether or not it were under color of authority, as the detention of goods under levy of execution. *Hilton v. Osgood*, 49 Conn. 110, 112.

Wanton or malicious.

Const. § 241, provides that, when death results from wrongful act, the damages shall be prosecuted by the personal representative of the deceased. Held, that the words "wrongful act" applied only to acts from which negligence could arise, and hence did not apply to Gen. St. c. 1, § 6, giving a right of action for damages to the widow of the person killed by the wanton or malicious use of firearms. *McClure v. Alexander* (Ky.) 24 S. W. 619.

The word "wrongful," as used in Code Tenn. §§ 3471, 4289, providing that plaintiff in attachment shall give a bond conditioned that he will prosecute the attachment with effect, or, in case of failure to so prosecute it, he will pay such damages as the defendant sustains by the wrongful suing out of the attachment, means a mere failure to prosecute with effect, and the court is not authorized, in any suit for statutory damages, to import from the common law any element of malice or want of probable cause, for the suit does not require it, and its object is to create a right or remedy to prescribe its limitations and conditions; but, if there be malice and want of probable cause, the defendant may also recover punitive damages. *Jerman v. Stewart* (U. S.) 12 Fed. 266, 270.

The word "wrongful," as used in a bond conditioned on the payment of all costs and damages that plaintiff might sustain by wrongful suing out of a writ of ne exeat, is not synonymous with the word "malicious," and the writ may have been wrongfully sued out, though it was done without malice. *Spivey v. McGehee*, 21 Ala. 417, 422.

Under a statute providing that, when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may sue, etc., it is held that the word "wrongful" is not used in the sense of "willful" or "malicious." *McLean v. Burbank*, 12 Minn. 530, 533 (Gil. 438, 443).

The words "wrongful act," as used in Const. § 241, and Ky. St. § 6, giving a right of action for the death of a person resulting from injury inflicted by wrongful act, are comprehensive enough to include negligent acts, but they were intended primarily to cover cases where the act was wantonly or intentionally committed, or where one may have counseled or procured another to do it, when in contemplation of law the act of counseling or advising makes the wrongful act his own; and hence a recovery for the death of a servant, resulting from the master's breach of contract to furnish a guard to protect him from assault by others, cannot be sustained. *Lewis v. Taylor Coal Co.*, 23 Ky. Law Rep. 2218, 2219, 66 S. W. 1044, 112 Ky. 845, 57 L. R. A. 447.

Without sufficient grounds.

Within Code Civ. Proc. § 200, providing that plaintiff in attachment shall give an undertaking conditioned to pay all damages by reason of the attachment, if the order be wrongfully obtained, an attachment will not be held wrongful because dissolved on account of defects in the forms of proceeding, or mere omissions, irregularities, or informalities which the officer may have committed in the issuance of the process, but that the attachment was resorted to without sufficient ground. *Storz v. Finklestein*, 69 N. W. 856, 50 Neb. 177.

WROUGHT.

A railroad's classification and tariff, fixing a certain rate for marble "wrought," does not necessarily mean worked or worked upon. Marble sawed into slabs is never used in that condition for any purpose, but is sawed into slabs preparatory to being worked or fitted for some particular use or purpose, and is not "wrought" within the meaning of the tariff rate. *Bancroft v. Peters*, 4 Mich. 619, 625.

WROUGHT BY HAND.

Astrakhan trimmings, with no evidence of hand work save the turning down of the hem and the basting thereof, are not "dress trimmings wrought by hand," within Tariff Act Oct. 1, 1890, c. 1244, par. 398, 26 Stat. 597, imposing a duty on such articles. In *re Downing* (U. S.) 56 Fed. 815, 817.

X

X.

A complaint charged that the defendant answered an inquiry to the plaintiff in figures, words, signs, and abbreviations as follows: "Gentlemen: Could you furnish the following: 40 Brack. 8x5, 8 Mem.; 36 Brack. 12x8, 8 Mem.? At what price, and how soon?" The complaint averred that by the usages and customs of the business of manufacturing, buying, and selling dressed lumber and brackets, the abbreviation "brack." is

intended to and does mean "bracket"; that the character "x" is a substitute for and means "by"; and that the abbreviation "mem." stands for the word "member." Held, that the terms in the complaint were per se intelligible in themselves, and hence plaintiff properly alleged their meaning in the trades and business in which they were used, and that he was entitled to prove such meaning by parol at the trial. *Jaqua v. Witham & A. Co.*, 100 Ind. 547, 548, 7 N. E. 314, 315.

Y

YACHT.

As barge, see "Barge."

YARD.

See "Gravity Yard"; "In Yard"; "Railroad Yard"; "Square Yard."

The word "yard," by common and current acceptation, is an inclosure within which any work or business is carried on. In an insurance policy on lumber in yard, it does not include lumber in a clearing in a forest. *Cook v. Loew*, 69 N. Y. Supp. 614, 84 Misc. Rep. 276.

Webster's definition of the word "yard" is an inclosure, usually a small inclosure in front of or around a house or barn. The word "yard," as generally used in speaking of a dwelling, does not necessarily mean or suggest the idea to the American mind of an inclosure, but rather the plat immediately surrounding and upon which is situated the dwelling and other buildings used in connection therewith for domestic purposes. *State v. Bugg*, 72 Pac. 236, 66 Kan. 668.

"Yard," as used in Act 1876, known as the jury law, prohibiting the summoning of jurors within the courthouse or yard, does not include an uninclosed public square used as an open market and public resort, though situated only 20 feet from the courthouse. *Matthews v. State*, 6 Tex. App. 23, 39.

YARD FIXTURES.

The term "yard fixtures," in a fire policy excepting store and yard fixtures, etc., does not include an awning attached to the front of the insured building. *Commercial Fire Ins. Co. v. Allen*, 1 South. 202, 207, 80 Ala. 571.

YEAR.

See "Calendar Year"; "Current Year"; "Each Year"; "Fiscal Year"; "Full Year"; "Half Year"; "Previous Year." See "By the Year."

Agreement to be performed within a year, see "Perform."

The term "year" means a period of 365 days. *Pol. Code Cal. 1903*, § 3257.

Fractions of a year are to be computed by the number of months, thus: Half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day and involve no questions of priority. *Rev. Codes N. D. 1899*, § 5132; *Civ. Code S. D. 1903*, § 2466.

Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year 1752 is the 1st day of January, according to such style. For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bisextile or leap year, consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four, and every year which is not a leap year is a common year, consisting of three hundred and sixty-five days. The term "year," in a statute, contract, or other public or private instrument, means three hundred and sixty-five days; but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract, or public or private instrument the term "year" means twelve months, the term "half year" six months, and the term "a quarter of a year" three months. *Laws N. Y. 1892*, c. 677, § 25.

Under a statute for the relief of persons robbed of their goods, and providing that no person should take any benefit thereby unless he should commence his suit or action within one year next after such robbery, the day when the robbery was committed was to be included in computing the year. *Rex v. Addersly*, 4 Doug. 463, 465.

A will in which testator gave to his son all his real estate, on condition that he pay "in one year next after my decease" certain legacies, should not be construed to include the day of the testator's death in the computation of the time within which the son was required to make the payment of money mentioned in the devise. *Sands v. Lyon*, 13 Conn. 18, 25.

Such words as "eighteen hundred and seventy-one," as used in an indictment, in stating the time of the alleged offense, immediately following the month and day of the month, sufficiently denote the year, though the word "year" is not used. *State v. Munch*, 22 Minn. 67, 71.

The words "eighteen hundred and fifty-eight," immediately following the month and day of the month, in an indictment or complaint, in stating the time of the alleged offense, sufficiently denote the "year," though the words "the year of our Lord" are omitted. *Commonwealth v. Doran*, 80 Mass. (14 Gray) 37, 38.

Laws N. Y. 1892, c. 677, as amended by *Laws 1894*, c. 447, § 25, declare that the term

"year" in a statute, contract, or any public or private instrument means 365 days, and also means 12 months. *Aultman & Taylor Co. v. Syme*, 57 N. E. 168, 169, 163 N. Y. 54, 79 Am. St. Rep. 565.

There is no real difference between "one whole year" and "one whole year at the least." An occupation of premises beginning on September 30th in one year and ending on September 29th in the next year, thus making 365 days, will be deemed "one whole year," within the meaning of a statute relating to landlords and tenants. *Reg. v. St. Mary, Warwick*, 18 Eng. Law & Eq. 309, 314.

The service to gain settlement must be for a whole year, though it happens to be leap year, and consists of 366 days. A hiring from the 13th day of May, 1819, to the 13th of May, 1820, and service under it till May 12, 1820, namely, 365 days, was not sufficient to give a settlement. *Rex v. Inhabitants of Roxby*, 10 Barn. & C. 51.

As calendar year.

A year at common law, in the absence of anything showing a different meaning, was construed to mean a calendar year. *Fretwell v. McLemore*, 52 Ala. 124, 145.

The term "year," as used in a contract, does not necessarily mean a calendar year, but its meaning is gathered from the subject-matter of the contract and the connection in which the term is used. *Williams v. Bagnelle*, 72 Pac. 408, 410, 138 Cal. 699 (citing *Brown v. Anderson*, 77 Cal. 236, 19 Pac. 487).

While "year" ordinarily means a calendar year, that signification is not always to be given the word; but the meaning of the word "year" in a statute is to be determined by the subject-matter and the context, so as to concur with the intention of the party using it. *Thornton v. Boyd*, 25 Miss. 598, 605.

The word "year" in Comp. Laws 1897, c. 25, art. 16, § 1, making it unlawful for any board of county commissioners or county clerk to issue county warrants or orders in any one year to a greater amount than the amount of the county tax levied in the same year to defray county expenses, means a calendar year, and not a fiscal year. *Garfield Tp., Finney County, v. Dodsworth Book Co.*, 58 Pac. 565, 567, 9 Kan. App. 752.

"Year," as used in Comp. Laws 1879, c. 25, art. 16, § 1, and chapter 25, § 220, will be construed to mean the calendar year; following *Garfield Tp. v. Dodsworth Co.*, 58 Pac. 565, 567, 9 Kan. App. 752; *Garfield Tp. v. Hubbell*, 59 Pac. 600, 9 Kan. App. 785.

"Year," when used in the statute, is construed to mean a calendar year, unless a different intent can be gathered from the context or otherwise. *United States v. Dick-*

son, 40 U. S. (15 Pet.) 162, 10 L. Ed. 689; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. And hence, as used in Act 25th Gen. Assem. Iowa, c. 62, providing for an annual tax for sale of intoxicating liquors, and section 7, providing for a rebate in the tax in case the sales of intoxicating liquors had not been continued for more than six months in the year for which taxes were assessed, then the total tax for the year, exclusive of costs, may be reduced pro rata, the word "year" means calendar year, or from January to January. *David v. Hardin County*, 73 N. W. 576, 578, 104 Iowa, 204.

Code, § 3898, limiting the service of a juror to "four weeks in a year" means a calendar year, and although a juror may have served four weeks during a term of court which began in December, yet he would not be disqualified from another week of service in the succeeding year, although at the same term, which continued into the year. *Atlanta & C. Air Line Ry. v. Ray*, 70 Ga. 674, 676.

"Section 8 of our Code provides that the word 'year,' when used therein, means a calendar year; and we hold that an agreement for a performance of a year's service means a year, to commence on the next day. This construction is in accordance with the ordinary rule for the computation of time, which excludes fractions of a day; and it is in harmony, too, with section 14 of the Revised Code, which provides that, in computing the time within which any act is required to be done, there must be an exclusion of the first day and an inclusion of the last." *Dickson v. Frisbee*, 52 Ala. 165, 166, 23 Am. Rep. 565.

The term "year," when used in any statute, means a calendar year, unless a contrary intention be expressed. Code Miss. 1892, § 1521; Rev. St. Tex. 1895, art. 3270; Civ. Code Mont. 1895, § 4662, subd. 4; Code Civ. Proc. Mont. 1895, § 3463, subd. 4; Pol. Code Mont. 1895, § 16, subd. 4; V. S. 1894, 12; Code Va. 1887, § 5; Civ. Code Ala. 1896, § 8; *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 10; Gen. St. Conn. 1902, § 1; *Horne's Rev. St. Ind.* 1901, § 240, subd. 4; Rev. St. Wyo. 1899, § 2724; *Mills' Ann. St. Colo.* 1891, § 4185; Rev. St. Wis. 1898, § 4971; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 10; Pen. Code Ga. 1895, § 2; Rev. Codes N. D. 1899, § 5132; Civ. Code S. D. 1903, § 2466; Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 11; Rev. Code Del. 1893, c. 5, § 1, subd. 8; Gen. St. Minn. 1894, § 255, subd. 9; Rev. St. Okl. 1908, § 2805; Code W. Va. 1899, p. 132, c. 13, § 14; Pub. St. R. I. 1882, p. 77, c. 24, § 11; Code Iowa 1897, § 48, subd. 11; Code N. C. 1883, § 3765, subd. 3; Gen. St. Kan. 1901, § 7342, subd. 11; Comp. Laws Mich. 1897, § 50, subd. 10; Pub. St. N. H. 1901, p. 63, c. 2, § 8; Rev. St. Mo. 1899, § 4160; Gen. St. N. J. 1895, p.

3195, § 34; Shannon's Code Tenn. 1896, § 64; Ky. St. 1903, § 452.

As crop year.

A year is a period of time, and it does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December. When the term is used in a contract, its meaning is to be determined from the connection in which it is used and the subject-matter of the contract. As used in an agreement for the purchase of certain fruits, providing that portion of the purchase price was to be paid when the crop was taken off at the end of the "year," was meant the end of the fruit season, and not the end of the calendar year. *Brown v. Anderson*, 19 Pac. 487, 488, 77 Cal. 236.

As fiscal year.

Unless otherwise expressed, the word "year" is always intended to mean the calendar year; but, where applied to matters of revenue, the presumption is in favor of its referring to a fiscal year. *Glasgow v. Rowse*, 43 Mo. 479, 487.

As license year.

"Year," as used in 1 Rev. St. p. 679, § 5, prescribing the time during which license to sell liquors shall remain in force, refers to the license year, and not to the calendar year. *Disbrow v. Saunders* (N. Y.) 1 Denio, 149, 150.

As theatrical season.

"Years," as used in a contract whereby a party agreed to perform at another's theater, and the latter agreed to engage her for three years, etc., according to the uniform usage of a theatrical profession, means simply the theatrical season; that is, the time when the theater is open for performance. *Grant v. Maddox*, 15 Mees. & W. 737, 745.

As 12 calendar months.

The word "year" is interpreted to mean 12 calendar months. *Muse v. London Assurance Corp.*, 108 N. C. 240, 244, 13 S. E. 94.

The term "year" does not necessarily mean the period commencing with the 1st day of January and ending with the 31st day of the succeeding December. When the word "year" is used, 12 calendar months are usually intended, but not necessarily 12 months commencing with the first and ending with the twelfth month of the calendar arranged by St. Geo. II. When the word "year" is used, its meaning is to be determined from the subject-matter of the contract and the connection in which it is used, and which will carry into effect the intention of the parties. *Knobe v. Baldrige*, 73 Ind. 54, 55 (citing *Thornton v. Boyd*, 25 Miss. 598; *Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 262).

Const. art. 2, § 2, providing that no person should at any time be allowed to vote in the election of the city council of the city of Providence, or upon any proposition to impose a tax, or for the expenditure of money in any town or city, unless he shall "within the year next preceding" have paid a tax assessed upon his property therein, valued at least at a certain sum, does not mean the preceding calendar year, but only the preceding 12 months. In re *Providence Voters*, 13 R. I. 737, 740.

As year of office.

Although it is true that in ordinary dealings and discourse, when the period of a year is mentioned, it will be intended that a calendar year was spoken of, yet that signification is not necessary always and at all times to be given to the word. On the contrary, the period of time intended to be designated by the term "year" is to be determined by the subject-matter in the context, and that signification is to be given which accords with the intention of the party using it. Thus, in a statute fixing the term of office of certain officers, the word "years" was construed to mean political years from the general election, including the time between one general election and the succeeding general election. *Thornton v. Boyd*, 25 Miss. 598, 604.

The expression "one whole year," as used in a statute, must be understood to be a political, or, rather, a municipal, year, which may sometimes exceed and sometimes fall short of a calendar year. As used in St. 1793, c. 34, art. 6, § 2, providing that any person, being chosen and actually serving "one whole year" in certain offices in any town or district, shall thereby gain a settlement therein. *Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 262, 263.

By charter the capital burgesses and common council of a borough were authorized every year, on Monday next before Michaelmas, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, before he were admitted to execute that office, or in any way to intermeddle in the same office, was, on Friday next after the feast of St. Michael next ensuing such nomination and election, not only to take this corporal oath well and faithfully to execute the office, but also all the oaths appointed by a mayor to be taken; and after such oath so taken, he might execute the office of mayor of the borough for one whole year then next ensuing. It was then provided that none who should have once borne the office of mayor should be again elected and preferred to be mayor within the space of three years next ensuing the end and determination of his office of mayoralty. Held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years, and therefore a person who had

once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened. *King v. Swyer*, 10 Barn. & C. 486.

As used in Act April 20, 1818, c. 118, relating to the compensation of the receivers of public moneys, providing that the whole amount which any such officer shall receive shall not exceed for any one year a certain sum, means a year commencing from the date of his appointment, instead of calculating it by the fiscal year, which commences with the calendar year on the 1st day of January in every year. *United States v. Dickson*, 40 U. S. (15 Pet.) 141, 160, 10 L. Ed. 689.

As year of our Lord.

The word "year," when used in any statute, is equivalent to the expression, "year of our Lord." Rev. St. Utah, 1898, § 2498; V. S. 1894, 12; Code Va. 1887, § 5 [Va. Code 1904, p. 6]; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 10; Horner's Rev. St. Ind. 1901, § 240, subd. 5; Rev. St. Wyo. 1899, § 2724; Rev. St. Wis. 1898, § 4971; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 11; Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 11; Rev. Code Del. 1893, p. 43, c. 5, § 1, subd. 8; Code W. Va. 1899, p. 132, c. 13, § 14; Code Iowa 1897, § 48, subd. 11; Code N. C. 1883, § 3765, subd. 3; Gen. St. Kan. 1901, § 7342, subd. 11; Comp. Laws Mich. 1897, § 50, subd. 10; Pub. St. N. H. 1901, p. 63, c. 2, § 8; Rev. St. Mo. 1899, § 4160; Ky. St. 1903, § 452; Gen. St. Minn. 1894, § 225, subd. 9.

Under Rev. St. c. 1, § 4, cl. 11, providing that the word "year," when used for a date, means "year of our Lord," an indictment alleging that the crime was committed in the year 1859 was not defective for failure to state in what era the year occurred. *State v. Bartlett*, 47 Me. 388, 393.

"It is a fact, historically known, that Christian nations have generally adopted the Gregorian calendar, numbering the years from the birth of Christ. This is a Christian state, and has adopted the same, and when the year is mentioned in our legislative or judicial proceedings, and no mention is made of the Jewish, Mohammedan, or other system of reckoning the time, all understand the Christian calendar to be used." *Engleman v. State*, 2 Ind. (2 Cart.) 91, 92, 52 Am. Dec. 494.

YEAR OF OUR LORD.

The expression "year of our Lord" has a well-settled meaning, and indicates a year of the Christian calendar, which begins January 1st and ends the 31st of the succeeding December. *Garfield Tp., Finney County, v. Dodsworth*, 58 Pac. 565, 567, 9 Kan. App. 752.

YEAR TO YEAR.

See "Tenant from Year to Year."

YEARLING.

See "Short Yearling."

"Yearling," as used by dealers in cattle has a well-defined meaning, viz., cattle from 10 months to 18 months of age. *Vassau v. Campbell*, 81 N. W. 829, 830, 79 Minn. 167.

Any animal in the second year of its growth is a yearling. *Stollenwerk v. State*, 55 Ala. 142.

In defining the word yearling, Webster uses as an illustration the term "yearling heifer." In Montana, when an animal of the bovine species has reached the age of one year, it is usually called a yearling. *Milligan v. Jefferson County*, 2 Mont. 543, 546.

YEARLY.

As used in a lease at the rate of a "yearly" rent of £42, followed by the provision that the first payment should be for the period from April 19th to June 24th, being the proportion of rent to that date, followed by the regular habendum clause, "until one of the said parties shall give unto the other six calendar months' notice in writing to quit," the word "yearly" was only a word of calculation, and did not fix the term. *Doe v. Grafton*, 18 Adol. & E. (N. S.) 496, 501.

A power under which a lease was granted, providing that a rent should be reserved and "made payable yearly," did not require that there should be one entire yearly payment, but the words were the same as "payable every year." *Doe v. Wilson*, 5 Barn. & Ald. 363.

YEARLY INCOME.

"Yearly income," within the meaning of St. 1793, c. 34, § 2, cl. 4, giving a settlement to persons having a freehold of the clear yearly income of £3 and taking the rents and profits thereof three years successively, means not the sum actually received annually by the owner of the estate as rents and profits, but the yearly value thereof as a rentable estate. *Inhabitants of Pelham v. Inhabitants of Middleborough*, 70 Mass. (4 Gray) 57, 59.

"Yearly income," within the meaning of St. 1793, c. 34, giving a settlement to persons having an estate of inheritance or freehold of the clear yearly income of £3 and taking rents and profits thereof three years successively, means an actual annual income of a designated amount in each and every year for three years. *Inhabitants of Western v. Inhabitants of Leicester*, 20 Mass. (3 Pick.) 198.

A "yearly income," within Settlement Act Mass. 1793, c. 34, providing that the occupant of a freehold estate by a clear yearly income of \$10 has a settlement, etc., is to be ascertained by deducting all expenses to which the income might necessarily or legally be subjected, and must be valued as if the property had been subject to taxation, when forbearance to tax it has been on account of the poverty of the occupants. *Inhabitants of Freeport v. Inhabitants of Sidney*, 21 Me. (8 Shep.) 305, 306.

YEARLY MEETING.

"Yearly meeting," as used in a will giving land to the yearly meeting of people called "Quakers," means the assemblage composed of representatives from the quarterly meetings, and such other members of the society within its limits as might be present and the individuals composing it. The devise was not to any certain individuals, but to the members of an assembly, meeting together annually, and to such other members of this variable body in endless succession as by delegation should compose it. *Greene v. Dennis*, 6 Conn. 293, 299, 16 Am. Dec. 58.

YEARLY PRODUCE.

"Yearly produce," as used in a demise of a farm, whereby it was agreed to furnish the owner with one-half of the yearly produce of such farm, did not comprehend the wood and timber of the farm cut thereon, but only such crops as are annually gathered. *Ladd v. Abel*, 18 Conn. 513, 518.

YEARLY VALUE.

See "Clear Annual or Yearly Value."

The "yearly value of a widow's dower" in real estate, when it is not susceptible of division, and when she is to take an annual sum in lieu of dower, under Rev. Code, p. 435, §§ 28, 29, is net annual product, without the expenditure of money or labor upon it, after deductions have been made from its gross income, of all the charges to which it is subject, such as taxes and repairs. *Riley v. Clamorgan*, 15 Mo. 331, 334.

YEARS.

Estate or tenancy for years, see "Estate for Years."

YIELD.

The word "yield," used in the sense of yielding up the possession of an estate, means to give as claimed of right, to resign, to surrender, or to give place to. *Drake v. Curtis*, 55 Mass. (1 Cush.) 395, 405.

The word "yield," in a stipulation that the capital stock of a company should yield annually certain dividends, implies a natural accretion from the business of the corporation. *Struthers v. Clark*, 30 Pa. (6 Casey) 210, 213.

YIELDING AND PAYING.

"Yielding and paying," as used in a lease requiring the yielding and paying of rent, created a liability, and not an express covenant, for the payment of rent. *Fanning v. Stimson*, 13 Iowa, 42, 49.

The words "yielding and paying," in a lease for years, were construed at common law as creating a covenant by the lessee to pay rent. *Young v. Hargraves' Adm'r*, 7 Ohio, 63, 69, pt. 2.

The expression "yielding and paying rent," in a lease, expresses the thing to be done, and in that sense the contract is express; but the words, being introduced in form as a condition of the demise, are susceptible of such construction, and the covenant arising out of the words "yielding and paying" is an implied one, and the lessee is not liable on it for rents accruing after an assignment of his term. *Kimpton v. Walker*, 9 Vt. 191, 198.

As used in a lease of land, the lessee "yielding and rendering" therefor a certain amount of rent, and providing that, if not paid at the day appointed, it should be recovered as an action of debt, import a covenant, and not a condition. *De Lancey v. Ganong*, 9 N. Y. (5 Seld.) 9, 20 (citing *Jackson v. McClallen* [N. Y.] 8 Cow. 295; 2 Bac. Abr. 556; *Boone v. Eyre*, 2 W. Bl. Rep. 1314).

In case of an indenture or deed executed by both the lessor and lessee, or grantor and grantee, a covenant to pay the rent therein reserved arises on the words "yielding and paying," and there are some authorities which hold that the words create an express covenant to pay the rent. It is a covenant which runs with the land, and will be binding on the assignee without his being specially named, and as long as he continues to be assignee he is liable for the rent in the same manner as the lessee or original grantee was. *Royer v. Ake* (Pa.) 3 Pen. & W. 461, 464.

YOKE OF OXEN.

Single ox.

"Yoke of oxen," as used in Gen. St. p. 474, § 3, cl. 5, providing that two cows, ten hogs, one yoke of oxen, etc., shall be exempt from sale on execution, when owned by a person engaged in farming and who is head of a family, includes a steer which is only 20 months old and has never yet been worked, or broke to work, and does not neces-

sarily relate only to cattle already broke to work. *Mallory v. Berry*, 16 Kan. 293, 294.

"Yoke of oxen," as used in Acts 1833, c. 80, exempting from execution a horse, mule, or yoke of oxen in the hands of the head of a family, should be construed to include a single ox. *Wolfenbarger v. Standifer*, 35 Tenn. (3 Sneed) 659, 660.

Unbroken oxen.

Gen. St. 1878, § 310, subd. 6, exempting from execution a "yoke of oxen," should be construed to include a pair of two-year-old steers, fit to be used for light work, though not yet broken. The general tendency of the courts is to hold that, where a statute exempts oxen, young animals of the species and description, that by time and subsequent growth would become such within a popular sense, are within the meaning and import of these terms as used in the statute. *Berg v. Baldwin*, 18 N. W. 821, 822, 31 Minn. 541 (citing *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202; *Freeman v. Carpenter*, 10 Vt. 433, 33 Am. Dec. 210; *Mundell v. Hammond*, 40 Vt. 641; *Carruth v. Grassie*, 77 Mass. [11 Gray] 211, 71 Am. Dec. 707; *Mallory v. Berry*, 16 Kan. 293).

"Yoke of steers," as used in Gen. St. c. 47, § 13, exempting from execution a "yoke of steers" such as the debtor may select, should be construed to include a yoke of steer calves less than a year old; the words of the statute not being limited in meaning to steers of the age when they are usually put to service, or to such as were actually put to use as a team. *Mundell v. Hammond*, 40 Vt. 641, 642.

In *Mundell v. Hammond*, 40 Vt. 641, two calves less than a year old were held to be exempt under a statute exempting a "yoke of oxen" or steers. The only distinction between this statute and ours is that they use the term "yoke of oxen," while ours uses the term "yoke of work oxen." We think they both mean the same. A yoke of oxen means a pair of cattle used for work, suitable for work, and that are fit for working together. A yoke of work oxen means the same thing. *Nelson v. Fightmaster*, 44 Pac. 213, 215, 4 Okl. 38.

YOU.

"You have got my money on your shelves," as spoken and published of a plaintiff who was a merchant, implied clearly an act of fraud, if not a flagrant act of dishonesty, committed by such plaintiff in regard to the procurement of his goods. *Davis v. Davis* (S. C.) 1 Nott & McC. 290, 291.

YOU ARE MY PRISONERS.

The use of the words, "You are my prisoners. Surrender!"—by an officer to per-

sons whom he is attempting to arrest, is a sufficient notice of his character as a police officer. *People v. Pool*, 27 Cal. 572, 578 (citing *Roscoe*, Cr. Ev. 755; 1 Russ. Crimes, 627; 1 Hale, P. C. 461; *Mackalley's Case*, 9 Ooke, 68b, 68a).

YOU SHALL HAVE YOUR MONEY.

A statement by a person, when asked about the settlement of certain books, that the matter ought to have been settled long ago, and "you shall have your money" within 10 days, means no more than the words, "I will pay you all I owe you," and are insufficient to remove the bar of the statute of limitations. *Ward v. Jack*, 33 Atl. 577, 172 Pa. 416, 51 Am. St. Rep. 744.

YOUR ACCOUNT.

"Your account," as used in a letter reciting, "As there was no time set for the payment of your account, and J. thought it would be an accommodation to him, etc., I will be surety for the payment," are ambiguous, and may mean either a past or future account. *Walrath v. Thompson* (N. Y.) 4 Hill, 200, 201.

YOUR UNDERWRITERS.

"Your underwriters," as used in a contract for the equipment of a certain factory with automatic sprinklers, providing that the sizes of pipe should conform "to the schedule required by your underwriters," means the insurance companies to whom the owners of such factory might apply for insurance, or those companies who should furnish such insurance. *United States Sugar Refinery v. Providence Steam & Gas Pipe Co.* (U. S.) 62 Fed. 375, 379, 10 C. C. A. 422.

YOUNG.

The expression "young person," as used in the article relating to factories, means a person of the age of 14 years and under the age of 18 years. *Rev. St. Mo. 1899*, § 10,104.

The term "young person," as used in all laws relative to the employment of labor, shall mean a person of the age of 14 years and under the age of 18 years. *Rev. Laws Mass. 1902*, p. 917, c. 106, § 8.

Pub. Laws Me. 1885, c. 275, making it unlawful to fish for, catch, buy, sell, expose for sale, or possess, between certain days, any "young lobster" less than 10½ inches in length, means any lobster under the prescribed length, without regard to its age. The inhibition is against taking anything under the prescribed length. The word "young" is used in a presumptive or assumptive sense merely. *Thompson v. Smith*, 8 Atl. 687, 688, 79 Me. 160.

YOUNG MEN'S CHRISTIAN ASSOCIATIONS.

As public charity, see "Public Charity."

YOUNGER.

The addition of the word "younger" is no part of a name, and its being found in one case attached to the name, and not in another, raises no doubt of the identity of the person, when the change is readily accounted for on other grounds. *Blake v. Tucker*, 12 Vt. 39, 45.

The word "younger" or "2d" is affixed to a man's name to distinguish one individual from another whose names are the same, and the purpose may be supplied by any other description, or wholly dispensed with, when no other person of the same name resides in the same town or vicinity. *Isaacs v. Wiley*, 12 Vt. 674, 678.

YOUNGEST.

A testator devised his farm to the children of his son W. as a class, other children that W. might have to share equally in the benefits of the provision. He also desired that the farm should not be divided, but carried on under the direction of W., the executor, until W. should die, if that should occur before W.'s youngest child came of age, and, if not, the farm to be kept together until the youngest child came of age, when it should be divided equally among them. Held, that the term "youngest child" meant the youngest child named in the will or living at testator's death, and not the youngest child that might be born to W. *Arnold v. Arnold*, 19 S. E. 670, 674, 41 S. C. 291.

As used in a will providing that the testator's interest in a business concern should be continued, and the profits paid to his executors, until the majority of the youngest child, and should then be divided between the testator's wife and children, does not mean that one of the testator's minor children which shall live to first reach majority, but means the youngest child living at the time of the testator's death, and the effect of the provision is simply to prevent a division of the estate until the child shall attain the age of 21 years or previously depart this life. In re *Sands*, 3 N. Y. Supp. 67, 69, 1 Con. Sur. 259.

The phrase, "youngest child of all my said children," in a will devising property to testator's children in trust "until the youngest child of all my said children shall have attained the age of 21 years," to apply the net proceeds of the property to the education of testator's grandchildren, means testator's youngest child, and not the youngest

of testator's children. *Otterback v. Bohrer*, 12 S. E. 1013, 1014, 87 Va. 548.

By the words "youngest child," in a devise providing that no division of certain real estate should be made among testator's children until the youngest child should become of age, is meant, not the youngest child which shall live to majority, but the youngest child living when the will took effect, at the death of the testator. *Simpson v. Cook*, 24 Minn. 180, 186.

The term "youngest," as used in the chapter relating to homesteads, is construed to mean the decedent's child, whether by birth or adoption, last to attain majority. Rev. Codes N. D. 1899, § 3627.

"Youngest grandchild," as used in a will devising the estate of the testatrix to her executors in trust, to hold during the lives of her son-in-law and youngest grandchild then living, for the purpose of investing the rents and profits of the real estate for the benefit of her grandchildren living at her death or subsequently born, and providing that on the death of the son-in-law and the arrival of her youngest grandchild at the age of 21 the real estate so devised should go to her grandchildren then living, cannot be construed to mean a grandchild not yet born, but means the youngest grandchild mentioned in the will, since to construe it as meaning a grandchild not yet born would make the trust invalid by extending the suspension of alienation beyond two lives in being. *Roe v. Vingut*, 1 N. Y. Supp. 914, 917, 49 Hun, 607.

YOUTH.

"Youth," as used in a will bequeathing property for the establishment of a free English school for the instruction of youth, wherever they may belong, should be construed to include children and youth of both sexes, and does not limit the school to the instruction of either to the exclusion of the other. The term "youth" often means "young men." When used with the indefinite article (a youth) that is its proper meaning; but, used by an inhabitant of Massachusetts in reference to the establishment of a free school for the purpose of affording general instruction, the word "youth" includes youth of both sexes. This is the sense in which it is generally understood by educated men; a sense not derived from any one source or authority or course of reasoning, but, as all our knowledge of the sense of vernacular language is derived, from good usage. The word "youth" differs from the word "children" only by referring to and embracing young persons of somewhat more advanced age and proficiency. *Nelson v. Cushing*, 56 Mass. (2 Cush.) 519, 533.

Z

ZANTE CURRANTS.

"Zante currants" is a well-known commercial expression among importers, dealers, and growers of raisins, and relates to and comprehends a kind of raisin made from a small, seedless grape, grown not only on the island of Zante, but also, and to a much greater extent, on the mainland of Greece and other neighboring localities. It derives the name of "currants" from the fact that in times past it was shipped from the city of Corinth, Greece. In German it is called "Korinthen"; in French "raisin de Corinthe"; in Spanish "pasas de Corinto." It is a raisin grape, as distinguished from the shrub currant, with which its name may be confounded, but from which it is entirely distinct; the former belonging to the grapevine family of plants, the latter to the shrubs. "Zante Currants" (U. S.) 73 Fed. 183, 187.

ZINC ORE.

By the term "zinc ores" is meant those veins or lodes in which the ore of zinc is the predominating ore. *Boston Franklinite Co. v. New Jersey Zinc Co.*, 13 N. J. Eq. (2 Beasl.) 322, 344.

Zinc ore means a mineral body containing so much of the metal of zinc as to be worth smelting. *New Jersey Zinc Co. v. New*

Jersey Franklinite Co., 13 N. J. Eq. (2 Beasl.) 322, 346 (cited in *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.*, 26 Atl. 920, 922, 55 N. J. Law [26 Vroom] 350).

The term "zinc," in a deed conveying all the zinc and other ores, except franklinite, may be explained by evidence, when a dispute exists between the grantor and the grantee as to whether a certain vein of ore is zinc or franklinite. *New Jersey Zinc Co. v. Boston Franklinite Co.*, 15 N. J. Eq. (2 McCart.) 418, 420.

ZONE.

"Zone" has been defined to be an air space so arranged that, in case of a breakage of any wire at any point, that wire would come in contact with the wire of another system, either by being blown against it or by falling directly on it by weight of gravity. Where two leads of wire are said to be in the same zone, they are in that proximate relation to each other that a contact is possible between the two systems by falling wires. *Chicago Telephone Co. v. Northwestern Telephone Co.*, 65 N. E. 329, 340, 199 Ill. 324.

&—&C.—& CO.

See vol. 1, pp. 1, 2

APPENDIX.

CONTAINING DEFINITIONS IN CASES REPORTED SINCE THE MAIN COMPILATION WAS CLOSED.

ABANDON—ABANDONMENT.

The word "abandoned," as used in Act 1890, p. 248, c. 220, providing that whenever on an unfinished railroad a right of way, or location on any part thereof, remains for 10 years unused for railroad purposes, the same shall be held to be abandoned, and shall be liable to be used and appropriated by another railroad company on purchase or condemnation in a manner provided by law, cannot import such an abandonment as would cause a reversion to the first owner, for the reason that such a construction would be to take from the railroad company property obtained by condemnation and paid for, without compensation, and therefore raise a constitutional question. Its more reasonable construction would be that it is to be applied to cases only where there has been no use of the property for railroad uses, and in such a case there has been such an abandonment that authority is granted to another railroad to take condemnation proceedings to secure it for its use without further special legislative permission so to do. *Canton Co. v. Baltimore & O. R. Co. (Md.)* 57 Atl. 637, 640

Whether the act of the party constitutes an abandonment of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. Mere absence and nonuser of the property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. *Farmers' Irr. Dist. v. Frank (Neb.)* 100 N. W. 286, 292; *Farmers' Canal Co. v. Same, Id.*; *Walker v. Same, Id.*

An easement may be lost, as provided in Civ. Code 1895, § 3068, by abandonment or nonuser, if the abandonment or nonuser continued for a term sufficient to raise the presumption of release or abandonment. Nonuser of a street for a period of some 40 years raises a very strong presumption of abandonment. *Kelsoe v. Oglethorpe*, 48 S. E. 366, 367, 120 Ga. 951.

ABATEMENT.

See "Plea in Abatement."

"Abatement" is defined as "a suspension of proceedings in a suit from the want of proper parties capable of proceeding therein." *The Telegraph v. Lee (Iowa)* 98 N. W. 364, 365 (quoting *Bouv.*).

ABDUCTION.

The word "abduction," as used in Rev. Codes 1899, § 2718, providing that the rights of personal relation forbid the abduction of a husband from his wife or the abduction of a wife from her husband, means the taking away by either violence, fraud, or persuasion. A married woman may maintain an action against another woman to recover damages for the alienation of the affections of her husband and his consequent abandonment of her. *King v. Hanson (N. D.)* 99 N. W. 1085, 1088.

ABILITY.

See "Inability."

Solvency distinguished from ability to purchase, see "Solvency."

ABLE.

See "If Able."

ABODE.

See "Permanent Abode."

ABOUT.

See "On or About."

ABOUT TO SIGN.

The expression "about to sign" in an entry in a house journal under the caption "Signing of Bills," reciting that the speaker announced that he was about to sign certain bills, denotes that the speaker was at that time engaged in the act of signing the several bills described in the entry. *State v. Cahill (Wyo.)* 75 Pac. 433, 441.

ABSOLUTE.

A contingent claim does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate. *Hazlett v. Blakely* (Neb.) 97 N. W. 808, 811.

ABSOLUTE GIFT.

"An absolute gift is one where not only the legal title but the beneficial ownership as well is vested in the donee. A gift in trust is one where the subject of the gift is transferred to the donee, not for the purpose of vesting both the legal title and beneficial ownership of the subject in the donee, but that it may be held and applied to certain uses for a third party, the beneficiary." A gift which vests both the legal title and the beneficial ownership of the subject of the gift in the donee is not one in trust, even if it be a conditional one. Such a gift is an absolute one. A gift by deed, devise, or bequest to an existing corporation, or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift, which are reasonably consistent with the purposes of the donee, is not a gift in trust, but an absolute one to the corporation, within the meaning of the statute of uses and trusts. *Watkins v. Bigelow* (Minn.) 100 N. W. 1104, 1109.

ABSTRACT.

"To abstract" means to take from or to withdraw from, so that to abstract the moneys, funds, or credits of the bank, or of a portion of them, is to take or withdraw from the possession and control of the bank such moneys, funds, or credits. *United State v. Breese* (U. S.) 131 Fed. 915, 921.

Charges are abstract when they assert propositions of law not legitimately arising out of the testimony itself or the inferences deducible therefrom. *Gilliam v. State*, 50 Ala. 145, 146.

ABSTRACTION.

"Abstraction," under section 5209, Rev. St. [U. S. Comp. St. 1901, p. 3497], is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may

be done under color of loans, discounts, checks, and the like. The means used do not change the nature of the act. *United States v. Breese* (U. S.) 131 Fed. 915, 921.

ACCESSORY.

Under a statute providing that an accessory is one who, knowing that an offense has been committed, conceals the offender or gives him aid, that he may evade arrest, trial, or the execution of his sentence, in order that a person may be an accessory he must render to the principal some overt, active assistance. *Chenault v. State* (Tex.) 81 S. W. 971, 972.

ACCIDENT—ACCIDENTAL.

See "Pure Accident"; "Such Accident"; "Unavoidable Accident."

"A casualty cannot be classed as a pure accident, for which no one is to blame, merely because it would happen infrequently, if the danger of its occurrence was present to the mind of the party who was charged with the duty of taking care to avert the casualty, or if by reasonable prudence he could have known there was danger of its occurrence." *Rogers v. Meyerson Printing Co.*, 78 S. W. 79, 82, 103 Mo. App. 683.

Kidney disease produced in a servant by handling infected rags in the discharge of her duties is within an employer's liability policy, insuring against loss from liability on account of bodily injuries accidentally suffered. *Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York*, 78 S. W. 320, 323, 104 Mo. App. 157.

Death resulting from disease which follows as a natural consequence, though not the necessary consequence, of physical injury which is accidental, is an "accidental death," within the terms of an accident insurance policy; the death being deemed the proximate result of the injury, and not of disease as an independent cause. *Delaney v. Modern Acc. Club*, 97 N. W. 91, 95, 121 Iowa, 528, 63 L. R. A. 603.

A death resulting from a self-inflicted knife cut made by an insured while trimming a corn, which was followed by blood poisoning, is one from an "accidental, external, and violent" injury, within the meaning of an accident policy. *Nax v. Travelers' Ins. Co.* (U. S.) 130 Fed. 985.

ACCIDENT INSURANCE.

Employer's liability insurance may from its very nature appropriately be classified with and peculiarly belongs to what is commonly known and designated as accident insurance, inasmuch as such insurance has for its primary purpose indemnification against the effects of accidents resulting in bodily

injury or death. *State v. Aetna Life Ins. Co.*, 69 N. E. 608, 610, 69 Ohio St. 317.

ACCOMMODATION INDORSER.

An accommodation indorser is one who indorses a bill or note in order to enable another to obtain credit or money on it. *Citizens' Commercial & Savings Bank v. Platt* (Mich.) 97 N. W. 694, 695.

The provision in Act April 11, 1848 (Pub. Law 536), authorizing a married woman to make any contract in furtherance of the general power granted in a preceding section, but declaring that she shall not become accommodation indorser, maker, guarantor, or surety for another, applies only to technical contracts of indorsement, guaranty or suretyship included in the words of the act. *Herr v. Reinsoehl*, 58 Atl. 862, 863, 209 Pa. 483.

ACCOMPLICE.

One who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime is an accomplice. Rev. Cr. Code, § 364, declares that a conviction cannot be had from the testimony of an accomplice unless it be corroborated. An accessory after the fact is not an accomplice, within the meaning of the statute. *State v. Phillips* (S. D.) 98 N. W. 171, 173 (quoting Whart. Cr. Ev. 440).

A detective who, at the sheriff's instigation, purchases beer in violation of the local option law for a fixed sum is not an "accomplice" by the direct provisions of Pen. Code 1895, art. 447, as amended by Acts 1903, p. 57, c. 40, providing that a person purchasing intoxicating liquors sold in violation of law shall not be an accomplice of the seller. *Terry v. State* (Tex.) 79 S. W. 320.

ACCORD AND SATISFACTION.

Where a claim is unliquidated or in dispute, and the creditor has tendered a less sum than is claimed upon the condition that if it be accepted it must be in entire satisfaction of his claim, his acceptance of the claim is an accord and satisfaction. *Hillestad v. Lee*, 97 N. W. 1055, 1056, 91 Minn. 335 (citing *Marion v. Heimbach*, 62 Minn. 215, 64 N. W. 386).

ACCOUNT.

See "Long Account."

A claim for damages resulting from personal injuries is in no sense an "account" made up of items, within Comp. Laws 1897, § 2754, providing that every account against a village shall exhibit in detail all the items

making up the amount claimed and the true date of each. *Hunter v. Village of Ithaca* (Mich.) 97 N. W. 712, 713.

The law does not require an account to be kept in any particular language. Books of account, in order to be admissible in evidence, are not required to be in any particular language, or to conform to any particular system of bookkeeping, so long as they conform to the provisions of the statute regulating the reception of such books in evidence. *Cather v. Damerell* (Neb.) 99 N. W. 35, 36.

ACCOUNT STATED.

An "account stated" is, in effect, an admission of indebtedness. *Stagg & Conrad v. St. Jean*, 74 Pac. 740, 741, 29 Mont. 288.

"An account stated is an account balanced and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance." The cause of action upon an account stated is based entirely upon an agreement that the amount sought to be recovered was found to be due after a mutual adjustment of the accounts between the parties, and that there was then either an express or implied promise to pay it. The right to a recovery depends in no way upon the obligation originally created when the items of indebtedness arose, and for that reason it is unnecessary in such an action to set forth in the complaint or prove upon the trial the subject-matter of the original debt. *Hall v. New York Brick & Paving Co.*, 88 N. Y. Supp. 582, 583, 95 App. Div. 371 (quoting *Volkening v. De Graaf*, 81 N. Y. 268).

An "account stated" must be based upon previous dealings and transactions between the parties, and while it is not necessary, in order to support a count upon account stated, to show the nature of the original debt, or to prove the specific items constituting the account (*Jacksonville, M. P. Ry. & Nav. Co. v. Warriner*, 35 Fla. 197, 16 South. 898), it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of and concerning which an account was stated. *Daytona Bridge Co. v. Bond* (Fla.) 86 South. 445, 447.

An "account stated" involves a promise, express or implied, to pay a real indebtedness agreed upon as due. The consideration which places such promise on the plane of a contract is the agreement of one party, for the agreement of the other, that a certain amount, and that only, is due on the matters embraced in the settlement, wherefrom the law raises a new obligation on the part of the one against whom the balance stands, to pay that balance. *Ivy Coal & Coke Co. v. Long*, 86 South. 722, 724, 139 Ala. 535.

ACCUSATION.

The term "accusation," as used in reference to trials in courts having jurisdiction of misdemeanor cases, is but the equivalent of an information at common law. *Wright v. Davis*, 48 S. E. 170, 173, 120 Ga. 670 (quoting *Gordon v. State*, 102 Ga. 679, 29 S. E. 446.)

ACKNOWLEDGMENT.

Payment is regarded as an acknowledgment of an existing obligation, and from such acknowledgment a promise to pay may be implied. Whether payment be a part of the principal or the interest, it is an acknowledgment of an existing indebtedness, from which the promise to pay will be implied. A payment of interest on a note constitutes a sufficient acknowledgment to pay to toll the statute of limitations, and where a sufficient payment on a note secured by a mortgage was made to take the note out of the statute of limitations the payment was effective to prevent the mortgage securing the debt from being barred. *MacMillan v. Clements* (Ind.) 70 N. E. 997, 998.

ACQUAINTANCE.

See "Intimate Acquaintance."

ACQUAINTED.

See "Made Acquainted."

ACQUIRE.

The word "acquire," as used in a statute providing that where a person transacts business as a trader without disclosing the name of his principal all the property, stock, money, and choses in action used or acquired in such business shall be liable for his debts, means obtain, procure, to get as one's own; and the proceeds of a policy of insurance on goods of the trader for an undisclosed principal is obtained and procured in such business and is applicable to the payment of his debts. *Meridian Land & Industrial Co. v. Ormond*, 85 South. 179, 180, 82 Miss. 758.

ACQUISITION

Where the general purpose of an irrigation act, as indicated by the caption, is to provide means for the acquisition and conveyance of water to be used for the several purposes mentioned in the act, a statement in the caption that one of the purposes of the act is to provide for the acquisition of the right to the use of water does not, when considered with the whole of the caption, prohibit an incorporation in the act of a provision conferring the right of eminent domain over land. The expression, "to provide

for the acquisition of the right to the use of water," does not convey the idea that the right of eminent domain, or the power to condemn water owned exclusively as private property, as distinguishable from the riparian rights of the owner of land upon streams or water courses, was intended to be conferred, and no such right is given in the act. *Borden v. Trespacios Rice & Irrigation Co.* (Tex.) 82 S. W. 461, 465.

ACQUIT.

See "Autrefols Acquit."

ACROSS.

A city ordinance providing that trains shall not be allowed to stand or remain "across" any street longer than a certain time is not violated by allowing a train to stand so that the head end reaches slightly into the street, but not in such a way as to obstruct public travel. *Crowley v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 99 N. W. 1016, 1017.

ACT.

See "Constituted by the Act"; "Healing Act"; "Judicial Act"; "Ministerial Act"; "Overt Act"; "Wrongful Act." Work synonymous, see "Work."

ACT OF BANKRUPTCY.

The giving of a mortgage by an insolvent, subsequently and within four months adjudged a bankrupt, to secure money borrowed at the time for the purpose of preferring certain of his creditors, where the lender knew or had reason to believe that such was his purpose, was an "act of bankruptcy," under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. In *re Pease* (U. S.) 129 Fed. 446, 447.

A mortgage made by an insolvent, and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an act of bankruptcy. In *re Edelman* (U. S.) 130 Fed. 700, 701.

ACT CHARGED.

Though the time be stated in an information for incest, the prosecutor has the right to select, among all the acts of the kind which he could prove to have been committed between the parties within the period alluded to and within the jurisdiction, any one of those acts before evidence has been introduced as the "act charged" in the information. In other words, until evidence of some such act has been given the charge in the information is floating and contingent,

aimed as much at one as at another, and at no one act in particular, and it remains for the evidence to point the charge to a particular act intended. But when evidence has been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, from that moment that particular act becomes the "act charged." What has till then been floating and contingent has now become certain and fixed. *People v. Jenness*, 5 Mich. 305, 327.

ACTION.

See "Cause of Action"; "Chose in Action"; "Civil Action — Case — Suit — etc."; "Local Action"; "Penal Action"; "Subject of Action."

Any action, see "Any."

A proceeding upon a writ of *scire facias* to revive a judgment is not an "action," but simply a continuance of a former suit. *Bick v. Tanzey*, 80 S. W. 902, 904, 181 Mo. 515.

A proceeding for leave to issue execution on a judgment charging land with owelty in partition is an "action," within the statute of limitations. *Ex parte Smith*, 47 S. E. 16, 18, 134 N. C. 495; *Appeal of Hamilton* (N. C.) 47 S. E. 16, 18.

A proceeding by mandamus to compel public officers to perform an official act is an action, within Rev. St. 1898, § 2918, which provides that costs shall be allowed of course to the plaintiff in an action in the circuit court on a recovery in certain specified cases, and section 2920, which declares that costs shall be allowed of course to the defendant in the actions mentioned in the two preceding sections, unless the plaintiff was entitled to costs therein. *State v. Board of Trustees of Policemen's Pension Fund*, 98 N. W. 954, 959, 121 Wis. 44.

The word "action," defined by Rev. Code Civ. Proc. § 12, as being an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, does not include a proceeding to foreclose a mortgage by advertisement, because no right is litigated between the parties, nor is the power of a court of law or equity invoked. *Stevens v. Osgood* (S. D.) 100 N. W. 161 (citing *Hall v. Bartlett* [N. Y.] 9 Barb. 297).

ACTION FOR USE AND OCCUPATION.

An action for use and occupation depends upon the existence or the implication of a contract whereby the relation of landlord and tenant may be created. *Ettlinger v. Degnon-McLean Contracting Co.*, 85 N. Y. Supp. 394, 42 Misc. Rep. 215.

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ACTION FOR THE VIOLATION OF A LAW.

Acts 1887, p. 225, No. 127, providing that in all actions against railway companies for the violation of any law, regulating the transportation of freight or passengers, the plaintiff, if successful, shall recover a reasonable attorney's fee, to be taxed according to the costs, refers to actions against railroad companies for violation of statutory regulations of the state in regard to transportation of freight and passengers, for to hold it applicable to all actions against railroads in the carriage of freight or passengers, whether or not any statute was violated, would doubtless render it unconstitutional. *Kansas City Southern Ry. Co. v. Marx* (Ark.) 80 S. W. 579, 580.

ACTION ON A NOTE.

A declaration contained two special counts, in effect declaring on a note, and also contained the consolidated common counts. The special pleas all began by stating that the causes of action in the several counts were the same as contained in the special counts, and the evidence all related to the special counts. Defendant, the guarantor of the note, pleaded failure of consideration, and contended that there was a contemporaneous written agreement with the note, and referring to it, which was specially pleaded by plaintiff. It was held that the suit was an "action on a note," within 2 Starr & C. Ann. St. 1896, p. 2802, c. 98, § 9, declaring that in such actions defendant may plead failure of consideration. *Ewen v. Wilbor*, 70 N. E. 575, 578, 208 Ill. 492.

ACTIONABLE NEGLIGENCE.

"Actionable negligence, or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that he will refrain from willful or affirmative acts which are injurious." *Means v. Southern California Ry. Co.* (Cal.) 77 Pac. 1001, 1003 (citing *Gibson v. Leonard*, 143 Ill. 182, 189, 32 N. E. 182, 183, 17 L. R. A. 588, 36 Am. St. Rep. 376).

ACTIVE MEMBER.

The by-laws of a police relief association required \$2 per annum as dues from active members, and \$8 per annum from those who had honorably left the force, and also made a distinction as to sick benefits between active and retired members of the force. The rules of the board of police commissioners, which had authority to define plaintiff's

Status, required plaintiff, though on the pension roll, to be subject to call by day or night. Held, that plaintiff was entitled to pay dues and receive sick benefits as an active member of the force. *Nickerson v. Providence Police Ass'n* (R. I.) 57 Atl. 1057, 1058.

ACTIVE TRUST.

An active trust was created where the property was devised to a trustee to sell and convey, and invest the proceeds as he deemed best, and he was further authorized to hold, manage, control, care for, lease, and re-invest during a period of five years, and to pay the income to the children of testatrix. *Harris v. Ferguy*, 69 N. E. 844, 207 Ill. 534.

ACTUAL COST.

The phrase "actual cost," as used in St. 1890, c. 428, §§ 3-7, providing for the abolition of grade crossings by a railroad company, declaring that commissioners were to decide what alterations were necessary, and providing that the company should pay a specified per cent. of the actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages for the taking of the land necessary to carry out the alterations that have been ordered, means "cost of what is described, though, where damages are incurred in taking land to carry out the report of the commissioners, counsel fees and extra work done by selectmen paid by a town in defending or settling a claim for such damages for land taken for the purpose of abolishing grade crossings have been held to be included." Interest paid on money borrowed by the railroad company to make the alterations is not a part of the actual cost. In re *Directors of Old Colony R. Co.*, 70 N. E. 62, 63, 185 Mass. 160.

ACTUAL DAMAGES.

As used in a libel law providing that, before any proceedings shall be brought for the publication in a newspaper of a libel, plaintiff shall serve a written notice on defendant, specifying the article and the statements which he alleges to be false, and that, if it appears on trial that the article was published in good faith, that its falsity was due to an honest mistake in fact, and that there were reasonable grounds for believing that the article was true, and that within ten days after the service of notice a fair and full retraction was published, plaintiff shall recover only actual damages, the term "actual damages" means compensatory damages, and includes pecuniary loss, direct or indirect, or special damages, damages for physical pain and inconvenience, damages for mental suffering, and damages for injury to reputation. It does not include punitive damages. *Os-*

born v. Leach, 47 S. E. 811, 813, 135 N. C. 628, 66 L. R. A. 648.

ACTUAL EXPENSE.

"Actual expense," in *Sess. Laws* 1899, pp. 405, 406, § 1, providing that the sheriff shall be allowed, in addition to his salary, the actual and necessary expense for care of each prisoner, means the actual outlay or payment of money for benefits furnished the prisoners. *Mombert v. Bannock County* (Idaho) 75 Pac. 239, 241.

ACTUAL KNOWLEDGE.

The word "notice," as used in a provision in the bankruptcy act, that judgment of discharge does not bar such debts as have not been duly scheduled with the name of the creditor, if known, unless such creditor has notice or actual knowledge of the bankruptcy proceedings, etc., means the same as "actual knowledge." The terms are merely convertible. *Fields v. Rust* (Tex.) 82 S. W. 331, 333.

ACTUAL MARKET VALUE.

The best test of actual market value is a sale on a market under circumstances calculated to elicit full and free bidding by intending purchasers. Opinions as to what a thing would bring are necessarily less convincing as to its value than the fact of what it did bring. *Francis v. Million* (Ky.) 80 S. W. 486, 487.

ACTUAL NOTICE.

"Notice is actual when the purchaser knows of the existence of the adverse claim, or perhaps when he is conscious of having the means of knowledge, and yet does not use them; and it is immaterial whether his knowledge results from direct information, or is gathered from facts and circumstances." *Clark v. Lambert* (W. Va.) 47 S. E. 312, 318.

Within the rule of law that "actual notice" must be given to persons dealing with a partnership, of the retirement of a partner, so as to relieve the retiring partner of liability, one who sells his business, which he has conducted under a firm name, to another, such other continuing the business under the same name, must give actual notice of the sale to those who have dealt with him. Publication of the sale in a newspaper, and changing the name of the proprietor on the sign at the place of business, is not actual notice. *Werner Co. v. Calhoun* (W. Va.) 46 S. E. 1024, 1026.

ACTUAL OCCUPANCY.

Laws 1885, p. 482, c. 283, § 9, declaring that the forest commission shall have the

"care, control, and superintendence" of the forest preserve, and Laws 1900, p. 62, c. 20, § 220, subd. 1, declaring that it shall have the "care, control, and supervision" thereof, do not place the commission in the actual occupancy of the wild and vacant lands within the preserve. *People v. Kelsey*, 89 N. Y. Supp. 416, 96 App. Div. 148.

ACTUAL POSSESSION.

"'Actual possession,' as a legal phrase, is put in opposition to the other phrase, 'possession in law' or 'constructive possession.' Actual possession is the same as *pedis possessio* or *pedis positio*, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title." *People v. Kelsey*, 89 N. Y. Supp. 416, 418 (citing *Churchill v. Onderdonk*, 59 N. Y. 134).

ACTUAL REBELLION.

"Actual rebellion or insurrection," in its ordinary acceptation, means a resistance to the established order of things. *State v. McDonald* (Ala.) 4 Port. 449, 457.

ACTUAL RESIDENT.

Whether a person is an "actual resident" of a particular school district, within the meaning of Gen. St. 1894, § 3697, must depend upon the special facts of each particular case. *State v. Board of Education of Independent School Dist.*, 97 N. W. 885, 886, 91 Minn. 268.

ADDITION.

See "In Addition to."

ADDITIONAL.

"Additional" means given with or joined to some other, and embraces the idea of joining or uniting one thing to another, so as to form an aggregate. *Kadderly v. City of Portland*, 74 Pac. 710, 717, 44 Or. 118 (citing *Anderson's Law Dict.*; *State v. Hull*, 53 Miss. 626, 645; *Brooks v. Whitmore*, 139 Mass. 356, 81 N. E. 731).

ADDITIONAL AMENDMENT.

An amendment, though not on the same subject or article, is an "additional amendment" within Const. art. 17, § 2, prohibiting the proposal of any additional amendment or amendments of the Constitution while one is awaiting action of a second Legislature or of the electors. *Kadderly v. City of Portland*, 74 Pac. 710, 717, 44 Or. 118.

ADDITIONAL SERVITUDE.

The construction, maintenance, and operation of a telephone system on the streets of a city in such a manner as not to cause unnecessary injury or inconvenience to property owners is not an additional servitude for which an abutting owner is entitled to compensation. *Kirby v. Citizens' Telephone Co. of Sioux Falls* (S. D.) 97 N. W. 3, 4.

The establishment by a railway company of a system of wires and posts over its right of way is not the imposition of an "additional servitude," within the meaning of that term, authorizing an abutting owner to claim additional compensation. Railroad companies may devote the right of way which they have acquired to any use indispensable to or which will facilitate the fulfillment of the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe, and successful conducting of their business and regular running of their trains. *City of Canton v. Canton Cotton Warehouse Co.* (Miss.) 36 South. 266, 271, 65 L. R. A. 561.

ADEQUATE CONSIDERATION.

An adequate consideration is one which must not be so disproportionate as to shock our sense of that morality and fair dealing that should always characterize transactions between man and man. *Eaton v. Patterson* (Ala.) 2 Stew. & P. 9, 19.

The word "adequacy," as used in an instruction that the adequacy of the consideration was for the parties to consider at the time of making an agreement, and not for the court when it was sought to be enforced, evidently does not refer to the legal sufficiency of the consideration, but to the inducements which operated on the minds of the parties in making the contract. *Rosseau v. Rouss*, 86 N. Y. Supp. 497, 502, 91 App. Div. 230.

ADJACENT.

It is not essential that property, to be adjacent to a river, should be in actual contact therewith. A thing is adjacent to another when it lies near or close to it, although it is not in actual contact therewith. *Yuba County v. Kate Hayes Min. Co.*, 74 Pac. 1049, 1050, 141 Cal. 360.

The word "adjacent" means contiguous, adjoining, lying close at hand, near. As used in Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting to certain railroad companies the right of way through the public lands to the extent of 100 feet on each side of the central line of the road, with the right to take materials for its construction from the public lands adjacent to the line of the road, it does not in-

clude lands which are 20 miles distant from the right of way, but it does include lands within 2 miles. *United States v. St. Anthony R. Co.*, 24 Sup. Ct. 333, 335, 338, 192 U. S. 524, 48 L. Ed. 548.

Under a marine policy insuring a dredge, and providing that it was warranted confined to the use and navigation of the waters of New Haven Harbor and "adjacent inland waters," and declaring that any deviation beyond the limits shall avoid the policy, the use of the dredge in an inland water adjacent to Bridgeport Harbor, 17 miles from New Haven Harbor, was a deviation. *Kirk v. Home Ins. Co.*, 86 N. Y. Supp. 980, 981, 92 App. Div. 28.

ADJOURNED TERM.

The "adjourned term" mentioned in Rev. St. 1899, § 1605, which provides that special or adjourned sessions of any court may be held in pursuance of the proclamation of the sheriff, or in continuation of the regular term, when so ordered by the court in term time, the order being entered on its record, although it is a continuation of a regular term, is not the uninterrupted or unbroken session held in pursuance of an adjournment from day to day, but is a session held after lapse of a longer period, and is commonly called an "adjourned term." Rev. St. 1899, § 7033, providing that an election contest shall be determined at the first term of the circuit court held 15 days after the official counting of the votes and service of the notice of contest, unless the same should be continued by consent or good cause shown, is not limited to the next regular term of court, but authorized the service of notice of contest to be held at an adjourned term. *Montgomery v. Dormer*, 79 S. W. 913, 915, 181 Mo. 5.

ADMINISTRATION.

See "Matter of Administration."

ADMINISTRATOR.

Administrators are creatures of the statutes, and have no powers except those conferred therein. The only direct and specific power conferred on the administrator in connection with the repairs and improvements of an estate is that he is authorized to keep the buildings in tenantable repair, extraordinary casualties excepted, unless not directed to do so by an order of the court. *Rice v. Conwill* (Tex.) 80 S. W. 393, 394.

ADMINISTRATOR AD COLLIGENDUM.

An administrator ad colligendum is the mere agent or officer of the court to collect and preserve the goods of the deceased until some one is clothed with authority to admin-

ister them, and cannot complain that another is appointed administrator in chief. *Flora v. Mennice*, 12 Ala. 836, 837.

An administrator ad colligendum is not such a representative of the estate as to require claims to be presented to him in order to avoid the statute of nonclaim. *Erwin v. Branch Bank at Mobile*, 14 Ala. 307, 314.

ADMISSION.

What are called "admissions" in civil actions, in criminal law are called "confessions." *Merriweather v. Commonwealth* (Ky.) 82 S. W. 592, 598.

ADMITTED TO BAIL.

The words "not admitted to bail," as used in Rev. Codes 1899, § 8679, relating to release on habeas corpus, mean that the accused has not been discharged on bail, but is in custody under commitment because unable or unwilling to furnish the bail required. *State v. Larson*, 97 N. W. 537, 538, 12 N. D. 474.

ADOPTED.

The word "adopted," in a stipulation to the effect that the report of a referee shall be accepted and adopted, has the same meaning as "accepted," and the effect of the stipulation is merely to waive the right to question the authenticity of the report on the settlement of the bill of exceptions. *Babcock v. Ormsby* (S. D.) 100 N. W. 759.

ADULT.

"Full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law." Under the express provisions of Code, § 3188, a male person remains a minor until the age of 21 years, but the common law is modified by the statute to the extent of declaring a female an adult at 18 years of age, and all persons such upon marriage. *Banco De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 100 N. W. 532, 535 (quoting Blackstone).

ADVANCE.

The advance of money does not imply a loan. A contract of employment as a salesman at a certain commission, the employer to advance the salesman a certain sum monthly, "said advances to be charged and deducted from the commissions computed at the end of the period of employment," does not create a personal liability on the part of the salesman to repay advances in excess of commissions earned. *Schlesinger v. Burland*, 85 N. Y. Supp. 350, 351, 42 Misc. Rep. 206.

The phrase in a memorandum of sale of beans, "he to have advance for two weeks," cannot, without extrinsic testimony, be construed to refer to the market price at the end of two weeks, but it either refers to the highest price during the two weeks, or requires extrinsic evidence to explain it, in which event its construction on conflicting testimony was properly submitted to the jury. *Chase v. Ainsworth* (Mich.) 97 N. W. 404.

ADVANCEMENT.

An advancement is an irrevocable gift by a parent to a child of the whole or part of what it is supposed the child will be entitled to upon the death of the parent, who afterwards dies intestate. In *re Allen's Estate*, 56 Atl. 928, 929, 207 Pa. 325 (citing *Appeal of Eahleman*, 74 Pa. [24 P. F. Smith] 42.)

An advancement is an irrevocable gift by a parent in his lifetime to his child, on account of such child's share of the estate after the parent is dead. *Schweitzer v. Schweitzer* (Ky.) 82 S. W. 625

"An advancement is that bestowment of property by one standing in loco parentis to another, in anticipation of the latter's share in the donor's estate. It may in one sense be a gift; but its treatment in law as an advancement depends on two facts—one, that the donor shall die intestate, totally or partially; the other, that the gift shall have been in fact with a view to a portion or settlement in life upon the donee." *Owsley v. Owsley* (Ky.) 77 S. W. 394, 396.

The word "advancement," in its limited statutory meaning, is applicable only to cases of intestacy, and to moneys advanced by a parent to a child in anticipation of such child's future share of the parent's estate. It is employed by courts of equity in a wider sense to denote money or property advanced as a satisfaction pro tanto—a general legacy given by a parent or other person standing in loco parentis to a child or grandchild. In *re Cramer*, 89 N. Y. Supp. 469, 470, 43 Misc. Rep. 494.

Comp. St. 1903, c. 23, § 34, declares that, in order that a gift or grant shall be deemed an advancement, it must be expressed in the gift or grant to be so made, charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. This section by implication excludes parol evidence of an advancement. *Boden v. Mier* (Neb.) 98 N. W. 701, 704 (citing *Pomeroy v. Pomeroy*, 67 N. W. 430, 93 Wis. 262; *Bulkeley v. Noble*, 19 Mass. [2 Pick.] 337; *Bullard v. Bullard*, 22 Mass. [5 Pick.] 527; *Barton v. Rice*, 39 Mass. [22 Pick.] 508).

ADVERSE CLAIM.

A claim, by one who acquired possession of property of a bankrupt before the filing of the petition in bankruptcy, that such property was delivered to him in part payment of a debt, and that he had no reasonable cause to believe that a preference was thereby intended, is clearly an adverse claim, which a referee has no jurisdiction to summarily determine on its merits, except by the claimant's consent. In *re Adams* (U. S.) 130 Fed. 788, 789 (citing *In re Hartman* [U. S.] 10 Am. Bankr. Rep. 387, 121 Fed. 940).

ADVERSE PARTY.

The term "adverse party," as used in Rev. St. 1887, § 4808, providing that the service of notice of appeal must be made on the adverse party or his attorney, means every party whose interest in the subject-matter would be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he is a plaintiff, defendant, or intervener. *Titiman v. Alamance Min. Co.* (Idaho) 74 Pac. 529.

"Adverse parties," within Laws 1899, p. 83, c. 62, providing for the service of notice of appeal on adverse parties, are all parties whose interests require that the order, judgment, or decree appealed from be sustained. It is immaterial whether such party appeared as one of the original parties to the action, or was brought in by order of the court. *Stephens v. Stevens*, 75 Pac. 619, 620, 27 Utah, 261.

The term "adverse party," as used in Rev. St. 1898, § 3049, relating to the service of notice of appeal to the Supreme Court, does not mean merely the opposite party on the record. A person may be an appellant or an adverse party, within the meaning of the statute, and his name not appear in the litigation resulting in the decision. If he has a substantial interest adverse to the decision, that is all that is required for an appellant, whether it be direct, or by privity created between himself and the person against whom the decision was rendered, by reason of succeeding to his rights after the decision or subsequent to the commencement of the action. *Harrigan v. Gilchrist*, 99 N. W. 909, 926, 121 Wis. 127 (citing *Rogers v. Shove*, 98 Wis. 271, 73 N. W. 989; *Crowns v. Forest Land Co.*, 99 Wis. 103, 74 N. W. 546; *Hiscock v. Phelps* [N. Y.] 2 Lans. 106; *Cotes v. Carroll* [N. Y.] 28 How. Prac. 436; *Barnes v. Stoughton* [N. Y.] 6 Hun, 254; *Pickersgill v. Read* [N. Y.] 7 Hun, 636; *Baylies*, New Trials & Appeals [2d Ed.] 145).

The plaintiff serving an amended complaint after answer must be deemed an "adverse party," within Code Civ. Proc. § 798, providing that, if service on an adverse party

is made through the post office, the time within which such adverse party is required to do an act is double the time specified. *Bucklin v. Buffalo, A. & A. R. Co.*, 85 N. Y. Supp. 114, 115, 41 Misc. Rep. 557.

ADVERSE POSSESSION.

See, also, "Substantial Inclosure."

"An adverse possession ought to be such as to challenge the right of all the world; but when an occupant evacuates the place, and suffers it to go to wreck, he hauls down his colors, and the challenge is withdrawn." Adverse possession "is to be made out by acts which are open, visible, notorious, and continuous, and does not depend upon the secret purpose and intention of the intruder that he will return at his convenience, sooner or later, and reoccupy the land." Continuous possession for five years, and after an abandonment for several years a possession for six months, followed by occupancy of a storehouse for several years, but less than seven, did not make out that continuous adverse possession sufficient to create title by prescription under color. *Clark v. White*, 48 S. E. 357, 358, 120 Ga. 957 (quoting and adopting definitions in *Stephens v. Leach*, 19 Pa. 262; *Denham v. Holeman*, 26 Ga. 183, 71 Am. Dec. 198).

Before possession lawfully taken by a co-tenant can become adverse to the parties jointly interested in the property, so as to set in motion the statute of limitations, there must be an actual ouster, and notice or knowledge of the hostile intention in pursuance of which the exclusive possession has been held. *Beers v. Sharpe*, 75 Pac. 717, 719, 44 Or. 386.

The use of the word "adverse," in an instruction that plaintiff or his vendors must have held land in controversy in actual adverse possession, to a well-defined boundary line, continuously, for 15 years prior to an alleged trespass, requires a finding that the land was held in hostile opposition by plaintiffs to the claim of defendants and all others. *Vincent v. Willis* (Ky.) 82 S. W. 583, 584.

The possession of the vendee under an executory contract for the purchase of land is not adverse to the vendor so long as the purchase money is not paid, or at least not before the vendee is entitled to demand a deed. *Johnson v. Peterson*, 97 N. W. 384, 385, 90 Minn. 503 (citing *Hannibal & St. J. R. Co. v. Miller*, 115 Mo. 158, 21 S. W. 915).

To constitute the adverse possession described in Code Civ. Proc. § 47, providing that when it shall appear that an occupant entered into possession under claim of title, founding such claim on a written instrument

as being a conveyance, and there has been a continuous occupation, the premises shall be deemed to have been held adversely, the essential requirement seems to be that the party shall enter under a claim of title exclusive of any other right, founding such claim upon a written instrument. A tax deed under which possession is taken is sufficient color of title, though invalid. *Murphy v. Dafee* (S. D.) 99 N. W. 86, 88.

Good faith is no element of adverse possession. *Dawson v. Falls City Boat Club* (Mich.) 99 N. W. 17, 18.

Prescription distinguished.

"Prescription" is the term usually applied to incorporeal hereditaments; "adverse possession" to lands. *Hindley v. Metropolitan Elevated R. Co.*, 85 N. Y. Supp. 561, 564, 42 Misc. Rep. 56.

ADVISE.

The word "advise," as used in a statute authorizing city councils of certain cities to appoint a city attorney whose duty it shall be to advise the board as to all legal matters, etc., means that such city attorney shall be the legal adviser of the council in all matters of litigation and legal proceedings; and in defining the duties which are required of him in his department the council may properly include attention to litigation as to which it is his duty to advise it. *City of Ludlow v. Richie* (Ky.) 78 S. W. 199, 200.

AFFAIR.

See "Municipal Affair."

AFFIDAVIT.

See "Appear by Affidavit"; "False Affidavit"; "Fraudulent Affidavit."

An affidavit is defined by Bouvier as a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath. The signature of the affiant is not necessary, in the absence of a rule of court or statute requiring it. In re *Shannahan-Wrightson Hardware Co.* (Del.) 58 Atl. 1023.

AFFIRMATIVE WARRANTY.

"Warranties in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done or not done after the policy takes effect." *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021.

AFFRAY.

An instruction that an affray is a mutual combat voluntarily engaged in by two or more persons in a public place, while technically accurate, might be construed as one in which both willingly took part, and was therefore misleading. *Reynolds v. Commonwealth (Ky.)* 82 S. W. 978, 979. See, also, *Reynolds v. Commonwealth (Ky.)* 82 S. W. 233.

AFORETHOUGHT.

See "Malice Aforethought."

AFTERTHOUGHT.

Afterthought means a predetermination to do the act, however sudden or recently formed in the mind the resolution to do it has been made. *Hathaway v. Commonwealth (Ky.)* 82 S. W. 400, 402.

AGAINST HER WILL.

As used in a statute defining rape to be the carnal knowledge of a female forcibly and against her will, the words "against her will" are synonymous with the words "without her consent." *Gore v. State*, 46 S. E. 671, 672, 119 Ga. 418, 10 Am. St. Rep. 182.

AGAINST LAW.

See "Decision against Law."

AGENT.

See "Duly Authorized Agent"; "Local Agent."

As owner, see "Owner."

The word "agent," as used in the statute of Missouri providing that foreign corporations doing business in the state shall file their articles of incorporation, establish an office or agency, and subject themselves in prescribed respects to the laws of the state, but exempting corporations entirely non-resident, soliciting business through drummers or traveling salesmen, and further providing that service shall be authorized to be made, in an action against a corporation having no office or agency, by serving an agent of the company, wherever found, does not include one merely soliciting orders for goods which are sent to the nonresident principal, a corporation, to be filled, the solicitor receiving a commission on such orders, and having no other relation to the corporation, and having no relation to the matter out of which an action against the corporation arose. *Strain v. Chicago Portrait Co. (U. S.)* 126 Fed. 831, 832.

One employed by a refining company to sell and distribute oil to customers, being

paid by a commission on the amount of sales, is an agent or servant of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him. *Riggs v. Standard Oil Co. (U. S.)* 130 Fed. 199, 201.

The word "agent," as used in a statute providing for service of process on telegraph and telephone companies, is not intended to be understood in any unusual, limited, or restricted sense, or otherwise than was justified in its ordinary signification. *Southern Bell Telephone & Telegraph Co. v. Parker*, 47 S. E. 194, 197, 119 Ga. 721.

While a bookkeeper may be, and often is, the agent of his employer, the word does not ex vi termini import that relation, and, in the absence of averment that it exists, the courts cannot by intendment enlarge the ordinary signification of the word so as to bring it within a class to which it may or may not belong. Code 1887, § 3286 [Va. Code 1904, p. 1730], provides that when, in assumpsit, an affidavit is filed with a declaration that the amount claimed is justly due, a plea in bar shall not be received unless verified, in the absence of which judgment shall be for plaintiff. An affidavit by plaintiff's bookkeeper, filed with the declaration, is insufficient to authorize judgment in favor of plaintiff, though the statute permits the filing of the affidavit by plaintiff or his agent. *Merriman Co. v. Thomas & Co. (Va.)* 48 S. E. 490, 492.

AGGRAVATE.

Increase synonymous, see "Increase."

AGGRIEVED.

As determining right to appeal, see "Aggrieved Party."

Where it appears that a corporation has no personality subject to taxes, it sufficiently appears that it was aggrieved, so as to entitle it to a cancellation of a tax. *People v. Feitner*, 87 N. Y. Supp. 304, 307, 92 App. Div. 518.

The passenger to whom a transfer is denied must necessarily be the "aggrieved party," in the language of Railroad Law, § 104 (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1406, c. 676), providing that, for every refusal to comply with the act, the corporation so refusing shall forfeit \$50 to the aggrieved party. *Fox v. Interurban St. R. Co.*, 86 N. Y. Supp. 64, 65, 42 Misc. Rep. 538.

AGGRIEVED PARTY.

A defendant is truly "aggrieved" only when by appropriate pleadings, or pleadings and proofs, he has become an active party

to an issue or a controversy which is adjudged against him. *New Jersey Building, Loan & Investment Co. v. Lord* (N. J.) 58 Atl. 185, 187.

In legal acceptance a party is "aggrieved" by a judgment or decree when it operates on his rights of property, or bears directly upon his interest. *Ruff v. Montgomery*, 36 South. 67, 68, 83 Miss. 185 (citing 2 Cyc. p. 633).

Upon principle, as to any judgment or order of a court adverse to one in a suit or proceeding, who is the proper representative therein, of the interests of others prejudiced by the result, that one is a "party aggrieved," within the meaning of such term as used in appeal statutes. *McKenney v. Minahan*, 97 N. W. 489, 490, 119 Wis. 651.

Where the probate of a will is denied, the executor therein named is a "party aggrieved," and consequently possesses sufficient interest to enable him to appeal under Code Civ. Proc. §§ 1294, 2568, authorizing appeals by any person aggrieved by the order appealed from. In *re Rayner's Will*, 87 N. Y. Supp. 23, 93 App. Div. 114.

If the court entered a judgment which deprived complainant of any of its property rights, then it must be a "party aggrieved," within Rev. St. 1887, § 4802, providing that any party aggrieved may appeal. It is not necessary for a person or corporation to be named as plaintiff or defendant or intervenor in the title to an action, or in the title to a judgment entered therein, in order to become a party to the action. *Washington County Abstract Co. v. Stewart* (Idaho) 74 Pac. 955, 956, 957.

One not an heir, but merely a legatee under an alleged will of decedent antedating another alleged will of decedent, which was admitted to probate in the county court without first having procured the allowance of the will under which he claims in the county court, which has sole jurisdiction of the probate of wills, is a "party aggrieved," within Rev. St. 1898, § 3788, authorizing appeals from the county court on the probate of wills only by persons aggrieved. In *re Hunt's Will* (Wis.) 100 N. W. 874, 875.

Where the wife of a minor under guardianship had obtained a divorce, with a decree for alimony, prior to the settlement of the guardian's account on the husband's becoming of age, but she had neither brought suit against the guardian, attached the ward's estate, nor levied an execution, she was not a party aggrieved, so as to be entitled to appeal from a probate decree settling the guardian's accounts, though she be regarded as a creditor of the ward. *Leyland v. Leyland*, 71 N. E. 794, 795, 186 Mass. 420.

Under Ballinger's Ann. Codes & St. § 185, providing that any party aggrieved by the

taxation of costs by the clerk may have the same retaxed, and section 4749, providing that the party commencing the action shall be known as the "plaintiff" and the opposite party as the "defendant," the witnesses in a criminal case have no right to appeal from an order disallowing their fees for attendance and mileage as certified by the clerk, they not being parties to the proceeding. *State v. Fair*, 76 Pac. 731, 784, 35 Wash. 127.

AGREE TO LET.

The words "agree to let" and similar phrases have been held to confer a leasehold, though a further writing or memorandum was called for in the document wherein those words were used. *Ver Steeg v. Becker-Moore Paint Co. (Mo.)* 80 S. W. 346, 351.

AGREEMENT TO MARRY.

"The agreement to marry partakes of the nature of a civil contract, as upon its violation the injured party may recover damages; but the contract or agreement to marry and the marriage relation itself are by no means one and the same. When the agreement to marry has been executed in a legal marriage, the relation thus formed becomes much more than a mere civil contract. The rights and duties incident to this relation are from a source much higher than a contract of which the parties are capable, and can never be restricted nor enlarged nor in any way controlled by any contract which the parties can make." *Elkenbury v. Burns* (Ind.) 70 N. E. 837, 838.

AID.

Any other aid, see "Any Other."

AIM.

The word "aim," as used in *Burns' Ann. St. 1901, § 2073*, which provides that it shall be unlawful for any person over the age of 10 years, with or without malice, purposely to point or aim any pistol or other firearm, either empty or loaded, towards any other person, is used in the disjunctive, and under such circumstances the statute may be violated by doing either or both of the forbidden acts. The accused may be charged (1) with having purposely pointed the pistol at and towards another, (2) with having purposely aimed the weapon at and towards another, and (3) with having purposely pointed and aimed the weapon at and towards another. *Eaton v. State*, 70 N. E. 814, 162 Ind. 554.

ALCOHOLIC COMPOUNDS.

Fresh leaves of aconite and belladonna, and fresh roots of bryonia, immersed in their

natural condition in alcohol for preservation, are not "alcoholic compounds," as the term is used in paragraph 2, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]. *Boericke & Runyon Co. v. United States* (U. S.) 126 Fed. 1018.

ALIAS.

Sometimes a man is known by several different names, and it was formerly the custom, in drawing indictments, to charge him under all the names by which he was known; connecting them with the words "alias dictus," or with simply "alias." These words mean "otherwise called" or "otherwise." *State v. Howard* (Mont.) 77 Pac. 50, 51.

ALIEN.

Proceeding to expel or exclude alien as criminal proceeding, see "Criminal Proceeding."

Persons born out of the limits and jurisdiction of the United States, the father at the time of their respective births not being a citizen of the United States, are born aliens. The status, as aliens, of children born in a foreign country of alien parents, is not changed by the naturalization of their father as a citizen of the United States by taking out his second papers while the children are detained in custody as immigrants at Ellis Island, and they remain subject to exclusion under the immigration laws for a dangerous contagious disease contracted before their embarkation; such children not being affected by Rev. St. § 2172 [U. S. Comp. St. 1901, p. 1334], which provides that the minor children of persons duly naturalized, if dwelling in the United States, shall be considered as citizens thereof. *United States v. William* (U. S.) 132 Fed. 894, 895.

ALIEN IMMIGRANT.

A native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by a treaty of April 11, 1899, 30 Stat. 1754, with Spain, is not, upon her arrival at the port of New York, an "alien immigrant," within the meaning of the act of Congress of March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], providing for the detention and deportation of alien immigrants likely to become public charges. *Gonzales v. Williams*, 24 Sup. Ct. 177, 192 U. S. 1, 48 L. Ed. 317.

When defendant's ship was anchored off shore at a Mexican port, a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore, he found that the vessel had started, and proceeded some distance. Defendant refused his request that he be taken back, and landed, but promised to stop and leave

him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. Held, that such facts were not sufficient to warrant defendant's conviction for neglecting to detain an alien not entitled to land, as such Mexican was not an alien immigrant who left a foreign shore to come to the United States for the purpose of becoming a permanent resident here; all the acts and agreements affirmatively appearing to have been made in the utmost good faith, and not for the purpose of evading any law. *Moffitt v. United States* (U. S.) 128 Fed. 375, 379, 63 C. C. A. 117.

ALIENATION.

Alienation is the voluntary and complete transfer from one person to another, and if it be concerning the transfer of property it involves the complete and absolute exclusion, out of him who alienates, of any remaining interest, or particle of interest, in the thing transmitted. It involves the complete transfer of the property and possession of lands, tenements, or other things to another. *Orrell v. Bay Mfg. Co.*, 36 South. 561, 563, 83 Miss. 800 (citing *Stark v. Duvall*, 7 Okl. 217, 54 Pac. 454).

The word "alienation" means the transfer of the property and possession of land, tenements, or other things from one person to another, and is particularly applied to absolute conveyances of real property. Where a testator directs that his trustees have and exercise all requisite power, including that of alienation, necessary or convenient for the management of the estate and the division and distribution thereof, the use of the word "alienation" clearly imports an intention on the part of the testator to confer on the trustees the power to alienate or transfer the real estate if it should be necessary for the proper management of the estate or for the division and distribution thereof in the manner contemplated by the will. *Dickson v. New York Biscuit Co.*, 71 N. E. 1068, 1068, 211 Ill. 468.

ALIMONY.

"Alimony" is a technical word, theoretically restricted to personalty, and practically to money. It is payable out of the husband's estate, real as well as personal. But the word never covers the estate itself." This is the meaning of the word "alimony," as used in Comp. St. 1901, c. 25, § 22, provid-

ing that in case of a divorce the court may decree to the wife such part of the personal estate of the husband, and such alimony out of his estate, as it shall deem just and reasonable. Hence the district court, in a suit for divorce, has no jurisdiction to award real estate of the husband to the wife in fee as alimony. *Cizek v. Cizek* (Neb.) 99 N. W. 28, 30.

The word "alimony," in Pub. Acts 1899, p. 360, No. 330, amending Comp. Laws, § 10,891, by inserting a provision allowing imprisonment for nonpayment of alimony, includes allowance for the support and education of children. *Brown v. Brown* (Mich.) 97 N. W. 396, 397.

Alimony is "purely incidental to divorce proceedings, and is an allowance out of the divorced husband's estate, made to the divorced wife for her support and maintenance. In this state is has no existence as a separate and independent right. It must be adjudged, if at all, in the divorce proceedings, and cannot be the subject-matter of an independent suit." *Rariden v. Rariden* (Ind.) 70 N. E. 398.

ALL

The word "all," as an adjective of number, means the whole number of; every one of. *Encyclopædic Dictionary*. In considering whether the statute of Merton, in which the words "omnes viduæ" were used, applied to each of the five kinds of dower, Lord Coke observed, "Qui omne dicit nihil excludit"—who says all does exclude nothing. 2 Inst. 81. We would not be understood, however, as asserting that the word, as used in legislation, is always to be understood as an all inclusive one. As so used, it is a general term, which is to be understood as comprehending whatever is within the outmost circle of the meaning of the word, unless, after subjecting the statute to interpretation and construction, there is sufficient reason for holding that the term was not used in so broad a sense. *Pittsburgh, C. & St. L. Ry. Co. v. Lighthelser* (Ind.) 71 N. E. 218, 222.

All contracts of insurance.

The words "all contracts of insurance," as used in Act Pa. May 1, 1876 (P. L. p. 66) § 48, declaring that the agent of any insurance company of any other state or government which does not comply with the laws of Pennsylvania shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on behalf of the company, applies only to contracts of insurance on property in Pennsylvania. Though the language is inclusive of all contracts, yet, as the liability it imposes is an extraordinary and penal one, it should not be held to embrace anything beyond what

clearly appears to have been contemplated by the Legislature; and, for ascertainment of the legislative intent, attention is not to be confined to the words employed, but the familiar rule must be applied, "that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Rothschild v. Adler-Weinberger S. S. Co.* (U. S.) 130 Fed. 866, 867.

All costs herein expended.

The phrase "all costs herein expended," as used in a judgment reciting, "It is therefore considered and adjudged by the court that this cause be dismissed, and that defendant recover from the plaintiff all costs herein expended," meant "only such costs as were authorized by law, and could be properly taxed in favor of the defendant below." *Casto v. Elgeman*, 70 N. E. 807, 162 Ind. 506 (citing *Wilson v. Jenkins*, 147 Ind. 533, 46 N. E. 889; *Mott v. State*, 145 Ind. 353, 44 N. E. 548).

All damages.

The phrase "all damages," as used in a bond given to a sheriff to indemnify him against all damages sustained by a levy on personal property, is broad language, and must be construed to include every element of damages which may fairly be said to have been contemplated by the parties, and covers attorney's fees which the sheriff was compelled to pay in defending an action for conversion of the property levied on, after notice to the obligors to defend and their refusal to do so. *Cousins v. Paxton & Gallagher Co.*, 98 N. W. 277, 278, 122 Iowa, 465.

All expenses.

Any and all necessary expenses, see "Any."

The term "all expenses," as used in an agreement by a real estate agent to take charge of certain property and pay all expenses, must be deemed to include the annual taxes, and such other expenses or payments as an agent in full charge of property of such a character for a term of years would reasonably be required to pay out of the income in the process of a good management. *Seymour v. Warren*, 71 N. E. 260, 261, 179 N. Y. 1.

All of which one may die possessed.

A gift of "all of which one may die possessed" carries only the net amount of the estate. *Blakeslee v. Pardee*, 56 Atl. 503, 505, 76 Conn. 263.

All levies.

The words "all levies," as used in Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], making void "all levies, judgments, attachments, or other

liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him in case he is adjudged a bankrupt," are used in their most comprehensive sense, covering any and all seizures of property of the bankrupt within the four-months period, under legal process looking to the enforcement of claims against the bankrupt which would be released by his final discharge, and cover a seizure of property on a writ of replevin. *In re Hymes Buggy & Implement Co.* (U. S.) 130 Fed. 977, 980.

All my property.

There is no difference between the phrases "all my property" and "all the property I possess," as used in a will devising such property. *Thomas v. Blair*, 85 South. 811, 813, 814, 111 La. 678.

All persons.

The term "all persons," in an act providing that a conveyance certified and recorded shall impart notice to all persons of the contents thereof, means all persons who acquired interests as subsequent purchasers or mortgagees, and it was not intended that the record should be notice to all the world, or even to purchasers or mortgagees, in relation to other matters. *McCabe v. Grey*, 20 Cal. 509, 516.

All sums due to employés.

The expression "all sums due to employés" means sums due at the time of the decretal order appointing the receivers, and which accrued before it. *Dickinson v. Saunders* (U. S.) 129 Fed. 16, 21, 63 C. C. A. 666.

All the rest, residue, and remainder.

Where a testator, after creating in his residuary estate a trust to raise and pay the widow a certain income for life in lieu of dower, and to raise a certain income for his son for life, directed the trustees to divide all the rest, residue, and remainder of his estate into two equal parts, the words "all the rest, residue, and remainder of my estate" were intended to cover the remainder of the property held in trust for the annuity of the widow. *Thomas v. Thomas*, 89 N. Y. Supp. 495, 497, 43 Misc. Rep. 541.

ALL OTHER.

The word "other," as used in Const. art. 8, § 4, providing that all other grants, gifts, and devises that have been or may hereafter be made to the state shall be applied to the support and maintenance of the common schools, means other than the grants, gifts, and devises specified in sections 2 and 3 of the article. *McMurtry v. Engelhardt* (Neb.) 98 N. W. 40, 42.

ALLEGATION.

See "Immaterial Allegation."

ALLEGED.

Supposed synonymous, see "Supposed."

ALLEY.

As street, see "Street."

Webster defines an alley as a narrow passage, especially a walk or passage in a garden or park, bordered by rows of trees or bushes; a bordered way; a narrow passage or way in a city as distinct from a public street. *Milliken v. Denny*, 47 S. E. 132, 133, 135 N. C. 19.

ALLOT.

The term "allotted," as used in Sess. Laws 1903, p. 246, § 33, making it the duty of the state engineer to make an examination of the streams, beginning with those streams the waters of which have not been allotted, means decreed by the proper court. *Boise City Irrigation & Land Co. v. Stewart* (Idaho) 77 Pac. 25, 29.

ALLOTMENT.

The term "allotment," in the constitutional provision giving probate courts jurisdiction in all matters of the allotment of dower, applies to parties who claim in virtue of the title of the deceased, as the widow and heirs, and over whom the probate court may have jurisdiction. It signifies an apportionment of the interest of one or more parties entitled to a share of the estate. It does not affect strangers. *Jiggits v. Bennett*, 81 Miss. 610, 613.

ALTERATION.

See "Material Alteration."

AMBIGUITY.

See "Latent Ambiguity."

AMEND.

The power to amend must not be confounded with the power to create. The power of the court to amend a record presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed thereunder. The difference between creating and amending a record is analogous to that between the construction

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and repair of a piece of personal property. A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court *nunc pro tunc* 33 years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered, especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state court substituted in its place. *Gagnon v. United States*, 24 Sup. Ct. 510, 511, 193 U. S. 451, 48 L. Ed. 745.

A constitutional provision providing that the Legislature shall not pass a special, private, or local law amending, confirming, or extending the charter of any private municipal corporation prohibits the Legislature from passing a special law repealing such charter. The word "amend," in legal phraseology, does not generally mean the same thing as "repeal," but it does not follow that amendments of a statute may not often be accomplished by repeals of some of its parts. *Little v. State*, 35 South. 134, 136, 137 Ala. 659.

AMENDMENT.

See "Additional Amendment."

The word "amendment" is clearly susceptible of a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as of the construction that every proposition which effects a change in the Constitution or adds to or takes from it is an amendment. *People v. Sours*, 74 Pac. 167, 178, 31 Colo. 369 (citing *State v. Timme*, 54 Wis. 318, 11 N. W. 785).

AMENDMENT BY IMPLICATION.

"Amendment by implication" is merely a phrase in common use, because convenient, to indicate that rule of construction by which a later repugnant provision in a Constitution or statute modifies or abrogates an earlier one. *People v. Sours*, 74 Pac. 167, 176, 31 Colo. 369.

AMOUNT COLLECTED.

Laws 1896, p. 859, c. 908, § 187, as amended by Laws 1901, p. 297, c. 118, § 1, imposes an annual state tax for the privilege of carrying on insurance business by domestic insurance companies. The tax is imposed on the gross premiums collected. The "amount collected" is either the sum collected and retained, or else it includes something for the business not done or unrealized in the anticipation of business. While in a certain

sense it may be said that payment of the premium in advance for one year involves insurance made for one year, notwithstanding the fact that according to its terms the policy is subsequently canceled, a majority of the court is of the opinion that this is inconsistent with the fair meaning of the words "business done," when looked back upon at the end of the year. The premium which represents business done is the amount which the company has the benefit of and furnishes an equivalent for. It is the money earned by the policy. When part of the premium is refunded, it is the same in effect as if it had never been paid. *People v. Miller*, 70 N. E. 10, 11, 177 N. Y. 515.

AMOUNT IN CONTROVERSY.

Where the damages recovered in an action against a telegraph company for negligence in the transmission of a message, together with interest thereon, amount to \$100, the case is appealable to the Court of Civil Appeals, the interest being a part of the amount in controversy. *Western Union Tel. Co. v. Noland (Tex.)* 77 S. W. 1031.

AMOUNT IN DISPUTE.

Where, under a statute providing that in case of death from negligent running of a train the railroad company shall forfeit and pay for every person so dying \$5,000, which may be sued for, etc., and only \$4,500 has been sued for and recovered, \$4,500 is the "amount in dispute," as regards appellate jurisdiction, although a recovery might have been had for \$5,000. *Marsh v. Kansas City Ry. Co.*, 78 S. W. 284, 285, 104 Mo. App. 577.

ANARCHIST.

The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and Labor, that an alien came within the provisions of the immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists, cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the federal government or of all governments, or of the assassination of officials, where there was evidence that such alien advocated, "as an anarchist," a universal strike, and proposed to lecture upon "the legal murder of 1887," and to address mass meetings on that subject, in association with a person who had been convicted of advocating revolution and murder. *United States ex rel. Turner v. Williams*, 24 Sup. Ct. 719, 723, 194 U. S. 279, 48 L. Ed. 979.

ANARCHY.

"Anarchy" is a term which has been used in recent years to describe a lawless

and dangerous doctrine, and its advocates have been looked upon as persons dangerous to society, and some of its more outspoken and unbalanced disciples have become assassins. *Von Gerichten v. Seitz*, 87 N. Y. Supp. 968, 969, 94 App. Div. 130.

ANCESTOR.

An "ancestor" is defined as "one who has preceded another in a direct line of descent; a lineal descendant; a former possessor; the person last seised; a deceased person from whom another had inherited land." *Bowen v. Hackney* (N. C.) 48 S. E. 633, 635 (quoting *Black's Dict.*; 2 Bl. Comm. 201).

AND.

Where, in a will containing three separate clauses devising property to each of testator's three children, the first two clauses providing that, if the devisees should die without children or grandchildren living at their death, the property was devised to the devisee's brother and sister or their children or grandchildren, and the third clause making provision for testator's son, and declaring that, if he should die without children or grandchildren, his share should pass to his brother and sister and their children or grandchildren, if there should be any living, the word "and" in the devise to testator's son should be construed as having been used instead of the word "or," and, where the son died without children or grandchildren, his share passed to his brother and sister in fee, and not to them and their children and grandchildren as tenants in common. *Davis v. Davis* (Ky.) 81 S. W. 246, 247.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1871], for "printing paper * * * suitable for books and newspapers," is not limited to such paper as is suitable for printing both books and newspapers; and paper used for printing covers of booklets, pamphlets, and the like, but not suitable for printing newspapers, is properly classified for duty under said provision. *Hensel, Bruckmann & Lorbacher v. United States* (U. S.) 126 Fed. 578, 577.

ANIMAL

Other animal, see "Other."

ANNUAL

The word "annual," as used in an antenuptial contract providing for the annual payment of a certain sum to the wife after the husband's death in lieu of dower, not only denotes the amount to be paid, but the time of payment. It means not only that the wife is to receive the specified sum for each year,

but that the sum is to be paid to her each year. An agreement to pay a fixed sum annually for each year, in the absence of language modifying the ordinary meaning of these terms, cannot fairly be construed as a promise to pay such sum annually in advance, or at the commencement of each year. *Mower v. Sanford*, 57 Atl. 119, 120, 76 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1008.

ANNUAL DAMAGES.

Gross damages equivalent, see "Gross Damages."

ANNUITY.

An annuity is a sum payable annually, unless the language of the instrument creating it may properly be construed as providing for a different time of payment. *Mower v. Sanford*, 57 Atl. 119, 120, 76 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1008.

A gift of an income from a certain fund is not an "annuity," and interest does not begin thereon until one year from the death of the deceased. *In re Brown's Estate*, 77 Pac. 160, 162, 143 Cal. 450.

ANONYMOUS.

The word "anonymous" is defined in the *Century Dictionary* as "of unknown name; one whose name is withheld, as an anonymous author, or as an anonymous pamphlet; or without any name; wanting a name; without the real name of the author; nameless." A newspaper article signed "Smith," written by a person with such a surname, is not "anonymous," within a statute providing that the requirement of notice of intention to bring an action for libel published in a newspaper shall not apply to anonymous publications. *Williams v. Smith*, 46 S. E. 502, 503, 134 N. C. 249.

ANSWER.

Under Gen. St. 1894, § 5236, providing that the answer may contain new matter constituting a counterclaim, and section 5240, declaring that sham, irrelevant, and frivolous answers may be stricken out, an answer consisting of a counterclaim may be stricken out as sham and frivolous, since a counterclaim, although consisting of new matter, may constitute an answer. *Monitor Drill Co. v. Moody* (Minn.) 100 N. W. 1104.

ANY.

Any action.

The words "any action," as used in *Hurd's Rev. St. 1901*, c. 51, § 9, giving courts, in any action pending before them, power to compel the protection of books containing

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evidence pertaining to the issue, includes a suit at law as well as a bill in chancery, and the words exclude the idea that the evidence sought to be obtained can only be acquired by a bill of discovery. *Swedish-American Tel. Co. v. Fidelity & Casualty Co.*, 70 N. E. 768, 773, 208 Ill. 562.

Any and all necessary expenses.

The phrase "any and all necessary expenses," as used in a will devising the body of the testator's estate to the executors in trust to collect the income, and, after deducting any and all necessary expenses, to divide the net income in equal shares among the persons named, is sufficient to include the payment of taxes charged upon the legacies under the collateral inheritance tax law, the New York state transfer tax, and the United States war tax, and such taxes are payable out of the gross income, and not out of the principal of the estate. *In re Brown's Estate*, 57 Atl. 360, 208 Pa. 161.

Any business.

The term "any business connected with said railway or incident thereto," as used in a conveyance by citizens of a town to a railroad, making a donation of a right of way through lands suitable for residences only, for the purpose of having railroad depots placed nearer the town and to enhance the value of their property, giving the right to the railroad to establish, on the land so conveyed, "any business connected with said railway or incident thereto," does not give the railroad the right to establish stockpens on the land so conveyed, to the damage of adjacent property. *Missouri, K. & T. R. Co. of Texas v. Mott (Tex.)* 81 S. W. 285, 289.

Any change in grade.

The words "any change in the grade of such highway," in Revision 1902, § 2051, providing that when the owner of land adjoining a public highway shall sustain special damages to his property by reason of any change in the grade of such highway he shall be entitled to the amount of such special damages, imply an already existing grade, and the statute contemplates the existence of a worked highway completed and in actual use. *Gorham v. City of New Haven*, 58 Atl. 1, 2, 76 Conn. 700; *Munson v. Same*, Id.

Any defense.

An instruction, in a suit on a note, that if defendant sets up a failure of consideration he must establish it by a preponderance of the evidence, and that the burden of proving "any defense" is on defendant, followed by an instruction that by a preponderance of the evidence is meant the greater weight of the evidence, is not erroneous as leading the jury to believe that the word "any" refers to every other defense than those spoken of in the instruction. *Ewen v. Wilbor*, 70 N. E. 575, 578, 208 Ill. 492.

Any description.

The words "of any description," as used in Pub. Laws 1901, c. 240, regulating the packing of sardines for canning purposes, are of wide application, and prohibit all sardine canning within the time limits fixed by the statute. *State v. Kaufman*, 57 Atl. 886, 888, 98 Me. 546.

Any extent.

Appreciable extent distinguished, see "Appreciable Extent."

Any means or force.

The term "by any means or force," in Pen. Code, § 245, declaring that every person committing an assault with a deadly weapon, or by any means or force likely to produce great bodily injury, etc., is a general and comprehensive term, designated to embrace many and various means or forces which, aside from a deadly weapon or instrument, may be used in making an assault. *People v. Perales*, 75 Pac. 170, 171, 141 Cal. 581.

Any part of.

The words "any part of or projection," as used in a deed providing that no dwelling or other house or building, or any part thereof or projection therefrom, shall be built on the grantor's remaining land within a certain distance of the premises conveyed, "evidently refer to bay windows or porches or things of that nature." *Clark v. Lee*, 70 N. E. 47, 185 Mass. 223.

Any person.

The words "any person," as used in Code, § 210, allowing any person to sue in forma pauperis on making affidavit that he is unable to give security, are broad enough to include any litigant whatever, and an administrator may sue in forma pauperis. *Christian v. Atlantic & N. C. R. Co. (N. C.)* 48 S. E. 743.

Any place.

The words, "in any place," in Pen. Code, § 675, as amended by Laws 1891, p. 657, c. 327, providing that any person who shall, by any offensive or disorderly act or language, annoy or interfere with any person in any place, or with the passengers of any public stagecoach, railroad car, or other public conveyance, refers to a public place, and public stages, railroad cars, and other conveyances were doubtless specified to remove any question as to whether they were public places, and included in the words "in any place." *People v. St. Clair*, 86 N. Y. Supp. 77, 79, 90 App. Div. 239.

Any property.

In Rev. St. 1895, art. 2113, declaring that no sale of any property belonging to an estate shall be made by an executor or administrator without an order of the court author-

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izing the same, the term "any property" embraces promissory notes as well as all other kinds of property. *Browne v. Fidelity & Deposit Co. (Tex.)* 80 S. W. 593, 595.

Any road crossing.

The words "any road crossing," as used in Code, § 2072, providing that in moving a railroad train the engine whistle must be sounded at least 60 rods before any road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, do not include private crossings, but include only roads as defined by section 48, cl. 5, providing that the term "road," as used in the Code, means any public highway, unless otherwise specified; and it is not otherwise specified in section 2072. *Nicholas v. Chicago, M. & St. P. R. Co. (Iowa)* 100 N. W. 1115, 1116.

Any trial, hearing, proceeding, or investigation.

The phrase "trial, hearing, proceeding, or investigation," as used in a statute relating to the preservation of the purity of elections, which defines and punishes offenses against the elective franchise, and provides that a person offending against any provision thereof is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, as any other person, means some trial, hearing, proceeding, or investigation of a person other than the witness for the commission of such offense. *Lindsay v. Allen (Tenn.)* 82 S. W. 648, 649.

ANY OTHER.**Any other aid.**

Where the concealing of an offender is first mentioned, and then there is added the giving of such offender any other aid, the "other aid" is of a similar character as that particularly specified. *State v. Jett (Kan.)* 77 Pac. 546, 547 (citing *State v. Doty*, 57 Kan. 835, 48 Pac. 145).

Any other person.

The term "or any other person entitled," in Code Civ. Proc. § 1368, providing that, if any person entitled to administration is a minor, letters must be granted to his guardian, or any other person entitled to letters, is general in its designation of persons, and must either apply to persons in the same class as the minor, or to persons in inferior classes, who, as provided in section 1365, are entitled, in the absence of others having superior rights, to a grant of letters. In re *Turner's Estate*, 77 Pac. 144, 146, 143 Cal. 438; *Turner v. Richardson, Id.*

Any other structure.

A railroad is within the term "any other structure," as used in a statute providing

that every person furnishing material of any kind to be used in the construction of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the materials furnished. *Giant Powder Co. v. Oregon Pacific Ry. Co. (U. S.)* 42 Fed. 470, 473, 8 L. R. A. 700; *Ban v. Columbia Southern Ry. Co. (U. S.)* 117 Fed. 21, 31, 54 C. C. A. 407.

Any other witness.

The use of the term "any other witness," as used in an instruction declaring that, if the jury are of the opinion that any witness has willfully sworn falsely as to anything material to the issue, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as the jury may find it corroborated by the testimony of "any other witness," renders the instruction fatally defective, because the jury may disregard the entire evidence of a witness not corroborated by some credible witness. *Hart v. Godkin (Wis.)* 100 N. W. 1057, 1060 (citing *F. Dohmen Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979; *Mercer v. Wright*, 3 Wis. 645; *Patnode v. Westenhaver*, 114 Wis. 460, 90 N. W. 467).

APARTMENT HOUSE.

The term "apartment or community house" is not synonymous with "tenement" in a covenant precluding the erection of any tenement, apartment, or community house. *McClure v. Leaycraft*, 90 N. Y. Supp. 233, 234.

APPAREL.

See "Wearing Apparel."

APPARENT.

The word "apparent," as used in an instruction in a personal injury action in connection with the word "reasonable," is not erroneous, for the word "apparent" means plain or evident, and is the fair equivalent of "certain." *Harrison v. Ayrshire*, 99 N. W. 132, 133, 123 Iowa, 528.

APPEAL

Proceeding on appeal as civil action or case, see "Civil Action—Case—Suit—etc."

A marked distinction exists between proceedings in error to obtain a reversal of a judgment or final order in a law action, and an appeal in a suit in equity, which latter brings up the case for trial de novo, and is accomplished solely by the filing in due time in the Supreme Court of a transcript of the record containing the judgment, decree, or

final order appealed from. In case of an appeal in a suit in equity, the filing of a transcript operates ipso facto as a removal of the cause to the appellate court, and, in the event of death, proceedings for a revivor and substitution are authorized, as though the action had been pending in the appellate court since prior to the death of the party; but the right to review by proceedings in error are regulated by an altogether different method of procedure, which must be followed in order to obtain such revivor. *Ritchey v. Seeley* (Neb.) 97 N. W. 818, 819.

The word "appeal" designates generally any method provided by statute for removing a case from an inferior to a higher court for review, including the proceeding under the statute by petition in error. *Caldwell v. State* (Wyo.) 74 Pac. 496.

A notice that a party "has appealed" from a judgment is sufficient notice that he "appeals" from the judgment. The words "intends to appeal," "will appeal," or "give notice of their application to appeal" are equivalent to and have the same effect as the more direct phraseology of the statute—that is, each will effect an appeal. *James v. James*, 77 Pac. 1082, 35 Wash. 655 (citing *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773; *In re Murphy's Estate*, 26 Wash. 222, 66 Pac. 424; *Brown v. Calloway*, 34 Wash. 175, 75 Pac. 630).

APPEAR.

See "If It Appears."

APPEAR BY AFFIDAVIT.

"Appear by affidavit" means that such legal evidence going to establish the fact must be given as would be received in the ordinary course of judicial proceedings, and not conclusions, opinions, or hearsay. The affidavit must contain a statement of the facts and circumstances upon which the applicant bases his belief of the truth of what he wishes to establish. It must be so full that the officer to whom it is presented may find, upon the evidence contained in it, that the facts exist satisfactorily to his mind. *Mackubin v. Smith*, 5 Minn. 367, 370 (Gil. 296, 298).

APPEARANCE DE BENE ESSE.

"The appearance de bene esse is peculiar to the courts of this state, and has invariably prevailed, from a time to which the memory of man runneth not to the contrary. I have known the practice to prevail for more than forty years, and have seen such entries long before my time. It was borrowed from the filing a declaration de bene esse; that is, conditionally, until special bail be put in. A declaration de bene must be

delivered and filed before the time for putting in bail has expired. If it be delivered after appearance, it is called 'delivering it in chief.' The reason of filing it conditionally is this: that it is no waiver of bail; but demanding a plea is, because it is admitting the defendant to be in court. This declaration stands, without more said, where the special bail is put in, and remains without exception. The declaration is generally indorsed thus: 'This declaration is filed conditionally, till special bail is entered,' or 'Common bail is filed,' as the case may be. All our proceedings are short notes—memoranda—afterwards to be filled up. The appearance de bene esse, if filled up at length, is an appearance conditionally, if the summons of scire facias be returned served. If it is, there is a return, with a full appearance; so much so that, on the writ thus returned, I would consider the party in court, appearing by his attorney, unless on or before the return he entered a retraxit of his appearance. The court would hold the attorney to it; there should be no shuffling." *Blair v. Weaver* (Pa.) 11 Serg. & R. 84.

APPELLEE.

By appellee is meant the party against whom the appeal is taken; that is to say, the party who has an interest adverse to setting aside the judgment. *Slayton v. Horsey* (Tex.) 78 S. W. 919, 920.

APPLIANCE.

Appliances include machinery, apparatus, and premises. The failure of an employer to furnish a domestic servant with a lodging room in such repair as not to endanger her health is a violation of his legal duty to furnish safe appliances. *Collins v. Harrison*, 56 Atl. 678, 25 R. I. 489, 64 L. R. A. 156.

A hoist was used for the purpose of elevating material to the second story of a building in course of erection. It was triangular in form, simple in design, and easily made. Its construction and operation on the roof was not immediately supervised by the foreman or master, but the material was selected and it was put together by the carpenters engaged upon the building. Such hoist was not an "appliance," within the rule that the master is obliged to use tools and appliances reasonably safe for the uses to which they are to be put. *Gittens v. William Porten Co.*, 97 N. W. 378, 90 Minn. 512.

APPLICABLE.

Rules of practice, when controlling the form of process to be used on a pleading, are applicable to it. *Farmers' Banking & Loan Co. v. Mauck* (Neb.) 97 N. W. 835, 836

APPLICATION.

See "Original Application."

The meaning of the term "application," as employed in a question propounded to an applicant for insurance as to whether any application to insure his life had ever been made to any other company on which a policy had not issued, is not confined to a full and final completion of all the various parts into which the preliminary negotiations and examinations are divided by another company for its convenience. In the absence of an agreement, the completion, signing, and delivery of an application for insurance to the soliciting agent constitutes an application for insurance. An applicant for insurance answered the question as to whether any application to insure his life had ever been made to any other company, and refused, in the negative. Some five months previously he had signed two of the divisional parts of an application to another company, and had delivered them to the local agent and medical examiner, and had been partially examined by the latter. Subsequently he declined to complete the examination on the ground that he had been misinformed as to the character of the policy. The parts of the application signed were thereafter forwarded to the company, and the application was formally rejected, of which fact he was notified. The failure to disclose such facts in answer to the question avoided the policy issued to him, which policy provided that all the statements in the application should be deemed material, and that the policy should be void if any statement was not full and complete, or was untrue. *Webb v. Security Mut. Life Ins. Co.* (U. S.) 126 Fed. 635, 637, 61 C. C. A. 883.

APPOINTED BY HIM.

The words "appointed by him," in Baltimore City Charter, § 25, authorizing the mayor to remove at pleasure during the first six months of their respective terms all officers appointed by him, means appointed by the mayor; and the mayor can remove the officers whom he has authority to appoint, whether appointed by him or his predecessor. *MacLellan v. Marine* (Md.) 56 Atl. 359, 360.

APPRECIABLE.

"Appreciable" is defined as "capable of being estimated; perceptible; as an appreciable quantity." *Chaffin v. Fries Mfg. & Power Co.*, 47 S. E. 226, 228, 135 N. C. 95.

APPRECIABLE EXTENT.

The words "appreciable extent," as used in an instruction, in an action for damages for maintaining a dam, that plaintiff is entitled to nominal damages if the dam caused water to be ponded on his land to any ap-

preciable extent, without proof of substantial damages, cannot be held to be synonymous with the words "any extent," and hence the instruction was erroneous, as plaintiff is entitled to nominal damages if the water was ponded on his land to any extent. *Chaffin v. Fries Mfg. & Power Co.* (N. C.) 48 S. E. 770, 771.

APPREHEND.

"Apprehend" is defined as "to take or seize (a person) by legal process; to arrest; as to apprehend a criminal." "Arrest" is defined as "the taking or apprehending of a person by authority of law; legal restraint; custody." The words "apprehension" and "arrest," as used in Rev. St. 1899, § 2474, providing that any two judges of the county court may offer, for the county, a reward for the apprehension and arrest of a person committing a felony, are synonyms, and a reward offered for the apprehension of a felon is within the authority of the judges of the county court. *Cummings v. Clinton County*, 79 S. W. 1127, 1129, 181 Mo. 162 (quoting Webster's Dict.).

A., knowing of a murder and of a reward for the apprehension, arrest, and conviction of the murderer, became suspicious that a certain party was guilty, took steps to locate him, and, having done so, telegraphed to a sheriff to arrest such party, which the sheriff did, without knowing of what such party was suspected, telegraphing the fact of the arrest to A., at his expense, receiving a fee for the arrest, and turning the suspected person over to A., who elicited a confession from him on which he was convicted. Held, that A. was the apprehender of the criminal, and entitled to the reward. *Ralls County v. Stephens*, 78 S. W. 291, 292, 104 Mo. App. 115.

APPROPRIATE REMEDY.

The words "appropriate remedy," in Greater New York Charter (Laws 1897, p. 188, c. 378, § 537), providing that, in the event of the removal of any member of the clerical or uniformed force of street cleaning, he shall have the right to sue out a writ of certiorari or other appropriate remedy for the purpose of reviewing the action of the commissioner or his deputy, means some remedy by which the proceedings taken by the commissioner can be brought before the court for review, and not by a proceeding independent of it, which commands the commissioner to do either one thing or the other. *People v. Woodbury*, 85 N. Y. Supp. 161, 163, 88 App. Div. 593.

APPROPRIATION.

Where a village charter authorizes the trustees to call a special tax meeting to

vote on appropriations for special purposes, the word "appropriations" does not, on natural construction, well describe a proposed issue of bonds extending over a period of years. *Village of Canandaigua v. Hayes*, 85 N. Y. Supp. 488, 493, 90 App. Div. 836.

APPROPRIATION OF WATER.

To constitute a valid appropriation of water there must be an intent to apply it to some beneficial use, existing at the time or contemplated in the future; a diversion thereof from a natural stream; and an application of it within a reasonable time to some useful industry. *Beers v. Sharpe*, 75 Pac. 717, 720, 44 Or. 386.

APPROVE.

The word "approve," as used in an instruction in a prosecution for murder to the effect that it was the duty of the jury to find defendant guilty as charged, if they believed her present with the design to give assistance, if necessary, to the person killing deceased, or present with the design to encourage, incite, or approve of such killing of deceased, conveys the meaning of a deed already accomplished and one committed by another party, and one who tacitly approves of or consents to the killing of any person cannot under any rule of law be held to have aided or abetted in such killing, and such an instruction is erroneous. *Harper v. State*, 35 South. 572, 574, 83 Miss. 402.

APPURTENANCE.

In the absence of a reservation, growing and unmatured crops upon lands conveyed by warranty deed pass with the land as "appurtenances," which are defined by Sess. Laws 1897, p. 101, c. 8, § 41, and *Id.* p. 94, c. 8, § 10, as all improvements and every right, of whatever character, pertaining to the premises described. *Marshall v. Homler*, 74 Pac. 368, 370, 13 Okl. 264.

Where the owner of land, on selling a portion thereof on which there were springs, reserved the right of taking water from the springs, and conveying it to buildings on the remainder of the land, such right became an "appurtenance" to the remainder. *Mason v. Thwing*, 87 N. Y. Supp. 991, 995, 94 App. Div. 77.

APPURTENANT TO.

The phrases "connected with" and "appurtenant to" are not necessarily synonymous. A mortgage given by a railroad company limited the lien on after-acquired property to such property and to such rights, acquired by liens from other railroad companies, as should be connected with or appurte-

nant to the railroad of the mortgagor, specifically described in the mortgage. The lien of the mortgage embraces rights acquired by leases made after the date of the mortgage to the mortgagor by other railroad companies, owning railroads connected with the mortgagor's road and being operated by the mortgagor in connection with its own railroad and as a part of its railway system. These rights, if not appurtenant to, are, within the meaning of the language of the mortgage, "connected with," the mortgagor's railroad. *Guaranty Trust Co. of New York v. Atlantic Coast Electric Ry. Co.* (U. S.) 132 Fed. 68, 70.

ARBITRATOR.

An arbitration is a judicial proceeding, and the arbitrators, being alike the agents of both parties, and not of one party alone, are bound to exercise a high degree of judicial impartiality, without the slightest regard to the manner in which the duty has devolved upon them. *Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc.*, 97 N. W. 875, 876, 91 Minn. 210.

While an arbitrator of loss by fire, appointed by a party in pursuance of an arbitration clause in a policy, is not the agent of the party selecting him, yet, where the proper act or conduct of such arbitrator prevents the selection of an umpire, the consequences of the failure of arbitration should be visited on the party who selected the arbitrator. *Fowble v. Phoenix Ins. Co. of Hartford, Conn.*, 81 S. W. 485, 487, 106 Mo. App. 527.

ARID.

In an action to determine the right to use irrigating waters, the question as to the quantity of water which might be used depended upon whether or not the land for which the water was to be used was in an arid portion of the state, and in determining such question the trial court instructed the jury that "by 'arid portions of the state' is meant those portions of the state where rainfall is insufficient for agricultural purposes, and irrigation, therefore, necessary. Where the rainfall is sufficient for agricultural purposes, that portion is not within the arid region, even though irrigation might or would increase the productiveness of the soil there." Appellant contended that an arid portion of the state should have been defined as one "in which, by reason of insufficient rainfall, irrigation is necessary for successful farming for successive years." The appellate court, in passing on the correctness of the instruction of the trial court, said: "The question whether this was an 'arid portion of the state' was, of course, an important one in this case. If it was not an arid portion of the state, then the use of water for irri-

tion was subordinate to the use for domestic purposes. In those portions of the state called 'arid,' by reason of the necessity for irrigation, the use is put upon an equal footing with such other necessary uses as water for stock, and domestic purposes. We realize the difficulty of framing an accurate definition. Irrigation might be necessary for some crops, and not for others. It might be necessary for one year, or a number of years, and not for other years. The jury cannot be instructed definitely with reference to all this. The prime question, however, seems to us to be whether the conditions are such that a jury can say that the use of water for irrigation is a necessity. We believe that this question was submitted about as clearly and accurately as possible in the charge given." *Hall v. Carter* (Tex.) 77 S. W. 19, 21.

ARISE—ARISING.

The use of the word "arises," in an instruction that if, from the testimony, there arises in the minds of the jurors a reasonable doubt as to defendant's guilt, they cannot find him guilty, was properly refused, since it implies that the reasonable doubt which will prevent a conviction is not that doubt that may come to a juror without careful weighing and considering of the evidence, and after full, fair, and free discussion with his fellows, but such reasonable doubt as may readily arise in his mind, be it only for a moment. *Baldwin v. State* (Fla.) 35 South. 220, 222.

The words "cause of action arising," as used in Rev. St. 1851, c. 2, § 38, providing that, when the court has jurisdiction of the parties it may exercise it in respect to any cause of action, wherever arising, except for the specific recovery of real property situated out of the territory or an injury thereto, and except as also provided by statute in relation to proceedings by foreign corporations, do not mean simply "cause of action accruing," but the word "arising" is also used in the sense of "originating"; that is, the court is given jurisdiction of any cause of action, wherever its subject-matter originated, except as therein stated. *Powers Mercantile Co. v. Blethen*, 97 N. W. 1056, 1058, 91 Minn. 339.

Arising under the Constitution or laws.

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the con-

struction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." The assertion, in a bill filed by a water company against a municipality and its common council, that the obligation of the municipality's rental contract with the company was impaired by an ordinance which, while denying the validity of the contract, allowed a claim for rentals, with a saving clause to prevent estoppel, is too clearly unfounded to present a case arising under the Constitution or laws of the United States. *Defiance Water Co. v. City of Defiance*, 24 Sup. Ct. 63, 66, 191 U. S. 184, 48 L. Ed. 140 (citing *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Little York Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276; *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 14 Sup. Ct. 905, 909, 38 L. Ed. 764, 769.

ARRAIGNED.

The word "arraigned" means practically the same thing as being personally present at the time; for it could not be true that defendant was in fact arraigned and pleaded to the indictment, if not personally present. *State v. Hunter*, 80 S. W. 955, 959, 181 Mo. 316.

ARRAIGNMENT.

In an "arraignment" three steps are necessary: The information must be read to the defendant, he must be given a copy thereof, and he must be asked whether he pleads guilty or not guilty to the information. *State v. De Wolfe*, 74 Pac. 1084, 1085, 29 Mont. 415.

ARREST.

Apprehension synonymous, see "Apprehend."

ARROWROOT IN ITS NATURAL STATE.

The term "arrowroot in its natural state" is the equivalent of the term "arrowroot in a state of nature," and that description would hardly fit an article which had been subjected to various processes by which it is converted into starch. The words "arrowroot in its natural state," as used in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 478, 30 Stat. 195 [U. S. Comp. St. 1901, p. 1680], relate to the tubers or roots of the arrowroot plant, and do not include the article commercially known as "arrowroot," consisting of

starch made from arrowroot tubers. *Leaycraft & Co. v. United States (U. S.)* 130 Fed. 108, 107.

ARSON.

"At common law arson is the malicious burning of another's house." Rev. St. § 6831, declaring that whoever maliciously burns or attempts to burn any dwelling house, kitchen, smokehouse, shop, office, barn, stable, storehouse, etc., shall be imprisoned in the penitentiary for a specified term, or fined, extends the offense of arson at common law, and also comprises it, and does not make it an offense to burn one's own building. *Jones v. State*, 70 N. E. 952, 70 Ohio St. 36.

ARTFUL CONCEALMENT.

"Artful concealment" is some unfair practice by which a party is intentionally deceived. *Lake v. Gilchrist*, 7 Ala. 955, 959.

AS IT MAY THEN BE.

Where testator devised all of his property to his wife, with a provision that, if his son survived her, he should have one-half of all the property devised to his mother "as it may then be," his interest was not confined to the personal estate. *Bailey v. Pittsburgh, C., O. & St. L. Ry. Co.*, 57 Atl. 58, 59, 208 Pa. 45.

AS SHE THINKS PROPER.

A devise of testator's property to his wife, to will to his children "as she thinks proper," vests in the wife a discretion in the exercise of the power conferred, which includes the right of unequal distribution. *Allder v. Jones (Md.)* 56 Atl. 487.

AS SOON AS PRACTICABLE.

"It is well settled that 'immediately' means 'as soon as practicable,' and, conversely, it is proper to construe 'as soon as practicable' to mean 'immediately.'" The statute relating to a meeting of the state board of equalization and assessment of railroad property provides a day on which the railroad companies shall make returns. It provides a place where the meeting of the state board shall be held, and provides expressly that such meeting shall take place as soon as practicable after the returns are filed. The statute must be construed to furnish notice of the time and place of the meeting of the state board, and where the statute names the time and place personal notice is not necessary. *Chicago, B. & Q. R. R. v. Richardson County (Neb.)* 100 N. W. 950, 952.

ASCERTAINED MEMBERSHIP.

See "Certain Ascertained Membership."

ASSAIL.

Impeach equivalent, see "Impeach."

ASSAULT.

An assault is an attempt to do violence to the person of another, with the means at hand of carrying the intention into execution. *State v. Dyer (Del.)* 58 Atl. 947, 948.

"It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury; for if, by threats or a menace of violence, which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose, he commits an assault. It is the apparent imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from assault." A mere threat or violence menaced, accompanied by insulting or abusive words, as distinguished from violence begun to be executed, is insufficient to constitute an assault. *State v. Daniel (N. C.)* 48 S. E. 544, 545.

"The pointing of a loaded revolver at another, if within range, is an assault; and the same is true if it is not loaded, if the person aimed at is not aware of the fact." Where one points a loaded pistol at another, although he has some reason to think it is not loaded, and he pulls the trigger, causing the pistol to be discharged, and the person assaulted is killed thereby, he is guilty of manslaughter. *Ford v. State (Neb.)* 98 N. W. 807, 808.

ASSAULT AND BATTERY.

A verdict of assault and battery may be based upon evidence showing personal violence under circumstances in aggravation or mitigation of the offense, relevant to the penalty, which need not be averred. One was indicted for felonious assault with intent to kill, being armed with a dangerous weapon. The jury rendered a verdict of guilty of "assault and battery with a dangerous weapon." The words in the verdict meant no more than assault and battery. *State v. Henry*, 57 Atl. 891, 893, 98 Me. 561.

Assault is included in the specific offense of assault and battery, and judgment may follow for the minor offense, though the verdict finds the defendant guilty of assault and battery; for the word "battery" may be re-

jected as surplusage. *State v. Henry*, 57 Atl. 891, 893, 98 Me. 561.

ASSAULT WITH INTENT TO COMMIT GREAT BODILY INJURY.

In a prosecution for assault with intent to commit great bodily injury, the form of the verdict prepared by the court read "assault with intent to commit great bodily injury," and the verdict, as actually returned, read "assault with intent to do great bodily injury." The form of the verdict was sufficient, as no one could possibly be misled by the variation in terms. *State v. Leuhrman* (Iowa) 99 N. W. 140, 142, 123 Iowa, 476.

ASSAULT WITH INTENT TO COMMIT RAPE.

"The crime of assault and battery is not an essential element of assault with intent to commit rape; for the latter offense may be committed without actual violence to or contact with the person assaulted, and upon trial for assault with intent to rape the accused can be convicted of assault and battery only where the indictment, in addition to the charge of assault, sets forth facts amounting to a battery." *State v. Miller* (Iowa) 100 N. W. 334, 335 (citing *State v. Hutchinson*, 95 Iowa, 568, 569, 64 N. W. 610).

ASSAULT WITH INTENT TO MURDER.

An "assault with intent to murder" is an assault with intent to commit a felony, and an indictment charging the commission of an assault with intent to commit the highest degree of unlawful homicide likewise includes the charge of an assault with intent to commit the same felony in all its degrees, as the degrees do not constitute separate and distinct offenses, but merely degrees of the same offense, or lesser offenses of the same nature, but necessarily included in the higher. *Pyke v. State* (Fla.) 36 South. 577, 578.

In order to constitute an assault to murder, it must be made with the specific intent to kill, as well as upon malice aforethought. *Williams v. State* (Tex.) 77 S. W. 447.

ASSESS.

In Const. art. 13, § 5, vesting in municipal corporations power to assess and collect taxes, the term "assess" includes the valuation of property, as well as the levying of the rate of taxation. *State v. Eldredge*, 76 Pac. 337, 340, 27 Utah, 477.

The word "assessed," as used in a franchise granted by a municipality to a company to construct and operate a waterworks

system within the municipality, which provides that the municipality shall pay in municipal taxes which may be assessed against the company for the first ten years of the franchise, is used in the sense of a levy of taxes, rather than the mere determination to raise money by taxation—the proceedings requisite to charge property or the owners thereof with the payment of taxes, not the assessment of property for taxation. The term "assess taxes" is commonly used as synonymous with the levying of taxes, as descriptive of the steps in their entirety necessary to charge specific property with taxes, or the owner with the payment thereof. There is no such thing as the assessment of a tax in the mere sense of assessment of property for taxation. *Town of Washburn v. Washburn Waterworks Co.* (Wis.) 98 N. W. 539, 541 (citing *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77).

While ordinarily the terms "assess" and "assessment" apply only to ad valorem taxation, when used in respect of tax laws, as used in an act providing that the clerk of the county court shall collect all privilege taxes, declaring that any property or properties included in the act shall be back-assessed or reassessed for the period provided by law, when the same have been omitted from or escaped taxation, or when the owner or his agent fails or refuses to list the property to the assessor, as required by law, and requiring the assessor to make and return to the clerk of the county court the name of each person engaged in any business liable to a privilege tax, the word "assess" means simply the listing of names of persons exercising privileges subject to taxation, and the clerk of the county court is entitled to back-assess or reassess privilege taxes that have escaped listing and collection. *Fopplano v. Speed* (Tenn.) 82 S. W. 222, 223.

The words "assessed" and "taxed," in *Sess. Laws 1903, c. 73, § 29*, were used interchangeably by the Legislature, and were intended to express the same meaning. *State v. Fleming* (Neb.) 97 N. W. 1063, 1070.

ASSESSED VALUE.

The term "assessed value," in a city charter, providing that no improvement shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property, refers to the value of the property as assessed for general taxation at the time next prior to that when the improvement is ordered. *Ferry v. City of Tacoma*, 76 Pac. 277, 279, 34 Wash. 652.

ASSESSMENT.

"Assessment in a general sense denotes the process of ascertaining and adjusting the shares respectively to be contributed by the several persons toward a common beneficial

object according to the benefit received. Assessment, in taxation: The listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to benefit received. Also, determining the share of a tax to be paid by each of many persons, or apportioning the entire tax to be levied among the different taxable persons, establishing the proportion due from each." When a tax levying officer, levying a tax for the construction of a drainage ditch, knows the proportionate benefit to each tract and the amount of money necessary to be raised, and when he has determined the number of payments in which it shall be paid and the time of payment of the same, and has ordered his determination placed upon the tax list for collection by the proper officers, he has made an assessment. *Morris v. Washington County* (Neb.) 100 N. W. 144, 148 (quoting Black, Law Dict.).

ASSIGNEE.

The word "assignee," as used in Rev. St. § 4919 [U. S. Comp. St. 1901, p. 3394], which provides that damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee, or grantee, is used in a limited sense, as meaning an assignee of patent rights, and does not cover a mere assignee of a claim for infringement. *Webb v. Goldsmith* (U. S.) 127 Fed. 572 (citing *Waterman v. McKenzie*, 138 U. S. 255, 11 Sup. Ct. 334, 34 L. Ed. 923; *Moore v. Marsh*, 74 U. S. [7 Wall.] 515, 19 L. Ed. 37; *Gayler v. Wilder*, 51 U. S. [10 How.] 477, 13 L. Ed. 504; *Hayward v. Andrews* [U. S.] 12 Fed. 786; 3 *Robinson on Patents*, § 937).

ASSIGNMENT.

See "Equitable Assignment."

To constitute a valid assignment, there must be a perfected transaction between the parties, intended to vest in the assignee a present right in the thing assigned. An agreement to pay a certain sum out of, or that one is entitled to receive the same from, a designated fund when received, does not operate as a legal or equitable assignment, since the assignor in either case retains control over the subject-matter. *Donovan v. Middlebrook*, 88 N. Y. Supp. 607, 608, 95 App. Div. 365.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not an "assignment," within Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387]. *National Cash Register Co. v. New Columbus Watch Co.* (U. S.) 129 Fed. 114, 63 C. C. A. 616.

ASSIGNS.

The word "assigns," as used in Act Cong. June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 415], providing for the repayment of the purchase price to a person making an entry of public land, or to his heirs or assigns, in case of the cancellation of such entry for conflict, means one who derives from the original entryman by the voluntary act of the latter, and a mortgagee who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court is an assign. *United States v. Commonwealth Title Ins. & Trust Co.*, 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830.

The word "assigns," as used in Rev. Codes 1899, § 3265, providing that every contract made by or on behalf of any corporation doing business in the state without first having complied with the law shall be wholly void on behalf of such corporation and its assigns, does not include the indorsee of negotiable paper, who takes the same before maturity, for value and without notice of defenses thereto. *National Bank of Commerce v. Pick* (N. D.) 99 N. W. 63, 65.

ASSUMPSIT.

"Assumpsit" is but another word for an undertaking or a promise. It does not lie except there be an express or implied promise. A claim for the conversion by plaintiff of corn in which defendant had a valid landlord's lien gives rise to an implied assumpsit in defendant's favor, irrespective of whether or not plaintiff sold the corn and received the proceeds. *Crane v. Murray*, 80 S. W. 280, 281, 106 Mo. App. 697.

A promise express or implied is the basis of every cause of action enforceable in "assumpsit"; and every promise to amount to a cause of action, must be supported by a valuable consideration. *Ivy Coal & Coke Co. v. Long*, 86 South. 722, 724, 189 Ala. 535.

ASSUMPTION OF RISK.

Consent to the risk, see "Consent."

"Assumption of risk" and "contributory negligence" are not synonymous. *Parks v. St. Louis & S. R. Co.*, 77 S. W. 70, 73, 178 Mo. 108.

Assumption of risk and contributory negligence are distinct and separate defenses. Assumption of risk rests in contract. It is not conditioned or limited to the existence of contributory negligence, and the latter is not an element or attribute of it. Assumption of risk is alike available, whether the risk assumed is great or small, whether the danger from it was imminent and certain or re-

mote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger. *St. Louis Cordage Co. v. Miller* (U. S.) 126 Fed. 495, 499, 501, 61 C. C. A. 477, 63 L. R. A. 551.

A servant assumes the risk of a danger incident to his employment, but he never assumes the risk of his master's negligence. If the master furnishes unsafe implements, and the servant uses them, knowing them to be unsafe, a question of contributory negligence arises, but not of assumption of risk. *Cole v. St. Louis Transit Co.*, 81 S. W. 1138, 1142, 183 Mo. 81.

"The doctrine of assumption of risk generally pertains to controversies between masters and servants, although litigation, attended by circumstances which make the defense available, may arise between parties not sustaining that relation. Arise where it may, the defense is one which must rest on contract; or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. The word 'assumption' imports a contract, or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he faces risk, but it by no means follows that, legally speaking, he assumes the risk." It has no application to the case of a passenger injured while attempting to alight from an electric car at a dangerous place selected by the carmen, though she made no demands to have the car returned to a safe place for alighting. *Fillingham v. St. Louis Transit Co.*, 77 S. W. 314, 316, 102 Mo. App. 573.

ASYLUM.

See "Orphan Asylum—Orphanage."

An asylum is defined by Webster to be an institution for the protection and relief of the unfortunate. A soldier's home is included in the term "asylum," used in Const. art. 2, § 3, providing that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while kept in any almshouse or other asylum or institution wholly or partly supported at public expense. In re Smith, 89 N. Y. Supp. 1006, 1010, 44 Misc. Rep. 384.

AT.

The word "at," when used to designate a place, may, and often must, mean near to. It is less definite than "in" or "on." "At" the house may be in or near the house. *Town of Waynesville v. Satterthwait* (N. C.) 48 S. E. 661, 665.

"At" means in the neighborhood of. Where a petition in an action against a telegraph company for negligently delivering a message announcing the increased illness of the recipient's mother alleges that plaintiff was at the home of her sister at H., a small village, there is no variance between such allegation and evidence that plaintiff's sister's house was two miles from the village. *Western Union Telegraph Co. v. Roberts* (Tex.) 78 S. W. 522, 524.

AT THE END.

The words "at the end," in 2 Hill's Ann. St. & Codes, §§ 462, 463, providing that the lien of a judgment remaining unsatisfied at the end of five years after the rendition may be revived, mean "after the expiration" of five years. *Tacoma Nat. Bank v. Sprague*, 74 Pac. 393, 394, 33 Wash. 285.

AT OWNER'S RISK.

Where apples were stored with a public warehouseman for hire, the recital in a receipt given therefor that they were "at owner's risk" did not relieve the warehouseman from liability for injuries arising from his negligence in failing to protect them from unusually cold weather. *Denver Public Warehouse Co. v. Munger* (Colo.) 77 Pac. 5.

AT PLEASURE.

See "Remove at Pleasure."

ATLANTIC SEABOARD.

The words "Atlantic seaboard" as used in a contract by which a seller of a fishing trade agreed as a condition of the sale that he would not become engaged or interested in the business of catching or manufacturing the products from certain classes of fish along the Atlantic seaboard, in competition with the business of the purchaser, for a specified term, would seem to be broad enough to include such indentations in the coast as Delaware, New York, or Massachusetts Bay, and, at least, a location of a plant on Chesapeake Bay, about 70 miles from the Atlantic Ocean. *Fisheries Co. v. Lennen* (U. S.) 130 Fed. 533, 535.

ATTACHMENT.

See "Warrant of Attachment."

Attachment proceeding as civil action, see "Civil Action—Case—Suit—etc."

ATTACK.

See "Collateral Attack"; "Direct Attack."

Impeach equivalent, see "Impeach."

ATTEMPT.

The word "attempt," in an instruction that the attempt of accused to prove an alibi does not shift the burden of proof, did not mean to discredit the evidence of defendant on the question of alibi; but it evidently meant that the fact that defendant had offered evidence for the purpose of proving an alibi did not shift the burden of proof. *People v. Lang*, 76 Pac. 232, 234, 142 Cal. 482.

"An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime." Pen. Code, § 34. "Felonious intent alone is not enough, but there must be an overt act shown, in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause." Defendant formed a plot to obtain possession of certain indictments, for the purpose of destroying them, by bribing the assistant district attorney having them in his charge to deliver them to him for a certain consideration. A third party, pretending to act for the district attorney, delivered them to him, and he took possession of them and walked away, whereon he was arrested and the indictments recovered. Defendant was properly convicted, under Pen. Code, § 94, of an attempt to unlawfully remove documents from a public officer, and, under section 531, of an attempt to commit grand larceny in the second degree. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274, 18 N. Y. Cr. R. 269.

ATTORNEY.

Attorney's fees as costs, see "Costs."

Where plaintiff was admitted to the bar in 1893, but never filed the certificate required by Laws 1899, p. 406, c. 225, with the clerk of the Court of Appeals, or practiced law, except for about a year after admission, he is not an attorney, within Code Civ. Proc. § 73, prohibiting an attorney from buying a chose in action with intent to sue thereon. *Thompson v. Stiles*, 89 N. Y. Supp. 876, 44 Misc. Rep. 334.

ATTORNEY'S LIEN.

An attorney's lien is simply the right to hold or retain in the attorney's possession the money or property of the client until his proper charges have been adjusted and paid. It requires no equitable proceeding for its establishment. *Sweeley v. Sieman*, 98 N. W. 571, 123 Iowa, 183 (citing *Foss v. Cobler*, 105 Iowa, 728, 75 N. W. 516; *In re Wilson* [U. S.] 12 Fed. 235).

AUGMENT.

Increase synonymous, see "Increase."

AUTHORIZED AGENT.

See "Duly Authorized Agent."

AUTREFOIS ACQUIT.

"To entitle a defendant to the plea of autrefois convict, or acquit, it is necessary that the offense charged be the same in law and fact." *People v. Kerrick*, 77 Pac. 711, 712, 144 Cal. 46 (citing *People v. Helbing*, 61 Cal. 620).

AVAILABLE COAL.

"Available coal," within the meaning of a contract referring to certain unmined coal, includes coal under a creek and under a railroad, which could be mined by leaving proper supports at a greatly enhanced cost. *In re Redstone Oil, Coal & Coke Co.'s Dis-solution*, 56 Atl. 355, 356, 207 Pa. 125.

AVAILABLE FUNDS.

In a contract to pay a teacher the available funds from certain school lands for one year, the words "available funds for one year" meant the profits derivable from the capital during that time, whether it was actually received by the commissioners before the close of the year or not. *Commissioners of Section 16 v. Criswell*, 6 Ala. 565, 571.

AVERAGE.

See "General Average."

BAGGAGE.

A woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her traveling, is regarded in law as baggage. *Galveston, H. & S. A. Ry. Co. v. Fales* (Tex.) 77 S. W. 234, 235.

A female traveler's own clothing, and that of her children, including fancy work and miscellaneous ornaments, a savings bank and contents, and a zither key, all of which are carried in her trunk, constitute baggage, for the loss of which she is entitled to recover. She may also recover for the loss of a small amount of her husband's underwear, which was being carried in her trunk as a part of her baggage; it appearing that her husband was traveling with her. She cannot, however, recover for the loss of articles constituting household goods, which she was carrying in her trunk, though she and her husband were changing their residence by removal from one state to another; the carrier having no notice of the fact that such goods were being transported as baggage. *Yazoo & M. V. R. Co. v. Baldwin* (Tenn.) 81 S. W. 599-602.

BAIL

See "Admitted to Bail."

"Bail" is defined as to set at liberty a person arrested or imprisoned on security being taken for his appearance. *State v. Davis*, 75 Pac. 857, 858, 27 Utah, 368 (citing *Black, Law Dict.*).

BALLOT.

A ballot is a paper to express intent, and where its language is plain it must be so taken. *Stanton v. O'Kane* (W. Va.) 47 S. E. 245, 246.

A blank piece of paper, having on it no words or marks of any kind whereby the meaning and intent of the person who deposited it may be ascertained, is not a "ballot," and hence such paper cannot be considered in summing up the total vote, a majority of which a candidate must receive in order to be elected; for a ballot is a form of expression for a candidate to be voted for. *Murdoch v. Strange* (Md.) 57 Atl. 628, 629.

BANK.

The word "bank" is defined in standard dictionaries as "the face of a coal vein in process of being mined"; "the surface immediately about the mouth of a mine"; also, "to form or lie in banks." *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193.

In commercial law.

"The receiving of deposits to be kept and returned on demand is the generally acknowledged feature of every bank, whether incorporated or unincorporated, whether its profits are obtained and business success accomplished." A bank cannot, by naming itself as a brokerage concern, conduct the banking business and receive deposits, the same as a bank, without being in fact subject to the statute regulating banking. Individuals are not prohibited from engaging in, but are permitted to conduct, banking business. *State v. Leland*, 98 N. W. 92, 93, 91 Minn. 321.

Of river.

"A river is a running stream of water, pent in on either side by banks, shores, or walls." "A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks; and in that condition of the water the banks, and the

soil which is permanently submerged, form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877 (quoting *Gould, Waters*).

BANK DIRECTOR.

As trustee, see "Trustee."

BANKING.

The business of banking is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, receiving deposits, buying and selling exchange, coin, or bullion, lending money on personal security, and obtaining, issuing, and circulating notes; and to these specified powers, and those necessary to the exercise of the powers expressed, the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation. *Commercial Nat. Bank v. First Nat. Bank* (Tex.) 80 S. W. 601, 603.

BANKING GAME.

A banking game is a game of one against the many. A game of dice, in which one person sits behind the table and takes all the bets of the persons playing on the outside, the dice being thrown by the parties alternately, is a "banking game," punishable under Pen. Code 1895, art. 388, providing that any person who shall bet at any gaming table or bank shall be punished. *Faucett v. State* (Tex.) 79 S. W. 548.

BANKRUPT.

The term "bankrupt," defined by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], includes a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition or has become a bankrupt, and does not include officers of a corporation declared a bankrupt. *United States v. Lake* (U. S.) 129 Fed. 499, 502.

BANKRUPTCY.

See "Act of Bankruptcy."

BANQUETTE.

To "banquette a street" can have no other meaning than to construct along the side of it such a sidewalk as is required by the city ordinances; that is, a sidewalk up to grade. *Redersheimer v. Bruning* (La.) 36 South. 990, 991.

BAR IRON.

Imported muck bars, produced by converting pig iron into wrought iron in the puddling furnace, and then rolling the wrought iron through a set of rolls, from which it comes in the form known as "muck bars," are within the meaning of "bar iron," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 123, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1638]. *Moorhead Bro. & Co. v. United States* (U. S.) 127 Fed. 779.

BARGAIN.

The word "bargain" is broad enough in its meaning to include "contract." *Koenig v. Dohm*, 70 N. E. 1061, 1064, 209 Ill. 468.

BASEBALL.

Playing baseball on Sunday as a crime, see "Crime."

BASTARD.

The word "bastard," in our language, both in its legal signification and in its literary use, has a well-defined meaning. Webster defines it as follows: "A natural child; a child begotten and born out of wedlock." Now, in order that the child be begotten and born out of wedlock, it follows that the mother is an unmarried woman. In law the word is defined as follows: "A child whose parents were not married to each other at the time of its birth." *Camplon v. Lattimer* (Neb.) 97 N. W. 290, 291.

BATTERY.

See "Assault and Battery."

A battery is the actual infliction of an injury. *State v. Dyer* (Del.) 58 Atl. 947, 948.

BE IN FORCE.

A policy of life insurance and the application on which the same was issued provided that it should not "take effect or be in force" until delivered to the applicant in person during his lifetime and while in good health. The expression "take effect or be in force" merely intended to distinguish between policies which have not been delivered and those which have been delivered. *Austin v. Mutual Reserve Fund Life Ass'n* (U. S.) 132 Fed. 555, 559.

BE RESPONSIBLE FOR.

A treasurer of a corporation, merely empowered by the by-laws to "have charge of and be responsible for" the securities of

the corporation, has no authority to change the registration and sell certain of its bonds without special authority. *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 87 N. Y. Supp. 348, 353, 92 App. Div. 491.

BED.

"A river is a running stream of water, pent in on either side by banks, shores or walls." "A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks, and in that condition of the water the banks, and the soil which is permanently submerged, form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877 (quoting Gould on Waters).

BEER.

"The primary meaning of the word 'beer' is a malt and fermented liquor containing more or less alcohol." Webster; Century; Black, Intox. Liq. "There is a secondary sense in which the word 'beer' is used to describe certain nonalcohol beverages, as root or persimmon beer; but, when so used, it is generally preceded by a word descriptive of the kind of beer referred to, as persimmon beer, root beer, and the like. When the word 'beer' is used alone, without the descriptive word, it is generally, almost universally, taken as referring to the malt liquor sold under that name." Black, Intox. Liq.; *Williams v. State* (Ark.) 77 S. W. 597, 598.

A Japanese alcoholic beverage made from rice by processes similar to those in making beer, which resembles still wine in its percentage of alcohol, which in quality is only remotely similar to beer, is not sufficiently similar to warrant its classification as such, under Act July 24, 1897, c. 11, § 1, Schedule H, par. 297, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1655]. *Nishimiya v. United States* (U. S.) 131 Fed. 650.

BELIEVE.

See "Best of the Knowledge and Belief."

The words "rely" and "believe" are nearly synonymous. "Rely" is to depend on some one or something as worthy of confidence; to repose confidence; to trust; used with "on" or "upon." "Believe" is to accept as true on the testimony or authority of others; to have faith or confidence in the truth of any one or anything. *Spencer v. Hersam* (Mont.) 77 Pac. 418.

BELONG.

The words "the town to which he belongs," in Rev. St. 1883, c. 14, § 1, relating to the care of a diseased person at his expense if able, otherwise at that of the town to which he belongs, mean the town in which he has his pauper settlement. *Inhabitants of Machias v. Inhabitants of Wesley*, 58 Atl. 240, 241, 99 Me. 17.

Where a testator in his will directs that certain property, after the death or remarriage of his widow, "shall go to and belong to" other relatives, the words "go to and belong to" are not equivalent to pay and divide. On the marriage or death of the widow, the property "goes" (that is, moves, passes, proceeds) and belongs to (that is, comes under the physical power of and is at the disposal of) those persons to whom the legal title was transferred at his death. Thus the language used correctly describes the progress of the tangible property from the possession of the testator to that of the beneficiary, and has nothing of the meaning of "paying and dividing." *In re Hitchins' Estate*, 89 N. Y. Supp. 472, 476, 43 Misc. Rep. 485.

BENEFICIAL

An irrigation act was attacked for uncertainty in the description of those portions of the state to which it was made to apply, the alleged insufficient description being as follows: "Those portions of the state of Texas in which, by reason of insufficient rainfall, or by reason of irregularity of the rainfall, irrigation is beneficial for agricultural purposes." The appellate court, in passing on this objection, held that the act was not void for uncertainty, basing this holding on the holding of the court in the case of *McGhee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587, 590, 22 S. W. 398, in which case it was held that a similar irrigation act, which described the portions of the state to which it applied "as those in which, by reason of insufficient rainfall, irrigation is necessary for agricultural purposes," was not void for uncertainty. The only difference in the description in that act and the act under consideration is in the use of the word "necessary," instead of the word "beneficial"; and the court held this difference immaterial. *Barden v. Trespalacios Rice & Irrigation Co.* (Tex.) 82 S. W. 461, 465.

BENEFICIALLY ENTITLED.

Testator devised the residue of his estate to a son, as trustee, to be managed for 20 years, with directions that from the net income the annuity of a specified sum should be paid to testator's three children, and provided for the disposition of the income in case any of the children died during the pe-

riod, and for the distribution of the residue at the end of the period, and for the contingency of each of the children dying prior to the expiration of that period without issue surviving the period. Under Hurd's Rev. St. 1901, c. 120, § 366, imposing a tax on the transfer of property by will where one becomes "beneficially entitled in possession or expectation to any property or income thereof," the residuary estate could not be taxed until the expiration of the 20-year period; for until that time it could not be known who would be beneficially interested therein. *People v. McCormick*, 70 N. E. 350, 352, 208 Ill. 437, 64 L. R. A. 775.

BENEVOLENT SOCIETY.

An association formed to extend aid to sick members and to defray burial expenses of their dead from funds accumulated from initiation fees and monthly dues is not a benevolent or religious society, within a code provision relating to misdemeanors of treasurers of such societies. *State v. Dunn*, 46 S. E. 949, 134 N. C. 663.

BEQUEST.

Collateral bequest, see "Collateral."

In common acceptation, "bequest" and "legacy" are synonymous terms; but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. *In re Campbell's Estate*, 75 Pac. 851, 853, 27 Utah, 361.

BEST KIND OF EVIDENCE.

To say that certain evidence is the best kind of evidence is tantamount to saying that it is better than any other kind. *Witlick's Adm'r v. Keiffer*, 31 Ala. 199, 201.

BEST OF THE KNOWLEDGE AND BELIEF.

The term "best of the knowledge and belief," as used in a statute providing that an order for the examination of a judgment debtor shall issue only if certain facts be made to appear by affidavit, which affidavit shall be made to the best of the knowledge and belief of affiant, does not permit an affidavit to be made on the best information and belief of affiant. *Ackerman v. Green* (Mo.) 81 S. W. 509, 512.

BET.

The legal meaning of the term "bet" is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties according to

the result of the trial of chance or skill, or both combined. *Mayo v. State* (Tex.) 82 S. W. 515, 516.

A bet, like an ordinary contract, involves a concurrence of wills. There must be an offer and an acceptance thereof in accordance with its terms; and the acceptance will not be complete until it is actually or constructively communicated to the party making the offer. *McQuesten v. Steinmetz* (N. H.) 53 Atl. 876, 877.

In order to constitute a bet, there must be a tender or offer to bet by one party and the acceptance by the other. The party who tenders the debt is not the party to accept the bet. It is the party to whom the tender is made who is the acceptor, and a person tendering or offering a bet on a horse race was not within Acts 1903, p. 68, c. 50, § 1, making it an offense to take or accept any bet on a horse race. *Windsor v. State* (Tex.) 79 S. W. 312, 313.

BETTERMENTS.

The improvements, for which Sand. & H. Dig. § 2590, authorizes compensation to one holding under color of title before causing possession to be transferred to the real owner after judgment in ejectment, are technically and commonly denominated "betterments"; and the definition of the term "betterments" to be found in the books is "improvements made to an estate. It signifies such improvements as have been made to the estate, which render it better than mere repairs. * * * The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. To entitle one to betterments depends upon his bona fide supposition that he bought the title in fee." *Bouvier, Law Dict.* This definition is that given substantially in all jurisdictions having similar statutes. Sometimes we say the improvements must be permanent, and not merely temporary. The idea seems to pertain that the improvements are such as were added to the value of the land as it shall come into occupancy and use of the true owner; for he is the person required to pay for them, although they have been made without his consent. *Greer v. Fontaine*, 77 S. W. 56, 57, 71 Ark. 665.

BETWEEN.

The word "between," if accurately used, imports that not more than two persons or groups are set against each other, and those groups are earmarked and shown to be regarded as groups. The children of the brothers of an illiterate testator take per capita, and not per stirpes, under the residuary clause of a will in which, after making a bequest to certain nephews and nieces, the tes-

tator provides for an equal division of the remainder "between my brothers Edwin and Charles children." *McIntire v. McIntire*, 24 Sup. Ct. 196, 197, 192 U. S. 116, 48 L. Ed. 369 (citing *Ihrle's Estate*, 162 Pa. 369, 29 Atl. 750; *Records v. Fields*, 155 Mo. 314, 35 S. W. 1021).

As used in a joint will of a husband and wife, providing that, in case of the death of either, the property of the one first dying should vest in the survivor, unless the survivor marry again, when the property inuring to the survivor's benefit by the death of the other should be divided equally between the survivor and the children of the survivor and the deceased, the word "between" is used in the sense of "among," and the survivor does not take one half of the estate and the children the other half. *Edwards v. Kelly*, 35 South. 418, 420, 83 Miss. 144.

BEYOND ALL REASONABLE DOUBT.

Full satisfaction distinguished, see "Full Satisfaction."

BICYCLE.

As carriage, see "Carriage."

BILL.

See "Cross-Bill"; "Domestic Bill"; "New Bill."

A claim of the superintendent of the poor of the county is a "bill," within Acts 1903, No. 397, establishing a board of auditors of Saginaw county, and providing that no bills against the county shall be audited in any other manner than as provided by the act, except the bills of the county drain commissioner and the expenditures authorized by the board of supervisors. *Morrison v. Kent* (Mich.) 97 N. W. 45.

BILL OF PARTICULARS.

The bill of particulars is not a part of the information. It is quite generally, if not universally, held by the courts that the effect of a bill of particulars is to limit the claim and restrict the proof to the very matters therein specified. The sole office of the bill of particulars is to give the adverse party information which the pleadings, by reason of their generality, do not give. *State v. Dix*, 74 Pac. 570, 572, 33 Wash. 405 (citing *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, 3 Enc. Pl. & Prac. 527).

BITCH.

"Bitch" is defined in *Oxford Dictionary* as a term applied opprobriously to a woman, strictly a lewd or sensual woman; by Web-

ster, as an opprobrious name for a woman, especially a lewd woman. The term is frequently used as a general term of opprobrium, without any definite reference to chastity; but it is capable of such references. *Stoner v. Erlisman*, 56 Atl. 77, 206 Pa. 600.

BLANCO P. CARRARA.

Where a subcontract for the furnishing of the marble work of an office building provided that the marble should be "Blanco P. Carrara" marble, and plaintiff's witnesses testified that such marble was not pure white, but was marble of the character furnished, and that pure white marble was known as "Blanco Puro," while the architects testified that by "Blanco P. Carrara" they meant to specify pure white marble, whether plaintiff had substantially complied with the contract was a question for the jury. *George A. Fuller Co. v. B. P. Young Co.* (U. S.) 128 Fed. 343, 345, 61 C. C. A. 245.

BLENDED FLOUR.

Blended flour is flour mixed with corn meal, about half and half, of a dark color and of a peculiar odor. *Bunch v. Well Bros. & Bauer* (Ark.) 80 S. W. 582, 65 L. R. A. 80.

BLOOD POISONING.

As disease, see "Disease."

BLOWN GLASSWARE.

Thermometers and lactoscopes, composed chiefly of blown glass, but in part of other materials, are not dutiable under the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule B. par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], as "blown glassware," but under paragraph 112 of said act, as manufactures of which glass is the component material of chief value, not specially provided for. *Elmer & Amend v. United States* (U. S.) 126 Fed. 439.

Blown glass blanks, which need further manufacture to prepare them for the trade, are not "blown glassware," within Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]. *United States v. Durand* (U. S.) 127 Fed. 624.

BOARD OF EDUCATION.

A board of education is in fact a board of trustees, and the term "board of education" is simply another name for trustees; and Pen. Code, § 1575, authorizing the trustees to sue and be sued, and making the board responsible for judgment, must be construed to apply to and include city boards of education, as well as boards of county

school districts. *Hancock v. Board of Education of City of Santa Barbara*, 74 Pac. 44, 48, 140 Cal. 554.

BOARD OF SUPERVISORS.

The term "board of supervisors" means an aggregation of town officers. There is no method by which one supervisor can be legislated or construed in a board. *People v. Maynard*, 15 Mich. 463, 472.

BODILY HEIRS.

The words "bodily heirs" have the same meaning as "heirs of the body," and are words of limitation, and not words of purchase. *Marsh v. Griffin* (N. C.) 48 S. E. 735, 736 (citing *Donnell v. Mateer's Ex'rs*, 40 N. C. 7; *Worrel v. Vinson*, 50 N. C. 91, 94; *Leathers v. Gray*, 101 N. C. 162, 164, 7 S. E. 657, 9 Am. St. Rep. 30).

"There is no substantial difference between the words 'heirs of his body' and 'bodily heirs.' They are all words of limitation, and not of purchase, and the latter have the same meaning as the former, unless there is something in the instrument to show that the donor used them in some other than their technical sense." A will, after making a gift to testatrix's daughter, gave to her son and his bodily heirs, forever, certain property, and provided that if either of testatrix's children should die without leaving a surviving bodily heir, before receiving its share of testatrix's estate, such share should descend to the surviving child and its bodily heirs, forever, thus devising to the son an estate in fee tail, which is by statute a life estate, with a remainder in fee to his children living at his death. *Miller v. Enslinger*, 81 S. W. 422, 424, 182 Mo. 195.

A deed to a married woman and her "body heirs" vests a fee simple in the grantee. *Bingham v. Weller* (Tenn.) 81 S. W. 343, 845.

BOILER.

As structure, see "Structure."

BONA FIDE PURCHASER.

The expression "bona fide purchasers" is to be understood as the equivalent of purchasers without notice. *Wilkins v. McCorkle* (Tenn.) 80 S. W. 834, 835.

To be a "bona fide purchaser without notice" the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice. *Cranwell v. Clinton Realty Co.* (N. J.) 58 Atl. 1030, 1035.

BOND.

See "Requisite Bond."

A bond is an obligation in writing to pay. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 93, 111 La. 982.

The phrase "a bond provided for by this Code," as used in a code provision authorizing the execution of a sufficient bond, in case a bond provided for by this Code be adjudged to be defective, refers to the bonds which the Code authorizes only, and has no application to an appeal bond given in an election contest. *Galloway v. Bradburn* (Ky.) 82 S. W. 1013, 1015.

BOND FOR THE PAYMENT OF MONEY.

A bond conditioned for the performance of an act or service is not within the statute which provides that all "bonds for the payment of money or other things" may be assigned by indorsement. *Shackleford v. Franks*, 25 Miss. 49, 52.

BONED.

See "Fish Skinned or Boned."

BOOK.

See "Judgment Book."

Periodical distinguished, see "Periodical."

BOOK OF ACCOUNT.

See "Account."

BOOK OF ORIGINAL ENTRIES.

"A book of original entries is a book in which a merchant keeps his accounts generally and enters therein from day to day a record of his transactions." A book of a firm, which was not one of the firm's regular books, and which contained only the account of one person, and in which the entries were not made contemporaneously with the transaction, was not a book of original entries. *McKnight v. Newell*, 57 Atl. 39, 40, 207 Pa. 562.

BOOMAGE.

"Boomage" is a fixed charge on logs, payable at the place of delivery. *Moss Point Lumber Co. v. Thompson*, 35 South. 828, 83 Miss. 499.

BORACIC ACID.

A dry, antiseptic preservative, consisting of an intimate mechanical mixture of boracic acid and borax, the former being the more valuable component, is an article not enumer-

ated in Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], either as "boracic acid," under paragraph 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], as "chemical compounds," under paragraph 3, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], or as "borax" or "borate material," under paragraph 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627], and is subject to an assessment at the same rate of duty as boracic acid, under said paragraph 1, by virtue of section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), which prescribes that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable, if composed wholly of the component material thereof of chief value. *Berth Levi & Co. v. United States* (U. S.) 126 Fed. 420.

BOTTLE.

Bottle-like containers of glass, used in chemical operations, and known as Koch flasks, and certain so-called Wolf flasks, shaped like bottles, but having two or three necks apiece, are "bottles or jars," within Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]. *Eimer & Amend v. United States* (U. S.) 126 Fed. 439.

BOYCOTT.

A boycott may be defined to be a combination of several persons to cause a loss to a third person, by causing others against their will to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him, or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs. *Gray v. Building Trades Council*, 97 N. W. 663, 666, 91 Minn. 171, 63 L. R. A. 753.

BRAKEMAN.

See "Extra Brakeman."

BREAKING.

As used in a statute defining burglary, the word "breaking" has a well-known and definite meaning at common law; and in order to constitute it the action of the person accused must have been such as would, without additional effort, have made an entry possible. *Gaddie v. Commonwealth* (Ky.) 78 S. W. 162, 163.

Unbuttoning the outside door of a chicken house and removing the slat fastening the inner door constitute a "breaking," within the meaning of the term as used in a statute defining burglary. *State v. Helma*, 78 S. W. 592, 594, 179 Mo. 280.

BRIBERY.

The offense of bribery embraces any attempt to bribe. *Commonwealth v. Bailey* (Ky.) 82 S. W. 299.

It is not necessary, in order to constitute bribery, that the vote of a public official bribed should be in a measure valid and enforceable. *State v. Lehman*, 81 S. W. 1118, 1129, 182 Mo. 424, 66 L. R. A. 490.

Bribery in elections involves moral turpitude, and falls within the class of crimes deemed infamous, within Const. art. 4, § 4, declaring that no person who has been or shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be eligible to the General Assembly, or to any office of profit or trust in the state. *Christie v. People*, 69 N. E. 33, 35, 206 Ill. 337.

BROTHER-IN-LAW.

The husbands of two sisters are "brothers-in-law," within the meaning of the law providing for the recusation of judges. *State ex rel. Ribbeck v. Foster*, 36 South. 554, 556, 112 La. 533.

BUILDER'S LIEN.

The term "builder's lien," in a contract providing that the contractor shall have a builder's lien, has reference to the lien described in the Constitution and the statutes, and extends, not only to the house or building erected, but also to the lot or lots of land necessarily connected therewith. *June & Co. v. Doke* (Tex.) 80 S. W. 402, 406.

BUILDING.

Other building, see "Other."

"Building" is defined as an edifice erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. It includes an ordinary fence. *Swasey v. Shasta County*, 74 Pac. 1031, 1032, 141 Cal. 392 (citing *Bouvier*, Law Dict.).

A hotel is a "building," within Cr. Code, § 36 (*Hurd's Rev. St.* 1899, c. 38), defining burglary as breaking or entering a dwelling house "or other building." *Bruen v. People*, 69 N. E. 24, 206 Ill. 417.

A wall cannot be held to come within the term "building." *Clark v. Lee*, 70 N. E. 47,

185 Mass. 223 (citing *Truesdell v. Gay*, 79 Mass. [13 Gray] 311).

BUILDING INSPECTOR.

As officer, see "Officer."

BULK.

See "In Bulk."

BURDEN OF PROOF.

The burden of the proof and the weight of the evidence are two entirely distinct and separate things. The former does not change, but the latter may, according to the nature and strength of the proofs offered on the trial. Even when the plaintiff has made out a prima facie case, the burden of the proof does not shift to the defendant in any proper sense. All that is meant by such an expression is that the other party must go forward with his proofs, if he would not have a judgment against him. *Gibbs v. Farmers' & Merchants' State Bank*, 99 N. W. 703, 705, 123 Iowa, 736.

BUREAU.

See "Head of a Bureau."

BURGLARY.

Burglary is defined as "the breaking and entering in the night of another's dwelling house with intent to commit a felony therein," and "if a man in the nighttime breaks into a dwelling house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not." *Mann v. Commonwealth* (Ky.) 80 S. W. 438 (citing 1 Bish. Cr. Law, §§ 437, 559).

BUSHELING SCRAP.

"Busheling scrap" has a definite signification. It consists of small pieces of wrought iron and steel, there being two grades, No. 1 and No. 2. *Lichtenstein v. Rabolinsky*, 90 N. Y. Supp. 247, 98 App. Div. 516.

BUSINESS.

See "Carrying on Business"; "County Business"; "Doing Business"; "Money Business"; "Transacting Business." Any business, see "Any." As property, see "Property."

The word "business," as used in a will reciting that, in consideration of the fact that the testator had during his lifetime given a son the "business" of an express company and other interests of much value, etc., must

be regarded as meaning the establishment of the enterprise, its good will, its connection with transportation lines so established, which were valuable adjuncts, and almost a necessity for the culmination of final success to the son. *Solley v. Westcott*, 88 N. Y. Supp. 297, 301, 43 Misc. Rep. 188.

The word "business," in Const. art. 8, § 5, declaring that all civil and criminal business arising in any county must be tried there, means causes of action, including probate and other civil proceedings. *Sherman v. Droubay*, 74 Pac. 348, 349, 27 Utah, 47.

BUSINESS DONE.

Laws 1896, c. 908, § 187, as amended by Laws 1901, c. 118, § 1, imposes an annual tax on the gross amount of the premiums received by domestic insurance companies for "business done" in the state. The premium which represents the business done is the amount that the company has the benefit of and furnishes an equivalent for. The business done through a canceled policy is the insurance made or indemnity furnished during the period that the policy is in force. That is the only business that a fire insurance company can do. *People ex rel. Continental Ins. Co. v. Miller*, 70 N. E. 10, 177 N. Y. 515.

BUSINESS OF AN INTERSTATE CHARACTER.

Tax Law, Laws 1896, p. 857, c. 908, § 184, provides for a franchise tax to be assessed on the gross earnings of a transportation corporation within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within the state, but shall not include earnings derived from "business of an interstate character." Where it appeared that a domestic railway company's assessment under the section included receipts from express business beginning in the state and transferred within the state for delivery in another state, or shipped outside the state for delivery within the state, such business was interstate commerce, and not taxable. *People v. Miller*, 88 N. Y. Supp. 373, 375, 94 App. Div. 587.

BUSINESS TENDERED.

The expression "the business tendered such railroads," in Laws 1903, p. 93, c. 68, § 1, declaring that all railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the railroad commission, refers to freight and passengers which come to the railroad from the public for transportation as a public highway; and the Legislature's intention was to require all railroad companies to provide all necessary means for accommodating such

business. *Railroad Commission of Texas v. St. Louis Southwestern R. Co. of Texas (Tex.)* 80 S. W. 1141.

BY THE ACT.

See "Constituted by the Act."

BY CHANCE.

Where prizes were offered to those sending bands of certain makes of cigars for the closest estimates of the number of cigars on which \$3 tax per thousand would be paid in a certain month, the number on which the tax was paid in each month for three years being published in connection with the offer, the distribution of prizes was not "by chance," within Pen. Code, § 323, defining lotteries as a distribution of money by chance. *People v. Lavin*, 87 N. Y. Supp. 776, 778, 93 App. Div. 292.

BY DESCENT.

See "Indians by Descent."

BY HER OWN LABOR.

In Hill's Ann. Laws Or. 1892, § 2993, providing that the property acquired by a married woman during coverture by her own labor shall not be liable for the debts of her husband, the words "by her own labor" are used as meaning "by her own efforts." *Elliot v. Hawley*, 76 Pac. 93, 95, 34 Wash. 585.

BY RIGHT OF REPRESENTATION.

The expression "by right of representation" means in the right of the ancestor through whom the heir takes. *Hemenway v. Draper*, 97 N. W. 874, 875, 91 Minn. 235.

BY-LAW.

By-laws are rules and ordinances made by a corporation for its own government. While the terms "ordinance" and "by-laws" are sometimes used interchangeably, it cannot be contended that a resolution of a city council granting privileges to a street car company is a by-law. *Holst v. Savannah Electric Co. (U. S.)* 131 Fed. 931, 940.

CABOOSE CAR.

A caboose car is a car attached to the rear of a freight train, fitted up for the accommodation of the conductor, brakeman, and chance passengers. *Louisville & N. R. Co. v. Commonwealth (Ky.)* 78 S. W. 167, 168.

A caboose car is intended solely for the accommodation of the men connected with

the train, contains their bunks and mattresses, in which they sleep, and in which is there deposited the lamps of the cars and the tools used by the men. It is not adapted for passengers, although passengers are sometimes allowed to ride on it. *Shoemaker v. Kingsbury*, 79 U. S. (12 Wall.) 369, 375, 20 L. Ed. 432.

CANARY SEED.

As grass seed, see "Grass Seed."

CAPABLE.

See "Incapable."

CAPACITY.

See "Fiduciary Capacity"; "Professional Capacity."

CAPACITY TO EARN MONEY.

The phrase "capacity to earn money," as used in Pub. St. 1901, c. 191, § 12, declaring that, in assessing damages for the death of a person, the jury shall consider his probable duration of life and capacity to earn money, must be understood to mean capacity to earn money for the estate of the person killed; and hence an instruction should be given, in an action for negligence causing the death of the child, that deceased would have been incapable of earning money for his estate during his minority. *Carney v. Concord St. Ry.*, 57 Atl. 218, 224, 72 N. H. 364.

CAPITAL.

In subjecting all classes of bankers to taxation upon their capital, the statute does not discriminate in favor of any class, and the term "capital" should be read as meaning the same thing in respect to a corporation that it does in respect to an individual banker. In other words, whatever comprises capital in the business of an individual banker likewise comprises capital in the business of a banking corporation, for the purposes of the statute. *Leather Mfrs' Nat. Bank v. Treat* (U. S.) 128 Fed. 262, 264, 62 C. C. A. 644.

The word "capital," as used in Revision 1888, § 3836, as amended by Pub. Acts 1889, p. 36, c. 63, providing that shares of capital stock shall be set in the list returned by the owner for assessment at their market value, but so much of the capital as shall be invested in real estate shall be deducted, describes the surplus over the company's liabilities, representing the fund in which the shareholder is equitably interested, and to which he would look for his final dividend, were the

company to be wound up. *In re Bulkeley*, 58 Atl. 8, 77 Conn. 45.

"'Capital stock' and 'capital' are practically the equivalent of each other, when considered as the basis of a franchise tax." *People v. Morgan*, 70 N. E. 967, 969, 178 N. Y. 433.

CAPITAL EMPLOYED.

Where a foreign corporation was organized with a paid-in capital stock, invested in improved real estate previously owned by the several stockholders in common, dividends being derived from rentals of such property, the capital so invested was "the capital employed within the state," within Tax Law, Laws 1896, p. 856, c. 908, §§ 181, 182; and hence the corporation was properly taxable thereunder. *People v. Miller*, 90 N. Y. Supp. 755, 98 App. Div. 584.

CAPITAL STOCK.

Capital synonymous, see "Capital."

"Capital stock," as that term is used in the tax law, does not mean share stock. It is limited to the actual money or property paid in and possessed by the corporation as such. *People v. Feitner*, 87 N. Y. Supp. 304, 306, 92 App. Div. 518.

The term "capital stock," when applied to the capital stock of a corporation, embraces the franchise of the corporation, as well as its physical property. *Georgia R. & Banking Co. v. Wright* (U. S.) 132 Fed. 912, 919.

The words "capital stock," as used in Corporation Tax Law, Laws 1896, c. 908, § 182, providing that every corporation organized under the law of the state shall pay an annual tax, computed on the basis of the amount of its capital stock employed within the state, does not mean the share stock held by individuals, but the capital stock which it represents, so employed; and, so construing the term "capital stock," United States bonds should, in the absence of proof that they were bought by the corporation with its surplus, be treated as capital, and as part of the basis on which the franchise tax is to be computed. *People v. Morgan*, 70 N. E. 967, 969, 178 N. Y. 433.

CAPTAIN.

Under a statute making the captain or owner of a steamer liable to a penalty for making a voyage without a licensed first or principal engineer in charge of the engines, it is held that one who was in command when the law was violated, though but for a single voyage, was liable to the penalty, even though another was regularly employed

as captain. *Leonard v. Board of Engineers*, 10 Ala. 52, 55.

CAR.

See "Caboose Car"; "Electric Car"; "Street Car."

A push car, used for transporting ballast for the repair of a track, is a "car," within the meaning of a statute providing that a railway company shall be liable for injuries to a servant in operating a car through the negligence of any other servant. *Seery v. Gulf, C. & S. F. R. Co. (Tex.)* 77 S. W. 950, 951.

Under a statute making railroad companies liable for injuries to servants caused by negligence of fellow servants in the operation of cars, a section crew, placing a hand car on the track, is engaged in the operation of a "car," within the statute. *Houston & T. C. R. Co. v. Jennings (Tex.)* 81 S. W. 822, 823.

In Gen. St. 1901, § 2098, subjecting to punishment any person who shall lawfully injure any locomotive, car, or the machinery on any railroad, or any woodhouse, car, or water station erected for the accommodation and use of any railroad, the word "car" was evidently intended to refer to passenger and freight cars used on railroads, where locomotives, woodhouses, and water stations are essential to their operation. *State v. Cain (Kan.)* 76 Pac. 443, 444.

CARE.

See "Due Care"; "High Care"; "Ordinary Care"; "Reasonable Care"; "Utmost Care and Skill."

"Care means more than mere mechanical skill. It includes circumspection and foresight with regard to reasonably probable contingencies." The rule as to the degree of care in the use of electricity is the same as in the use of steam and other agencies. The care must be proportionate to the danger. In determining the danger, it is the duty of those in control to have in view all the surroundings, including the contingency of other wires and their liability to fall and come in contact with the dangerously charged wire. *Youmans v. Moore*, 48 S. E. 283, 285, 69 S. C. 350 (quoting *Anderson v. Jersey City Electric Light Co.*, 43 Atl. 654, 655, 63 N. J. Law, 387).

CARELESSNESS.

Negligence and carelessness are generally esteemed as not only not willfulness, but rather the opposite. *Schooler v. Arrington*, 81 S. W. 468, 469, 106 Mo. App. 607 (following *Gibeline v. Smith*, 80 S. W. 961, 106 Mo. App. 545).

CARRIAGE.

See "Contract of Carriage."

Wagon synonymous, see "Wagon."

The word "carriages," as used in Gen. Laws 1896, c. 72, § 1, imposing on towns the duty of keeping highways in repair, "so that the same may be safe and convenient for travelers with their teams, carts, and carriages," does not include a bicycle; and hence a bicycle rider is not entitled to recover for injuries sustained by reason of a defect in the street, where the defect would not have caused injury to an ordinary traveler. *Fox v. Clarke*, 57 Atl. 303, 25 R. L. 515, 65 L. R. A. 234.

CARRIER.

See "Common Carrier."

CARRY.

"Coming into possession of a pistol while at a public gathering is not carrying a pistol to a public gathering." A conviction cannot be had under an accusation charging accused with carrying a pistol about his person to a place of public worship, the same being a designated church where a congregation was then assembled for public worship, on proof that accused came into possession of the pistol at a spring from which the congregation was using water, and which was so near the church as to be in legal contemplation a church. *Culbertson v. State*, 47 S. E. 175, 176, 119 Ga. 805 (quoting *Modesette v. State*, 41 S. E. 992, 115 Ga. 582).

CARRYING ON BUSINESS.

See, also, "Doing Business"; "Transacting Business."

Exercising corporate franchises synonymous, see "Exercising Corporate Franchises."

The doing by a foreign corporation of a single act of business in the Indian Territory, without appointing a resident agent on whom summons may be served, is not a violation of an act of Congress providing that, before any foreign corporation shall begin to carry on business in the Indian Territory, it shall designate an agent on whom summons or other process may be served, etc. *Ammons v. Brunswick-Balke-Collendar Co. (Ind. T.)* 82 S. W. 937, 940.

The expression "carrying on business," as used in Code, art. 75, § 132, rendering one liable to be sued in a county in which his business is carried on, relates to a fixed occupation, connected with some of the branches of trade, industry, or commerce, or the continuous pursuit of some calling or profession such as is ordinarily engaged in as a means of livelihood, or for the purpose of

gain or profit. It does not consist in the mere transaction of one's own private affairs. Nor does the making of a single transaction with another person in the line of a particular business constitute a carrying on of that business. A nonresident of a county owned property there, which he managed and received the rents from, and also collected rent from property which he owned as co-tenant with another, receiving a commission from his co-tenant for collecting the latter's share. He was not engaged in regular business, within the meaning of the section. *State v. Shipley* (Md.) 57 Atl. 12, 13.

CARRYING A PISTOL.

See "Unlawfully Carrying a Pistol."

CASE.

See "Civil Action—Case—Suit—etc."

A commission from the department of justice to an attorney, appointing him a special assistant to a district attorney, is not to be construed with technical nicety; and such a commission, appointing an attorney as special assistant to a district attorney to assist in the preparation and trial of "cases" in the United States against the officers of an insolvent national bank, against some of whom indictments had previously been returned, is to be construed as having been given under Rev. St. § 363 [U. S. Comp. St. 1901, p. 208], and to authorize the person so commissioned to assist in the performance of any duties of the district attorney, including appearance before the grand jury to present evidence for new indictments. *United States v. Twining*, 132 Fed. 129, 132.

The words "the case," as used in Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], requiring the board of general appraisers to "examine and try the case" submitted to it by a collector of customs, literally require the board, first of all, to determine its own jurisdiction, so far, at least, as to ascertain whether there is a protest, or whether the protest is apparently valid. This involves the question whether it was made in time, because, if not made in time, it is not a protest. *United States v. Brown, Durrell & Co.* (U. S.) 127 Fed. 793, 797, 62 O. C. A. 473.

CASH MARKET VALUE.

In condemnation proceedings, the only way to arrive at the cash market value of the land sought to be condemned is to estimate the specific identical land taken, by placing a value upon it; and this can only be done by a statement of facts, and by opinions and estimates of parties acquainted with the land. Upon such facts, opinions, and

estimates of the land must the valuation be based. *Wray v. Knoxville, L. F. & J. R. Co.* (Tenn.) 82 S. W. 471, 473.

CASH VALUE.

The cash value of an article is the amount of cash for which it will exchange in fact. That amount depends on the opinion of the public, of possible buyers, or of that part of it which will pay the most. *Ankeny v. Blakley*, 74 Pac. 485, 489, 44 Or. 78 (citing *National Bank of Commerce v. New Bedford*, 155 Mass. 313, 29 N. E. 532).

CASTS OF SCULPTURE.

Plaster casts of clay models, though painted and gilded and produced in unlimited quantities, are "casts of sculpture," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 649, 30 Stat. 151 [U. S. Comp. St. 1901, pp. 1626, 1637], and hence are entitled to free entry, where specially imported in good faith for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes. *Benziger v. United States*, 24 Sup. Ct. 189, 196, 192 U. S. 38, 48 L. Ed. 331.

CASUALTY.

A casualty is an unforeseen incident; a misfortune. *Gill v. Fugate* (Ky.) 78 S. W. 188, 191.

CAUSA MORTIS.

See "Gift Causa Mortis."

CAUSE.

See "Common-Law Cause"; "Efficient Cause"; "Probable Cause"; "Proximate Cause"; "Remote Cause."
Other cause, see "Other."

"Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the result of the cause. *Monroe v. Hartford St. Ry. Co.*, 56 Atl. 498, 501, 76 Conn. 201.

Code Civ. Proc. § 46, forbidding a judge to sit or take part in the decision of a "cause or matter" in which he has been an attorney or counsel, refers only to actions or special proceedings in which a judge might take part; the word "cause" meaning a cause of action, and the word "matter" referring to some judicial proceeding which, under the Code, is included in special proceedings for the enforcement of civil rights. *Keeffe v.*

Third Nat. Bank of Syracuse, 69 N. E. 593, 594, 177 N. Y. 305.

CAUSE OF ACTION.

See "Joint Cause of Action"; "New Cause of Action"; "No Cause of Action."

Cause of action arising, see "Arise—Arising."

Subject of action distinguished, see "Subject of Action."

"The cause of action is the statement of facts, upon the happening or nonhappening of which the plaintiff bases his action." *Lassiter v. Norfolk & C. R. Co.* (N. C.) 48 S. E. 642, 643.

An erroneous ruling by the trial court cannot be held to furnish a "cause of action," as that phrase is commonly understood. *Act Cong. July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]*, providing that any citizens entitled to commence any action or suit in any court of the United States may commence and prosecute to conclusion any such suit or action, refers to a legal demand by one against another, and not to the rulings of any trial court. *Bristol v. United States* (U. S.) 129 Fed. 87, 89, 63 C. C. A. 529.

CAUSE SHOWN.

See "Good Cause Shown."

CAVEAT EMPTOR.

The rule of caveat emptor applies with full force and vigor to purchasers of property from trustees, executors, and other persons acting in any fiduciary capacities. *Neary v. Neary* (Neb.) 97 N. W. 302, 304.

CENTRALLY.

The word "centrally" does not necessarily mean in the exact center. *Bredin v. Solmson* (U. S.) 132 Fed. 161, 162.

CERTAIN.

Apparent synonymous, see "Apparent."

CERTAIN ASCERTAINED MEMBERSHIP.

The meaning of a finding that a society has had at all said times "a certain ascertained membership" is that an organization exists sufficiently formed to take; i. e., the number at any time could be determined, not necessarily the same persons, but as "having at all times a certain ascertained membership." *In re Merchant's Estate*, 77 Pac. 475, 476, 143 Cal. 537.

CERTAINTY.

See "Moral Certainty."

CERTIFICATE.

See "Registration Certificate."

CERTIORARI.

"Certiorari, except as it has been enlarged and extended by statute, is a common-law writ. In its office it is confined to reviewing proceedings of inferior courts, officers, boards, and tribunals, where there is no other remedy provided by statute. The writ in terms directs inferior courts, officers, boards, or tribunals to certify to the superior court the record of their proceedings for inspection and review, and the writ can run only to persons or tribunals that have acted judicially in making the determination sought to be reviewed." *People v. Priest*, 88 N. Y. Supp. 11, 95 App. Div. 44.

CHAIR.

A dentist's chair is not exempt from levy and sale as a "chair sufficient for the use of the family," under an exemption statute. *Burt v. Stocks Coal Co.*, 46 S. E. 828, 829, 119 Ga. 629, 100 Am. St. Rep. 203.

CHAMOTTE.

The term "Chamotte," as used in the arts, has a broader meaning technically than ordinary fire brick crushed, or fire clay, and means, when used to describe an element in a patented combination, a clay which has been burned to an extent which deprives it of further shrinkage on being again subjected to heat. *Panzl v. Battle Island Paper & Pulp Co.* (U. S.) 132 Fed. 607, 609.

CHAMPERTY.

Champerty, "which is a species of maintenance, has been defined to be the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it; a bargain with a plaintiff or defendant campum partire to divide the land or other thing sued for between them if they prevail at law; the champertor agreeing to carry on the suit at his own expense." Where defendant in an injunction suit assigns to his attorneys, who have succeeded in securing a dissolution of a temporary injunction, his claim for damages on the injunction bond, consisting merely in his attorney's fees, the transaction is not objectionable as champertous. *Lacey v. Davis* (Iowa) 98 N. W. 366, 367 (quoting 6 Cyc. 850).

A contract is "champertous" where it is for attorneys' services, for which the attorneys agree to look solely to a certain percentage of the recovery for their compensation, without any right to recover for serv-

ices rendered, either before or after the recovery against the client. *Gargano v. Pope*, 69 N. E. 343, 184 Mass. 571, 100 Am. St. Rep. 575.

An agreement by an attorney for a contingent fee of 50 per cent. of the recovery, the attorney to advance all the court costs, is "champertous," within Code Civ. Proc. § 74, providing that an attorney shall not promise or give a valuable consideration to any person as an inducement to placing in his hands a demand of any kind for the purpose of bringing an action thereon. *Taylor v. Enthoven*, 88 N. Y. Supp. 138.

CHANCE.

See "By Chance"; "Game of Chance."

CHANGE.

Any change in grade, see "Any."

A vote at a school election "to move the schoolhouse onto the southeast corner" of a certain place is in effect a vote to change the schoolhouse site. *Livesay v. Whitney* (Mc.) 81 S. W. 640, 641.

CHANGE OF DOMICILE.

To effect a change of domicile, there must be a residence in the new locality and intention to remain there. *Eisele v. Oddie* (U. S.) 128 Fed. 941, 945.

To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile, acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. *People v. Molr*, 69 N. E. 905, 907, 207 Ill. 180, 99 Am. St. Rep. 205 (citing *Hayes v. Hayes*, 74 Ill. 312).

CHANGE OF INTEREST.

Where the condition in a fire policy is against any change in the title, there is no breach unless there is a change in the legal title. This doctrine cannot be applied "to a condition against any change of interest." The terms are not synonymous. The word "interest" is broader than the word "title," and includes ordinary legal and equitable rights. Hence, under a policy providing that it shall be void if any change takes place in the interest, title, or position of the subject of insurance, any material change in the interest of the insured in the subject of the insurance will avoid the policy. *Excelsior Foundry Co. v. Western Assur. Co.* (Mich.) 98 N. W. 9, 11.

A bankruptcy adjudication against insured, and a note by the referee in bank-

ruptcy in his record of the name of the person whom he had selected as receiver to take charge of his property pending the appointment of a trustee, and an order appointing the receiver, and his qualification two days after the destruction of the property covered by the policy, did not constitute such a "change of interest" as to invalidate the policy, under a provision that it should be void if any change, other than by the death of the insured, should take place in the interest, title, or possession of the subject of insurance, etc., during the life of the policy. *Fuller v. Jameson*, 90 N. Y. Supp. 456, 457.

CHANGE OF TITLE.

Change of interest distinguished, see "Change of Interest."

CHANGE OF VENUE.

The phrase "change of venue" has been used throughout the legislative history of the state to denote the removal of causes from one county to another county, and never removals from one court to another in the same county. *Dudley v. Birmingham Ry., Light & Power Co.*, 38 South. 700, 702, 139 Ala. 453.

CHANNEL.

See "Main Channel."

CHARGE.

See "Have Charge of"; "Take Entire Charge."

Abstract charge, see "Abstract."

CHARGED.

See "Act Charged."

The word "charged," as used in a holding that after a jury has been sworn and charged with the fate of the prisoner, it is too late to challenge any of its members, means when the prisoner has been placed in the hands of the jury for trial, which occurs when the jury is sworn and before indictment read or testimony heard, and not necessarily after the testimony in the case is heard or the law charged. When the jury has once been impaneled and charged with the trial of the prisoner, the discharge of the jury, unless by the consent of the prisoner, or in a case of legal necessity, will operate as an acquittal, and prevent his being again put on trial. Where, in a criminal case, after a jury was impaneled and sworn, the defendant arraigned, and the state and defendant announced ready for trial, the court, after asking them some questions, discharged two jurors over defendant's objection, one because of relationship to the defendant and the other because he had not been a resident

of the county a sufficient time, the defendant was entitled to discharge on the ground of former jeopardy. *Tomasson v. State* (Tenn.) 79 S. W. 802, 803 (quoting *Ward v. State*, 20 Tenn. [1 Humph.] 253; *State v. Connor*, 45 Tenn. [5 Cold.] 815).

CHARITABLE INSTITUTION.

A society having for its object the collection and preservation of historical and current accounts of events, persons, and inventions, etc., and all other materials of a similar character, connected with the interests of a certain town, is not a "charitable institution"; its object not possessing an educational character, and the collections of the society not necessarily being devoted to public use. *In re Vineland Historical & Antiquarian Soc.* (N. J.) 56 Atl. 1039, 1040.

CHARITABLE PURPOSE.

A donation to the poor of a certain locality is a gift for a "charitable purpose." *Brookville Borough v. Startzell*, 56 Atl. 938, 940, 207 Pa. 347.

The establishment of a mission for the preaching of the gospel is a "charitable purpose," within Acts 1885-86, p. 142, c. 1233, § 1, providing that churches and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, shall be exempt from taxation. *City of Louisville v. Werne* (Ky.) 80 S. W. 224, 225.

CHARITY.

"Charity" is defined by Lord Camden as a "gift to a general public use, which extends to the poor as well as to the rich." *Kronshage v. Varrell* (Wis.) 97 N. W. 928, 930 (citing *Jones v. Williams*, Amb. 651; *Perin v. Carey*, 65 U. S. [24 How.] 465, 16 L. Ed. 701).

A "charity" contemplates a public benefit, or the well-being of a community or a class, as contrasted with the beneficial use for private purposes, or for a private individual. To constitute a charity, the use must be public in its nature. *Smith v. Havens Relief Fund Soc.*, 90 N. Y. Supp. 168, 174, 44 Misc. Rep. 594.

"It is well settled that a Christian church lawfully existing is a 'charity,' in the sense of St. 43 Eliz. c. 6." Gifts to charitable institutions may lapse, as well as gifts to natural persons. A bequest to a church for deaf mutes, of which the testatrix had been a member, and in the prosperity of which she had been greatly interested, does not show such a general charitable intention as to entitle a new church corporation, formed by consolidation of the legatee with an-

other church, to take under the will, though the new corporation carried on the identical work which had been conducted by the legatee. *Gladding v. St. Matthew's Church*, 57 Atl. 860, 863, 25 R. L. 628, 65 L. R. A. 225.

CHARTER.

The charter of a corporation formed under a general law consists of its articles of incorporation, taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of its charter. *Traer v. Lucas Prospecting Co.* (Iowa) 99 N. W. 290, 292.

CHATTEL.

A chattel is defined to be every species of property, movable or immovable, which is less than a freehold. A ring, though an article of personal adornment, is property which may be the subject of a chattel mortgage. *Salabes v. J. Castberg & Sons* (Md.) 57 Atl. 20, 21, 64 L. R. A. 800 (quoting *Bouvier*, Law Dict.).

A horse is a chattel. *McVeigh v. Ripley*, 58 Atl. 701, 702, 77 Conn. 136.

CHECK.

See "Pay-Check."

"A check is a mere order for so much money to the credit of the drawer in the bank or drawee, which it is bound to honor when made in form and properly presented." Where an indictment charged the larceny of money, proof of the taking of a check on which the money was obtained was not a variance; and where defendant married a woman in pursuance of a scheme to procure certain money which she had on deposit in bank, and later procured a check for the money on representations that he would use the money in making an investment for her, he was guilty of larceny. *Hunt v. State* (Ark.) 79 S. W. 769, 772, 65 L. R. A. 71.

CHEMICAL COMPOUNDS.

Gadual, an alcoholic abstract of cod liver oil, unsuited in its imported state to be used as a medicine, but intended for use after a preparation in the form of an emulsion by the manufacturer, is dutiable under paragraph 3 of the tariff act of July 24, 1897, relating to "chemical compounds." *Merck & Co. v. United States* (U. S.) 126 Fed. 438.

A dry, antiseptic preservative, consisting of an intimate mechanical mixture of boracic acid and borax, the former being the more valuable component, is an article not enumerated in Tariff Act July 24, 1897, § 1, c.

11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], either as "boracic acid," under paragraph 1, Schedule A, § 1, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], as "chemical compounds," under paragraph 3, Schedule A, § 1, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], or as "borax" or "borate material," under paragraph 11, Schedule A, § 1, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627], and is subject to an assessment at the same rate of duty as boracic acid under said paragraph 1, by virtue of section 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], which prescribes that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable, if composed wholly of the component material thereof of chief value. *Berth Levi & Co. v. United States* (U. S.) 126 Fed. 420.

CHIEF OF POLICE.

As state officer, see "State Officer."

CHILD—CHILDREN.

See "Our Children"; "Surviving Children."

The word "child," as used in Pen. Code 1895, § 81, declaring that any person who shall administer to any woman pregnant with a child any medicine, etc., with intent to destroy such child, shall be punished, etc., means an unborn child, so far developed as to be ordinarily quick, so far developed as to move or stir in the mother's womb. *Sullivan v. State* (Ga.) 48 S. E. 949, 950; *Barrow v. State* (Ga.) 48 S. E. 950, 951.

The statute making the assault of a "child" an aggravated assault, as applied to a male, means one not above the age of 14 years. *Thompson v. State* (Tex.) 80 S. W. 623, 624.

The word "children" has sometimes been held to include grandchildren, as where it can fairly be seen from the context that such was the intention of the testator as exhibited in his will. *Lawrence v. Phillips*, 71 N. E. 541, 542, 186 Mass. 320.

"It is a matter of common knowledge that in ordinary conversation and affairs of life the word 'child' is commonly used to designate a son or daughter, a male or female descendant of the first degree. It is safe to say that, standing alone, it is never understood to mean grandchildren." A testator bequeathed money to designated grandchildren, and then declared that the residue of his estate should go "to such of the children of my own blood begotten as shall survive me." The word "children," as used in the residuary clause, did not include grandchildren. *Brown v. Brown* (Neb.) 98 N. W. 718, 722.

Unless it is necessary to effectuate the manifest intention of a testator, the word "children" is a word of purchase. *Jabine v. Sawyer* (Ky.) 78 S. W. 140, 141.

The word "children" is a word of purchase, and not of limitation, and describes the persons who take. Where a testator devised real estate to his son and to his children, with a direction that the son should pay certain legacies, the son acquired only a life estate, and the children of the son living at the testator's death took the estate in remainder. *Crawford v. Forest Oil Co.*, 57 Atl. 47, 53, 208 Pa. 5.

The word "children," as used in a will whereby a testator gave all his estate to his wife for life, and at her death the proceeds to his sons and daughters during their lives, and after the death of either of them he gave "to their child or children, should they leave any children at their death, the share held by my sons and daughters at the time of his or her death, but, should neither of my sons or daughters leave no heirs, then their share is to be divided between all of my grandchildren, share and share alike," meant "heirs of the body," and the testator's children took an estate in fee tail, which was enlarged by the statute into a fee simple. In *re Vilsack's Estate*, 57 Atl. 32, 33, 207 Pa. 611.

The word "children," in the statute of Kansas relating to descent (Gen. St. 1889, c. 33, §§ 20, 21, 29), which by Act Cong. Feb. 8, 1887, c. 119, § 5, 24 Stat. 389, are made to govern the descent of lands allotted in severalty to the members of certain tribes in the Indian Territory, and providing that children of the half blood shall inherit equally with the children of the whole blood, should be construed as meaning kindred. *Finley v. Abner* (U. S.) 129 Fed. 734, 735.

A deed of property in trust for the wife of the grantor for life, with remainder to her "children," inures to the benefit of children of the grantee by a subsequent marriage to another person after divorce from the grantor. *Pettit v. Norman* (Ky.) 82 S. W. 622, 623.

CHILD'S PART.

A "child's part," which a widow by statute is entitled to take in lieu of dower or the provisions made for her by will, is a full share to which a child would be entitled, subject to the debts of the estate and the cost of administration up to and including the point of actual distribution. Where a widow elects to take a child's part, and there is but one child and heir of the deceased husband, the widow is counted as a child, and she will be entitled to one-half of the estate after the payment of costs of administration. *Benedict v. Wilmarth* (Fla.) 35 South. 84, 87.

CHOSE IN ACTION.

As property, see "Property."

A life policy is a chose in action. It may be assigned or otherwise disposed of as other choses, subject to the condition that the assignee must have an insurable interest in the life of the insured, must be related by blood or marriage, and be so situated that the assignee or beneficiary has a pecuniary interest in the prolongation of the life of the insured, rather than in its early termination. *Lockett v. Lockett* (Ky.) 80 S. W. 1152, 1153.

Stock in a corporation is a "chose in action," and the certificates are the evidence of its existence and of its amount. *Allen-West Commission Co. v. Grumbles* (U. S.) 129 Fed. 287, 290, 63 O. C. A. 401.

CHURCH.

A church is "a religious congregation, comprising all those who worship together in one church." The more general definition is "the district in which such worshipers live." A deed to trustees, to be held in trust for "Trinity Parish, in the town of Moundsville, in the county of Marshall, in the state of West Virginia," does not create a valid trust, as the trust attempted to be created is void for uncertainty, as well to the beneficiaries as to the purpose of the trust, for there is nothing to indicate that the words "Trinity Parish" mean a church. *Weaver v. Spurr* (W. Va.) 48 S. E. 852, 856.

CIRCUMSTANCES.

Other circumstances, see "Other."

The word "circumstances," as used in an instruction in an action against a carrier for injuries to a passenger, to the effect that if the jury found that plaintiff was injured, that the accident could not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence was raised, and that the burden was on defendant to rebut it, and to that end defendant must prove that, as to the matters which the circumstances indicated were the cause of the accident, defendant and its employes exercised that high degree of care which the law required of them, merely had reference to the claim made by plaintiff as to the manner in which the accident happened, and the instruction was not erroneous on the theory that it was left uncertain as to what circumstances the jury might consider. *Fitch v. Mason City & C. L. Traction Co.* (Iowa) 100 N. W. 618, 620.

CITATION.

"Notice" and "citation" are not synonymous. A citation is a writ of the court, ad-

ressed to an officer of the court, and commands him to do certain things. Service by publication is a citation, and therefore may be resorted to by a justice of the peace. Inasmuch as the powers of the justice of the peace in this respect are derived from the statute, and as by no provision of the statute is that court expressly authorized to acquire jurisdiction over a defendant by issuance and service of notice as provided by statute for district and county courts, we must hold the power wanting, unless "notice" and "citation" are synonymous terms. *Carpenter v. Anderson* (Tex.) 77 S. W. 291, 293.

CITIZEN.

A corporation is not a "citizen," within the meaning of that clause of the Constitution of the United States, which declares that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. *Ætna Ins. Co. v. Brigham*, 48 S. E. 348, 349, 120 Ga. 925; *Humphreys v. State*, 70 N. E. 957, 962, 70 Ohio St. 67, 65 L. R. A. 776 (quoting 10 Cyc. 150; *Ducat v. City of Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Tatem v. Wright*, 23 N. J. Law [3 Zab.] 429; *Ducat v. Chicago*, 77 U. S. [10 Wall.] 410, 19 L. Ed. 972).

A state is not a "citizen," within the meaning of the Constitution or the acts of Congress; hence the federal Circuit Court cannot take cognizance of a case instituted by a state against a corporation of another state as one presenting a controversy between citizens of different states. *Minnesota v. Northern Securities Co.*, 24 Sup. Ct. 598, 601, 194 U. S. 48, 48 L. Ed. 870 (citing *Postal Tel. Co. v. Alabama*, 155 U. S. 482, 487, 15 Sup. Ct. 192, 39 L. Ed. 231).

CITIZENSHIP.

"Citizenship" and "residence" are not synonymous terms. A person may reside in one state and be a citizen in another. An allegation, in a petition for removal of a suit pending in the state court to the federal court, that defendant is a citizen of a state other than that in which the suit is pending, is not equivalent to an allegation that he is a nonresident of that state, and does not show his right to a removal. *Irving v. Smith* (U. S.) 132 Fed. 207.

A distinction is to be observed between citizenship and residence for the purpose of suit. The question of suability and jurisdiction is not so much one of citizenship as of finding. If a citizen of one state is found, for the purpose of the lawful service of judicial process, in another, he may ordinarily be sued there. A partnership may be sued in any county in which one of the partners has such a residence as will confer upon the courts of that county jurisdiction over his person, regardless of the place of his citi-

zenship. *J. B. Pyron & Son v. Ruoha*, 48 S. E. 434, 436, 120 Ga. 1060 (quoting *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 10, 28 L. Ed. 643; *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 522, 16 S. E. 303).

CITY.

As town, see "Town."

CITY GOVERNMENT.

"City government" usually means the mayor, board of aldermen, and common council of a city. *Grace v. Board of Health of City of Newton*, 135 Mass. 490, 494.

CITY LIMITS.

See "Within the City Limits."

CITY OFFICER.

A member of a municipal assembly is a city officer. *State v. Kelly*, 77 S. W. 996, 997, 103 Mo. App. 711.

CIVIL ACTION—CASE—SUIT—ETC.

"Every action for the enforcement or protection of private rights or the redress or prevention of private wrongs is a civil action." *Harrigan v. Gilbert*, 99 N. W. 909, 951, 121 Wis. 127.

Proceeding on appeal.

A proceeding on appeal from an order of a village board granting or refusing a license to sell intoxicating liquors is not a "civil case," within the meaning of Const. art. 1, § 24, and a final order in such a proceeding is not reviewable on appeal. *Halverstadt v. Berger* (Neb.) 100 N. W. 934.

The phrase "process in civil actions" in Gen. St. 1902, § 566, providing that process in civil actions brought to the superior court must be made returnable to the next return day, or to the next but one, to which it can be made returnable, includes an appeal from the probate court to the superior court. *Appeal of Campbell*, 58 Atl. 554, 555, 76 Conn. 284.

Attachment proceeding.

An action which has for its purpose the subjection of property to the payment of a debt, and is commenced by attachment for that purpose, is a civil action, and must be brought "in the county where the defendant resides or may be found." *First Nat. Bank v. Hesser* (Okla.) 77 Pac. 36, 40.

Bastardy proceeding.

A proceeding in bastardy to compel the father or mother of a bastard child to give bond to indemnify the county from the sub-

sequent maintenance of such child is a civil proceeding, and not a criminal prosecution. *State v. Liles*, 47 S. E. 750, 751, 184 N. C. 735.

Claim for damages for flowage.

A claim for damages for flowage of land by a milldam, under the mill acts, is not a "civil suit," within the meaning of Const. art. 1, § 20, declaring that in civil suits and in controversies concerning property the party shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. *Ingram v. Maine Water Co.*, 57 Atl. 893, 894, 98 Me. 566.

Divorce proceeding.

"Because marriage is declared to be a civil contract, it does not follow that a suit for divorce should be considered in the light of a civil action merely. It is a civil action, in so far as the divorce act in itself fails to prescribe rules of procedure. If the divorce act is to be made effective, resort must be had to the Civil Code, but in so far only as recourse must be had to the rules of civil procedure is it a civil action. As the marriage relation is a public concern, so divorce is a public concern." On the trial of an action for divorce, where defendant does not appear, the trial judge has the right, and it is his duty as representing the state, to elicit facts as to matrimonial offenses committed by plaintiff, and grant or withhold the decree accordingly. *Elkenbury v. Burns* (Ind.) 70 N. E. 837, 838.

Election contest.

An election contest is not a "civil case," within City Court Act, Laws 1901, p. 136, § 1, giving city courts concurrent jurisdiction with circuit courts in all civil cases. *Brueggemann v. Young*, 70 N. E. 292, 293, 208 Ill. 181.

Habeas corpus proceeding.

A proceeding in habeas corpus is in its nature civil. *In re Jewett* (Kan.) 77 Pac. 567, 569.

Prosecution for violation of ordinance.

The great weight of authority in the United States is to the effect that all prosecutions for the violation of ordinances are civil suits. A prosecution for being drunk and disorderly, in violation of an ordinance of an incorporated town, is a civil proceeding. *Fortune v. Town of Wilburton* (Ind. T.) 82 S. W. 738.

Proceeding to recover penalty.

Where a statute or ordinance imposes a penalty, unless special modes are prescribed, the sums must be collected by an action at law. Such action is a civil action. *People v. Sloan*, 90 N. Y. Supp. 762, 764.

CIVIL NATURE.

See "Suit of a Civil Nature."

CIVIL RIGHT.

"A civil right is a right accorded to every member of a district, community, or nation." *Winnett v. Adams* (Neb.) 99 N. W. 681, 684 (quoting *Anderson, Law Dict.*).

CLAIM.

See "Adverse Claim."

Demand distinguished, see "Demand."

"The words 'to claim' are sometimes incorrectly used as synonymous with 'to think,' or 'to insist.' Their proper meaning is 'to challenge as a right,' or 'to demand as due.'" *Hill v. Henry* (N. J.) 57 Atl. 554, 555.

The word "claim," used either colloquially or definitely, means the assertion of a right, and, where the court stated that it was about to give instructions based on this claim of the defendant that he acted in self-defense, it refers to the assertion by the defendant that the killing was excusable, because committed by him in the exercise of the right of self defense. *People v. Glover*, 74 Pac. 745, 747, 141 Cal. 233.

An instruction that unless the jury believed that plaintiff, or his vendors, under whom he claims, owned or held the land in controversy in actual adverse possession, continuously, to a well-defined, marked boundary line, for 15 years prior to the alleged trespass, they should find for the defendants, is not fatally defective, because it does not state that plaintiff must have claimed, as well as held, such possession, although it is usual to use the word "claimed" in an instruction of such character. *Vincent v. Willis* (Ky.) 82 S. W. 583, 584.

"The word 'claim,' as used in the statute governing appeals from actions of county boards, is used in the sense of an assertion or a pretension." *Sheldon v. Gage County Society of Agriculture* (Neb.) 98 N. W. 1045.

The word "claims," within the statute requiring all claims against the county to be filed with the county clerk, referred only to those claims originating in contract, express or implied, between the claimant and the county, and not to claims for damages for torts committed. *Gregg v. Board of Com'rs of Lake County* (Colo.) 76 Pac. 376, 378.

A claim against a city by a property owner for damages to his premises resulting from the overflowing of a sewer is now within the charter of second-class cities (Laws 1896, p. 438, c. 182), known as the "White Charter," requiring all claims against the city for damages to property alleged to have been caused by negligence of the city

or its officers to be presented to the common council. *Ahrens v. City of Rochester*, 90 N. Y. Supp. 744, 97 App. Div. 480.

Prior to the filing of an involuntary bankruptcy petition the bankrupt made an assignment of his claim on insurance policies constituting his sole assets, and the assignee rendered valuable services in attempting to collect the claims. On a trustee in bankruptcy being appointed, the assignee turned over to him the policies, with all proofs and claims, subject to a lien for allowances for the expenses incurred, and the trustee in bankruptcy subsequently settled the claims with the insurance companies. The claim of the assignee for expenses and services was an equitable claim, allowable by way of deduction from the fund realized for the benefit of creditors, to the extent of beneficial expenditure and service, and was not a claim against the bankrupt, under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560, 561 [U. S. Comp. St. 1901, pp. 3443, 3444]. *In re Levitt*, 126 Fed. 889, 891.

Code Civ. Proc. § 2718, authorizing reference of certain claims against a decedent's estate, is limited to claims which existed against the intestate, and does not authorize a reference of claims for funeral expenses. *Genet v. Willock*, 87 N. Y. Supp. 938, 93 App. Div. 588.

Judgment distinguished.

The word "claim," as used in the Code, relating to the liability of stockholders of a corporation, cannot be intended to be synonymous with the word "judgment"; hence a creditor whose claim has not been reduced to judgment may maintain an action against an insolvent corporation on behalf of himself and other creditors to enforce stockholders' liabilities, as defined by Rev. Codes 1899, § 2902, §§ 5767-5770, authorizing such an action. *Marshall Wells Hardware Co. v. New Era Coal Co.* (N. D.) 100 N. W. 1084, 1086.

CLAIM UPON LAND.

Tax liens held by the state are not interests in and claims upon the land on which they are a lien, within the meaning of Laws 1903, c. 234, § 6, p. 341, relating to the registration of land titles. *National Bond & Security Co. v. Daskam*, 97 N. W. 458, 91 Minn. 81.

CLASS.

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number. *Herzog*

v. Title Guarantee & Trust Co., 69 N. E. 283, 286, 177 N. Y. 86.

A devise to two persons, naming them, "with whom I live, and whom I regard and treat as my adopted daughters," is not a devise to a class, entitling one to the entire devise on the death of the other before the death of the testator. In *re Hittell's Estate* (Cal.) 75 Pac. 53, 54.

Where a testator, having sisters and children of deceased sisters, gave the balance of his estate to his lawful heirs, to be divided equally among them, the term "lawful heirs" constituted a single class, so that the distribution must be per capita, and not per stirpes. In *re Griswold*, 86 N. Y. Supp. 250, 252, 42 Misc. Rep. 230.

CLASS LEGISLATION.

In the exercise of the police power in establishing a day of rest, a large discretion must be allowed to the Legislature in determining what kind of labor or business should be prohibited, and what are and what are not works of necessity or charity; and unless the classification is manifestly purely arbitrary, and not founded on any substantial distinction or natural reason, the courts have no right to interfere with the exercise of legislative discretion, and the courts cannot hold such legislation unconstitutional, as being class legislation. Laws 1903, c. 362, prohibiting the keeping open of butcher shops for the sale of meats on Sunday, etc., is not "class legislation," within Const. art. 4, §§ 33, 34, prohibiting class legislation. *State v. Justus*, 98 N. W. 325, 326, 91 Minn. 447, 64 L. R. A. 510 (citing *State v. Petit*, 74 Minn. 376, 77 N. W. 225).

CLAUSE.

See "Residuary Clause."

CLEAN.

The term "clean" may be applied to a variety of merchandise, and its scope and meaning are within the comprehension of any one. Clean busheling scrap, like clean oats, or clean flour, or clean seed grain, needs no expert to define it. The term does not relate to the particular grade, but to the quality of the bunch sold, considered in its entirety. *Lichtenstein v. Rabollasky*, 90 N. Y. Supp. 247, 250, 98 App. Div. 516.

CLERK OF COURT.

As ministerial officer, see "Ministerial Officer."

COAL.

See "Available Coal."

Vein of coal synonymous with coal bed and coal seam, see "Vein."

COCOA BUTTER.

"Cocoa butter" is produced from the beans of the cacao or chocolate tree; the word "cocoa," used in this connection, being a corruption of the word "cacao." *United States v. Oriental American Co.* (U. S.) 129 Fed. 249.

COCOA BUTTERINE.

"Cocoa butterine," as provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 282, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], consists of products made in imitation of cocoa butter, and adapted for use as a substitute therefor. *United States v. Oriental American Co.* (U. S.) 129 Fed. 249.

COLLATERAL

"Collateral" means on the side, or at one side, of a subject, and in this sense a bequest to any person not in the direct line of relationship would be properly termed a "collateral bequest," although the person was not akin to the testator. In *re Campbell's Estate*, 77 Pac. 674, 676, 143 Cal. 623.

COLLATERAL ATTACK.

A collateral attack on a judgment is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on the judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect. *Scudder v. Cox* (Tex.) 80 S. W. 872, 873 (citing *Crawford v. McDonald*, 88 Tex. 630, 33 S. W. 327).

A collateral attack on a judgment is, in its general sense, any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree. The fact that the parties are the same, and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule, or make the attack any the less a collateral one. It is well settled that judgments of a court of competent jurisdiction are not subject to collateral attack, unless they are void, and by "void" is meant that they are an absolute nullity. *People v. McKelvey* (Colo.) 74 Pac. 533, 534 (citing *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027).

Collateral attack is a proceeding aside from or outside of the regular proceeding in the case. A motion to set aside a default judgment on the ground of want of jurisdiction is a collateral attack. *People v. Norris* (Cal.) 77 Pac. 998, 999.

COLLECT.

Levy distinguished, see "Levy."

COLLECTED.

See "Amount Collected"; "Sums Collected."

The word "collected," as used in Laws 1896, p. 859, § 187, as amended by Laws 1901, c. 118, § 1, imposing an annual state tax on domestic insurance companies, and providing that the term "gross premiums" shall include such premiums as are "collected" from policies subsequently canceled and from reinsurance, applies to the latter subject with the same force as to the former. The act does not refer to what is paid out, for it permits no deduction, even for expenses, for what is paid in. The premium paid for reinsurance is an expense of the business, but a premium collected from reinsurance is part of the gross receipts from the corporate business, which is what the statute aims at. *People v. Miller*, 70 N. E. 10, 11, 177 N. Y. 515.

COLLUSION.

"Collusion," as that term is used in matrimonial actions, is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant. *Doeme v. Doeme*, 89 N. Y. Supp. 215, 217, 96 App. Div. 284.

COLOR OF TITLE.

Color of title is that which in appearance is title, but which in reality is not title. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances in which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title. *Johnson v. Hurst* (Idaho) 77 Pac. 784, 791 (citing *Cameron v. United States*, 148 U. S. 301, 308, 13 Sup. Ct. 595, 37 L. Ed. 459, 462).

COMBINATION IN RESTRAINT OF COMMERCE.

A combination by stockholders in two competing railway companies to form a stockholding corporation, which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, is a combination in restraint of interstate and international commerce, and violates Anti-Trust Act July 2, 1890, c. 647, 20 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every com-

bination in restraint of interstate or foreign commerce. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 452, 193 U. S. 197, 48 L. Ed. 679.

COMFORT.

Some of the synonyms of "comfort" are "consolation," "contentment," "ease," "enjoyment," "happiness," "pleasure," and "satisfaction." It is a common English word. A person publishing a magazine under the name "Comfort" has a trade-name in such title, which is infringed by the use of the name "Home Comfort" for a magazine, entitling him to an injunction, without proof of damages. *Gannert v. Rupert* (U. S.) 127 Fed. 962, 963, 62 C. C. A. 594.

COMMENCED.

An action is "commenced" as to each defendant when the summons is served on him, and it is deemed to be pending from the time of such service until there is a final determination of the action. In case of service on a nonresident by publication, the action is commenced by the first publication. *H. L. Spencer Co. v. Koell*, 97 N. W. 974, 975, 91 Minn. 226.

COMMENCEMENT OF FORECLOSURE PROCEEDINGS.

By "commencement of foreclosure proceedings," in a fire policy providing that the same shall be void if with the knowledge of the insured foreclosure proceedings be commenced, is meant the institution of judicial proceedings for the enforcement of the mortgage; and waivers of legal delays, and other waivers of a nature to greatly facilitate and expedite the judicial proceedings, if ever begun, do not constitute of themselves the commencement of foreclosure proceedings. "Commencement of foreclosure proceedings" must be held to be synonymous with "filing of suit." *Stenzel v. Pennsylvania Fire Ins. Co.*, 35 South. 271, 273, 110 La. 1019, 98 Am. St. Rep. 481.

COMMERCE.

See "Combination in Restraint of Commerce"; "Regulate Commerce."

The business of insurance is not commerce in any proper sense, within the meaning of the Constitution of the United States. The commerce clause in the federal Constitution does not limit the power of the state to impose conditions on which a foreign insurance company may transact business in the state. *Fisher v. Traders' Mut. Life Ins. Co.* (N. C.) 48 S. E. 667, 669 (citing *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297).

Railroad companies are "instruments of commerce, and their business is commerce itself," and such companies operate "public highways established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 463, 193 U. S. 197, 48 L. Ed. 679 (quoting *Trans-Missouri Freight Ass'n Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and citing *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, 4 Interstate Com. Rep. 545; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702).

COMMON CARRIER.

A telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith. *Cogdell v. Western Union Tel. Co.*, 47 S. E. 490, 491, 185 N. O. 431.

A company operating an elevator in its office building for the use of tenants and their visitors is a common carrier of passengers for hire. *Goldsmith v. Holland Bldg. Co.*, 81 S. W. 1112, 1114, 182 Mo. 597.

Street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. *Lincoln Traction Co. v. Heller* (Neb.) 100 N. W. 197, 199 (citing *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736).

COMMON LAW.

There is no "common law of the United States." When a common-law right is asserted, we look to the state in which the controversy originated. Judicial decisions of the state must determine how far the common law has been introduced in each state. *Kennedy v. Delaware Cotton Co. (Del.)* 58 Atl. 825, 828.

There is no common law of the United States. Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], imposing a penalty for infringement of the copyright of any map, picture, work of sculpture, etc., unlike section

4964, relating to books, does not give the proprietor a right to maintain a civil action at law to recover damages for the infringement, and, the exclusive right of property in such artistic productions being purely statutory, the remedy for infringement is limited to that prescribed by the statute; there being no common law of the United States which can be invoked to supplement such remedy. *Walker v. Globe Newspaper Co. (U. S.)* 130 Fed. 593, 596.

The phrase "common law of England," as used in section 2695 of the Wyoming Revised Statutes of 1899, was not intended to and does not include the judicial decisions of England upon the subject rendered subsequently to the independence of America. But, notwithstanding such decisions are not a part of the common law adopted by the state of Wyoming, and are not, therefore, binding upon the courts of that state, yet, as evidence of what the common law, as so adopted, is, they are entitled to respect, and in particular cases may properly be regarded as conclusive.—*Johnson v. Union Pac. Coal Co. (Utah)* 76 Pac. 1089, 1093.

COMMON-LAW CAUSE.

The phrase "common-law causes," as used in Rev. St. U. S. § 916 [U. S. Comp. St. 1901, p. 684], providing that the party recovering a judgment in any common-law cause in any Circuit or District Court shall be entitled to similar remedies on the same by execution or otherwise to reach the property of the judgment debtor as are provided in like causes by the laws of the state in which such court is held, does not apply to judgments in criminal cases. *Allen v. Clark*, 128 Fed. 738, 740, 62 C. C. A. 58.

COMMON-LAW JURISDICTION.

Courts having "common-law jurisdiction," within the meaning of Rev. St. § 2165 [U. S. Comp. St. 1901, p. 1329], relating to naturalization, are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or courts which are governed by the principles and rules of the common law. The term is used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law. *Levin v. United States (U. S.)* 128 F. 826, 832, 63 C. C. A. 476.

COMMON-LAW LIEN.

"Common-law liens arise by implication of law, and not by express contract." Where a corporation advanced money to a bankrupt with which to purchase tobacco to be shipped to the corporation for sale, under an agreement that the corporation was to have

a lien on the tobacco so purchased, and that the debt for advanced commissions, insurance, etc., was to be "paid out of the proceeds of the sales when made," the lien of the corporation was not a common-law lien, personal to the corporation, but was an equitable lien, which attached to the claim and passed to the corporation's successor, which purchased its assets on its insolvency. *Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee* (Ky.) 78 S. W. 413, 415, 64 L. R. A. 219.

COMMON TOOLS OF TRADE

The phrase "common tools of trade," as used in an exemption statute, has uniformly been construed to refer, not to tools in common use by the debtor, regardless of their value, but to those simple and inexpensive appliances used in his trade. A dentist's chair is not exempt from levy and sale as a common tool of trade. *Burt v. Stocks Coal Co.*, 46 S. E. 828, 829, 119 Ga. 629, 100 Am. St. Rep. 203.

COMMUNICATION.

See "Confidential Communication"; "Privileged Communication."

"Transactions and communications," within Code Civ. Proc. § 829, prohibiting evidence of personal transactions and communications between interested persons and a decedent, embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. *Holland v. Holland*, 90 N. Y. Supp. 208, 211 (citing *Holcomb v. Holcomb*, 95 N. Y. 316).

COMMUNITY.

As partnership, see "Partnership."

COMMUNITY HOUSE.

See "Apartment House."

COMMUNITY OF INTEREST.

"Community of interest, in a common title or security, implies a mutual obligation not to impair it. It creates such a relation of trust and confidence that it is inequitable to permit one of the parties in interest to do anything to the prejudice of others, and when one of them obtains superior titles or liens he holds them in trust for the benefit of all who share in the common title or security, and who within a reasonable time after notice of his purchase contribute their share of his necessary expenditure." *Booker v. Crocker* (U. S.) 132 Fed. 7, 8.

COMMUNITY OF PROFITS.

"Community of profits," in reference to a partnership, means a proprietorship in them, distinguished from a personal claim upon the other associate; in other words, a property right in them from the start in one associate, as much as in another. Stipulating for a compensation in proportion to the profits or payable out of them will not confer the privileges or import the liabilities incident to a partnership, unless it confers a *jus in re*, as distinguished from a demand or chose in action. *Altgelt v. Alamo Nat. Bank* (Tex.) 79 S. W. 582, 586.

COMMUNITY PROPERTY.

The damages resulting from a personal injury to the wife are a part of the community property. *Paine v. San Bernardino Valley Traction Co.*, 77 Pac. 659, 660, 143 Cal. 654; *Western Union Telegraph Co. v. Campbell* (Tex.) 81 S. W. 580, 581.

COMMUTATION.

Commutation is a passing from one state to another; an alteration; a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate. The judicial sale of property under a decree of foreclosure for what it will bring, although it be less than the amount of the taxes assessed and delinquent against it, cannot be said to be a commutation of taxes, within the meaning of Const. art. 9, § 6, prohibiting the commutation of taxes. *Woodrough v. Douglas County* (Neb.) 98 N. W. 1092, 1095.

COMPETITION.

See "Unfair Competition."

COMPLAINT.

See "Sworn Complaint."

COMPLETE DETERMINATION.

The phrase "complete determination of the controversy," as used in Code Civ. Proc. § 452, providing that the court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, but, where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in, means that when there are persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, such

other persons must be made parties. *Shanks v. National Casket Co.*, 88 N. Y. Supp. 839, 841, 95 App. Div. 187.

COMPLETE RECORD.

A clause in a fire policy, requiring the insured to keep a set of books which shall present "a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with where it appears that the only record of cash sales kept is a cash book, which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from such sales, from the payment of past-due bills, or what not. *Everett-Ridley-Ragan Co. v. Traders' Ins. Co. of Chicago, Ill. (Ga.)* 48 S. E. 918.

COMPOSITION METAL.

So called "flitters," made from sheets of copper and zinc, and reduced to a fine condition for use in the same manner as bronze powder, is "composition metal," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1682], admitting free of duty all composition metal of which copper is a component material of chief value. *Geo. Meier & Co. v. United States (U. S.)* 128 Fed. 472.

COMPOUND.

See "Alcoholic Compounds"; "Chemical Compounds"; "Compromise."

COMPROMISE.

The words "or to compromise or compound any debt or claim" owing by the estate of their testator or intestate, in Laws 1893, p. 200, c. 100, amending Laws 1888, p. 928, c. 571, by which the surrogate was granted power to authorize executors and administrators to compromise or compound any debt or claim, indicate an intent of the Legislature to confer power on the surrogate to permit a settlement or compromise of the claim, either made for or against the estate. In *re Gilman's Estate*, 87 N. Y. S. 128, 129, 92 App. Div. 462.

CONCEALMENT.

See "Artful Concealment"; "Fraudulent Concealment."

CONCERN.

See "Local Concern."

CONCUBINAGE.

A statute punishing the taking away of any female under the age of 18 years from

her father, etc., either for the purpose of prostitution or concubinage, is leveled at both "prostitution" and "concubinage," which are entirely separate and distinct offenses. "Concubinage" is defined by Webster to be "the cohabiting of a man and a woman who are not legally married; the state of being a concubine; a woman who cohabits with a man without being married"; and by the law dictionaries as a "species of loose, informal marriage, which took place among the ancients, and which is yet in use in some countries." *State v. Adams*, 78 S. W. 588, 590, 179 Mo. 334.

CONCURRENT HEREWITH.

The words "concurrent herewith," as used in a fire policy for \$4,500, which provided that it should be void if the insured should procure other insurance, unless otherwise provided by agreement added to the policy, and which contained the clause, "\$3,500 total insurance permitted concurrent herewith on buildings," etc. "Other insurance permitted concurrent herewith on stock" relates to the term "total insurance," and means that the total insurance must all concur with the insurance effected by the policy, and the policy limits the insurance, the limitation taking into account the amount written in the policy; and the policy did not authorize \$3,500 additional insurance, and it was forfeited by the insured taking a policy for additional insurance on the same property from another company. *Senor v. Western Millers' Mut. Fire Ins. Co.*, 79 S. W. 687, 689, 181 Mo. 104.

CONCURRENT JURISDICTION.

Concurrent jurisdiction, properly so called, on rivers, means the jurisdiction of two powers over one and the same place. It is in this sense that the words are used in Virginia Compact 1789, § 11, declaring that the jurisdiction of the proposed state of Kentucky on the Ohio river should be concurrent only with the states which may possess the opposite shores of the river. Hence jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore. *Wedding v. Meyler*, 24 Sup. Ct. 322, 324, 192 U. S. 573, 48 L. Ed. 570.

CONDEMNATION MONEY.

The term "condemnation money," mentioned in the conditions of a bond given under Code Civ. Proc. § 677, relating to appeal bonds in an action for the foreclosure of a mechanic's lien, means the damages which the party failing in the action is adjudged or condemned to pay; and when the Supreme Court affirmed the judgment of the lower court, it found the condemnation mon

ey against defendant, though the appeal in the Supreme Court was a trial de novo. *Maloney v. Johnson-McLean Co.* (Neb.) 100 N. W. 423, 424.

CONDEMNATION PROCEEDING.

Condemnation proceedings are special proceedings provided by statute. *State v. District Court of Fifth Judicial District* (Mont.) 74 Pac. 200.

The distinction between a condemnation suit and a proceeding to contest an election is plain. The one is to recover a judgment for the amount of the compensation and damages which the owner of private property has sustained by reason of the taking of his property for a public use, and may be said to be a case and falling within the language of the statute giving said courts concurrent jurisdiction with circuit courts in all civil cases, while the contest of an election is a proceeding instituted for the purpose of determining which of the contestants has received the greater number of votes of a particular office. *Brueggemann v. Young*, 70 N. E. 292, 294, 208 Ill. 181.

A proceeding to condemn is, in substance, a proceeding to compel a sale by the owner to the petitioner, and is justified only when the purpose for which the land is to be used is a public one. *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.* (U. S.) 131 Fed. 657, 666.

CONDITION.

See "Good Condition"; "Terms and Conditions, Rights, and Privileges."

CONDITION OF PEONAGE.

The phrase "condition of peonage" means the actual status, physical and moral, with the inevitable incidents, to which the employé, servant, or debtor was reduced under that system, when held to involuntary performance or liquidation of his obligation. A condition of peonage, within the denunciation of Act March 2, 1867, c. 187, § 1, 14 Stat. 546 [U. S. Comp. St. 1901, pp. 1266, 1267], is the illegal holding of a person to involuntary servitude to work out a debt or contract claimed to be due by the person so held to the person so holding. *United States v. McClellan* (U. S.) 127 Fed. 971, 975 (quoting *Peonage Cases* [U. S.] 123 Fed. 679).

CONDITION PRECEDENT.

A condition precedent is one that must happen or be performed before the estate dependent on it can arise or be enlarged. *Frank v. Stratford-Hancock* (Wyo.) 77 Pac. 134, 138.

CONDITION SUBSEQUENT.

A condition subsequent defeats the estate in case it does not happen or is not performed. *Frank v. Stratford-Hancock* (Wyo.) 77 Pac. 134, 138.

A deed for a consideration alleged to have been nominal, conveying land to a city to be used as a burying ground, and forever kept, used, and inclosed in a decent and substantial manner, and for no other use or purpose whatsoever, in which the grantors made no record of any intention that the land should ever, under any circumstances, revert to them or their representatives, was not made on a "condition subsequent." *Thornton v. City of Natchez* (U. S.) 129 Fed. 84, 86, 63 O. C. A. 526.

CONDITIONAL.

The word "conditional," as used in a lease for a term of years, reciting that it is subject to the conditional limitations herein stated, and stipulating in the following paragraph that the occupation of the premises by the tenant and his family as a strictly private dwelling apartment is a specific consideration for the granting of the lease, has reference to a situation, state, or external circumstances. *Schworer v. Connolly*, 88 N. Y. Supp. 818, 820, 44 Misc. Rep. 222.

Statements in letters, concerning a note given by the writer, that he would pay when he was able, that he expected a raise of salary, and that he had other indebtedness to which he felt he must give preference, do not render the promise to pay conditional, so as to prevent it from removing the bar of limitations. *Walker v. Freeman*, 70 N. E. 595, 598, 209 Ill. 17.

CONDITIONALLY PRIVILEGED.

A defamatory publication which is "conditionally privileged" occupies a middle ground; that is, the publication is privileged, provided it was actuated by a sense of duty growing out of the action, and provided it was not malicious. When the court finds that the publication is conditionally privileged, the effect of the holding is to cast upon the plaintiff the burden of proving that malice prompted the act; not merely malice which arises by implication of law, but malice in fact, otherwise denominated "actual malice." *Cranfill v. Hayden* (Tex.) 80 S. W. 609, 613.

CONDONATION.

If, after an offense has been committed, and the offended party has become possessed of knowledge of the offense and of the means of proving it, the offended party elects to forego a remedy which the law affords, he or she is said to have "condoned the offense." *Rogers v. Rogers* (N. J.) 68 Atl. 822, 824.

CONDUCT.

See "Estoppel by Conduct"; "Unprofessional Conduct."

CONDUCTOR.

A conductor of a train is the superior in authority and grade in every train crew, and has charge of the train and its operations. All the other members of the crew are under his control and subject to his orders, which they must obey. He is the representative of the company, is vested with all its authority over the train and its crew, and charged with all the duties and responsibilities which the company owes to its employes. He is vice principal of the company, and it is liable for his negligence when acting in his official capacity. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.) 82 S. W. 487, 488.

CONFER TITLE OF NOBILITY.

To confer a title of nobility is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary and the objection to it arises more from the privileges supposed to be attached than to the otherwise empty title or order. *Horst v. Moses*, 48 Ala. 129, 142.

CONFESSION.

See "Judgment by Confession."
Admission distinguished, see "Admission."

A confession is a person's admission or declaration of his agency or participation in a crime, and is restricted to admissions of guilt. The term "confession" is restricted to acknowledgment of guilt, and is not a mere equivalent of words or statements. A statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession. *Owens v. State*, 48 S. E. 21, 22, 23, 120 Ga. 296 (citing *People v. Parton*, 49 Cal. 632, 637; 1 Greenl. Ev. § 170; *Davis v. State*, 114 Ga. 104, 39 S. E. 906; *Simmons v. State*, 116 Ga. 583, 42 S. E. 779).

A confession is a voluntary acknowledgment of a person charged with a commission of crime that he is guilty of the offense. It is a voluntary declaration by a person charged with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts criminating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or admission of participation

in it. Offers by a person arrested for forging a check to settle the matter by paying the amount of the check, or a greater sum, were not confessions, so as to authorize an instruction on the subject of confessions, in a prosecution for the crime. *Michaels v. People*, 70 N. E. 747, 748, 208 Ill. 603 (citing 8 Cyc. 562; 6 Am. & Eng. Ency. Law [2d Ed.] 520; 1 Greenl. Ev. § 170; *Johnson v. People*, 197 Ill. 48, 64 N. E. 826).

CONFIDENTIAL COMMUNICATION.

"Confidential communication," as used in Code, § 4608, providing that no practicing physician shall be allowed to disclose any confidential communication intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office, is not to be restricted to the mere verbal statements made by the patient, but must be construed to include all knowledge or information acquired by the physician through his own observation or examination. In an action for injuries, an objection to a question put to the physician who had attended plaintiff as to whether he found plaintiff conscious or unconscious at the time he attended him, and whether plaintiff talked to persons in an intelligent way, was properly sustained. *Battis v. Chicago, R. I. & P. R. Co.* (Iowa) 100 N. W. 543, 545.

CONFIRMATION.

See "Final Confirmation."

CONFUSION OF GOODS.

"The doctrine relating to confusion of goods has no application to cattle and horses and things of a similar nature that may be readily identified." *McKnight v. United States* (U. S.) 130 Féd. 659, 666 (citing *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Clafin v. Beaver* [U. S.] 55 Fed. 576; *Carlton v. Davis*, 90 Mass. [8 Allen] 94; *Moore v. Bowman*, 47 N. H. 494; *Capron v. Porter*, 43 Conn. 383; *Brown v. Bacon*, 63 Tex. 595; *Drake on Attachment* [7th Ed.] § 199).

CONGRESS.

There is no such office as "Congress" known to the law. In ordinary parlance, where a candidate is elected as representative of the people of a district of a state to Congress, he is known and designated as "congressman," or a candidate for Congress while running; but in law there is no such office as Congress, nor can an election be held to elect a candidate for the office of Congress. *Allison v. State* (Tex.) 78 S. W. 1065.

CONNECTED WITH.

Appurtenant to synonymous, see "Appurtenant To."

In an action against an agent to recover moneys alleged to have been collected by him from a customer named, a counterclaim for commissions earned on sales made to such customer and alleged to have been withheld, under a custom between the parties by which the agent was authorized to pay his own commissions, is a proper subject of counterclaim, under Code Civ. Proc. § 501, subd. 1, as "connected with the subject of the action." *Benton v. Moore*, 87 N. Y. Supp. 717, 42 Misc. Rep. 660.

CONSENT.

"Consent" supposes a physical power to act, a moral power of acting, and a serious determination and a free use of powers. It is an act of reason accompanied with deliberation (*Bouvier, Law Dict.*). Though work on a highway done by the commissioner of highways is necessary, a town cannot be made liable therefor by confirmation or approval after the work is done, as that does not amount to consent, within *Laws 1899, p. 108, c. 84, § 10*, providing, if a highway shall be damaged or become unsafe, the commissioner of highways of the town may cause it to be immediately repaired, if consented to by the town board. *People ex rel. Graham v. Studwell*, 88 N. Y. Supp. 967, 969, 91 App. Div. 469.

Consent to the risk implies knowledge of the danger of the act to be performed and the performance of the act understandingly and without constraint. The essence of the matter is that the employé must thoroughly comprehend the risk, if it exceeds that ordinarily connected with such a task and freely accepted, instead of facing it reluctantly and under protest. He may be aware of the risk he encounters without assenting to it, because some coercive influence, such as fear of losing employment, controls him, and if he remains after complaining of the danger the risk is not assumed. *Dean v. St. Louis Woodenware Works (Mo.)* 80 S. W. 292, 296.

CONSEQUENCE.

Cause distinguished, see "Cause."

CONSEQUENTIAL DAMAGES.

Consequential damages are those which are not the direct and necessary consequences of the wrongful conduct of the defendant, but merely the natural results thereof. *Swain v. Tennessee Copper Co.*, 78 S. W. 93, 95, 111 Tenn. (3 Cates) 430; *Cole v. Ducktown Sulphur, Copper & Iron Co., Id.*

CONSIDERATION.

See "Adequate Consideration"; "Fair Consideration"; "Present Fair Consideration."

A consideration may be something beneficial to the promisor or disadvantageous to the promisee. A release of a legal right by the promisee is a sufficient consideration to support a contract. *Wm. Deering & Co. v. Veal (Ky.)* 78 S. W. 886, 887 (quoting *Bish. Contracts*, §§ 61-63).

CONSIGN.

"To consign" means to deliver into the care and control of another; to intrust or commit. A man cannot consign a thing to another by merely saying that he consigns it, any more than he can deliver it by mere words. *Ryttenberg v. Schefer (U. S.)* 131 Fed. 313, 321.

CONSOLIDATION.

"The natural meaning and inherent force of the word 'consolidation' are perfectly plain, although it is known that in some of the authorities the word is used loosely. It has its place in proceedings in equity or in admiralty, where several libels or petitions are by authority of the court combined in one, so that at the close only one decree is rendered." An order of the court directing that nine indictments against a defendant, charging the fraudulent use of the mails, shall be tried together and at the same time, is not a consolidation in the proper sense of the word. *Betts v. United States (U. S.)* 132 Fed. 228, 234.

Actions consolidated under Code Civ. Proc. § 1894, merged into one suit, and only a single judgment should be rendered settling the entire controversy. The consolidation of actions under this statute must be distinguished from what has been known for many years as the "consolidation rule," which was first devised and established by Lord Mansfield. Under that rule, where many cases were pending between the same parties in which the same issues were involved, one case was tried, and all proceedings in the other cases were stayed until after such trial. It must also be distinguished from the old practice in equity of consolidating equity cases. Under such practice, each case was decided upon its own pleadings and evidence. The consolidation in equity cases under this practice was practically consolidating them for the purpose of trial alone. *Handley v. Sprinkle (Mont.)* 77 Pac. 296-298.

CONSORTIUM.

See "Loss of Consortium."

CONSPICUOUS.

"Conspicuous" means "open to the view; catching the eye; easy to be seen; manifest; obvious to the sight; seen at a distance; exposed to the view; clearly visible; prominent and distinct." The word "conspicuous," as used in 2 Gen. St. N. J. p. 2672, § 138, authorizing railroad companies, by giving notice, to limit their responsibilities as carriers of baggage to \$100 for every 100 pounds of baggage, and declaring that a general notice of the limitation of such responsibility, placed in a conspicuous place at or in the receiving office of such companies, where baggage is usually received by them for transportation, required a railroad company to post the notice in the baggage room, so that naturally, under the general surrounding circumstances, it would be open to the view, obvious to the sight, and catch the eye of the passenger of ordinary care and observation, and be seen by him in the course of checking his luggage. *Williams v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 434, 436, 93 App. Div. 582 (quoting *Century Dict. Worcester, Dict.*).

CONSPIRACY.

A conspiracy is a combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind. *Erdman v. Mitchell*, 56 Atl. 327, 331, 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783.

A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Standard Oil Co. v. Doyle (Ky.)* 82 S. W. 271, 275.

A combination of two or more to do the same thing by the same means is a conspiracy. *Erdman v. Mitchell*, 56 Atl. 327, 331, 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783.

A conspiracy to violate Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], by causing false entries to be made in the books of a national bank by an officer or agent thereof, for the purpose of defrauding the bank or others or deceiving an agent appointed to examine the affairs of the bank, is one to commit an offense against the United States, within the meaning of section 5440 [U. S. Comp. St. 1901, p. 3676]. *Scott v. United States (U. S.)* 130 Fed. 429, 432.

CONSTITUTED BY THE ACT.

In Code Cr. Proc. § 444, providing that, on a trial for murder or manslaughter, if the act complained of is not proven to be the

cause of death, the defendant may be convicted of assault in any degree constituted by the act and warranted by the evidence, "constituted by the act" means that the assault must form a component part of the act, of the wound indisputably fatal. *People v. Schiavi*, 89 N. Y. Supp. 564, 568, 96 App. Div. 479.

CONSTITUTION.

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. *Atkinson v. Woodmansee (Kan.)* 74 Pac. 640, 644, 64 L. R. A. 325.

CONSTRUCTION.

See "Contemporaneous Construction."

CONSTRUCTIVE CONTRACT.

"A constructive contract is where duty defines it, instead of the contract defining the duty to be performed. Constructive contracts are fictions of law adopted to enforce the legal duties by actions of contract where no proper contract exists, express or implied." Plaintiff, defendant, and another were the sole owners of corporate stock. Certain negotiations conducted by defendant, who was acting for the other two owners of the stock, as well as for himself, resulted in a sale of the whole stock of the corporation, to be paid for in the stock of another corporation. In this negotiation defendant simply stipulated for a cash payment of a large sum of money to himself as a part of the consideration for his own stock, and paid no part thereof to his associates. He was liable to his associates severally under the doctrine of constructive contract. *Graham v. Cummings*, 57 Atl. 943, 949, 208 Pa. 516 (citing *Hertzog v. Hertzog*, 29 Pa. [5 Casey] 465).

CONSTRUCTIVE DELIVERY.

To establish a constructive delivery by a ship of goods deposited on the wharf, it is necessary for the carrier to show that he separated the goods from the general bulk of the cargo, designated them, and gave due notice to the consignees of the time and place of their deposit and a reasonable time for their removal. *The Titania (U. S.)* 131 Fed. 229.

CONSTRUCTIVE MALICE.

See "Implied Malice."

CONSTRUCTIVE NOTICE.

A corporation should be held to have constructive notice of only such facts as

have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents by the actual notice of such other facts as would naturally put the officer or agent upon inquiry. *Iowa Nat. Bank v. Sherman & Bratager* (S. D.) 97 N. W. 12, 15.

CONSTRUCTIVE PRESENCE.

A constructive presence at the commission of an offense, so as to make one an accessory, is such as would enable him to take part in aiding the escape of the perpetrator, or giving him information of approaching danger, if necessary. *Able v. Commonwealth*, 68 Ky. (5 Bush) 698, 703.

CONSTRUCTIVE TRUST.

Constructive trusts have no element of fraud in them, but the court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and in working out the equity of the complainant. The party guilty of the fraud is said in such cases to be a trustee *ex maleficio*, and will be decreed to hold the legal title for the use and benefit of the injured party, and to convey the same, when necessary for his protection, as when one has acquired the legal title to his property by unfair means. *Avery v. Stewart* (N. C.) 48 S. E. 775, 778.

CONSTRUE.

See "Strictly Construed."

CONTEMPORANEOUS CONSTRUCTION.

Contemporaneous construction is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of a department of the government, however long continued by successive officers, must yield to the positive language of the statute. If there be any ambiguity or doubt, then such a practice, begun early and continued long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. *Houghton v. Payne*, 24 Sup. Ct. 590, 593, 194 U. S. 88, 48 L. Ed. 888 (citing *Graham Case*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *Edwards v. Darby*, 25 U. S. [12 Wheat.] 206, 6 L. Ed. 303; *United States v. Temple*, 105 U. S. 97, 26 L. Ed. 967; *Swift & C. B. Co. v. United States*, 105 U. S. 691, 26 L. Ed. 1108; *Rugles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. Ed. 812).

CONTEMPT.

See "Judicial Contempt."

The power to punish for contempt is essentially a judicial power, except in the limited degree in which it inheres in legislative body. It can be exercised only by a tribunal possessing judicial functions. *State ex rel. Haughey v. Ryan*, 81 S. W. 435, 436, 182 Mo. 849.

Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court, do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt. *Cuyler v. Atlantic & N. C. R. Co.* (U. S.) 131 Fed. 95, 98; *In re Daniels*, Id.

The willful violation of an injunction by a party to the cause is a contempt of court, constituting a specific criminal offense. *Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co.* (U. S.) 129 Fed. 105, 106, 63 C. A. 607.

CONTEMPT PROCEEDING.

As criminal proceeding, see "Criminal Proceeding."

A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil, as well as criminal, actions, and also independently of any civil or criminal action. *Bessette v. W. B. Conkey Co.*, 24 Sup. Ct. 665, 666, 194 U. S. 324, 48 L. Ed. 997.

CONTEST.

See "Election Contest."

CONTINGENT ESTATE.

A future estate is contingent, while the person to whom or the event on which it is limited to take effect remains uncertain. *In re Ryder*, 89 N. Y. Supp. 460, 462, 43 Misc. Rep. 476.

The rule for determining whether an estate bestowed by a will is vested or contingent is that, where the time of division or payment is of the substance of the gift, the legacy is contingent; when time is mentioned only as a qualifying clause of the payment or division, then the legacy is vested;

or, in other words, legacies payable after the death of the testator are either vested or contingent, and when the testator annexes time to the payment only the legacy will be vested, but if of the gift itself it will be contingent. *Johnson v. Terry*, 36 South. 775, 776, 139 Ala. 614.

CONTINGENT REMAINDER.

See, also, "Vested Remainder."

"A contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious or uncertain event." Where testator's will provided that the widow should have the sole use of all the property during her life, save in case of her remarriage, when the estate was to be divided between her and her children, or the survivors of them, their heirs, or legal representatives, and on her death unmarried it was to be divided between the children or the survivors of them, the remainders were contingent. *Thompson v. Adams* (Ill.) 69 N. E. 1, 3, 205 Ill. 552 (citing 2 Bl. Comm. 168).

CONTINGENTLY.

The word "contingently," in Code Civ. Proc. § 2662, providing that a person entitled absolutely or contingently to administration may present to the surrogate court a petition praying for letters to himself, means a person to whom at the time the petition is filed letters would issue, if persons entitled thereto with priority did not take. *In re Ferrigan*, 87 N. Y. Supp. 16, 17, 92 App. Div. 376.

CONTINUANCE IN OFFICE.

Const. art. 6, § 25, declaring that the compensation of judges of the superior and circuit courts in Cook county shall not be changed during their continuance in office, refers to the term of office, and not to the individual, so that Laws 1901, p. 207, providing that judges of the circuit and superior courts of Cook county hereafter to be elected shall receive \$10,000 per year, instead of \$7,000, does not entitle a judge, elected after the passage of the act to complete the unexpired term of a judge elected before the passage of the act, to receive a salary of \$10,000. *Foreman v. People*, 71 N. E. 35, 37, 209 Ill. 567.

CONTINUED DESERTION.

A continued desertion for the space of three years, within the divorce law, is a desertion for three years consecutively. Distinct and separate intervals cannot be combined together to make out the period. *Gallard v. Gallard*, 23 Miss. 152, 153.

CONTINUING COVENANT.

A covenant to build within a given time is not a continuing covenant. A covenant to pay rent by installments, to keep the premises in repair, to keep them insured, to pay the taxes, to properly cultivate the land, and many others that indicate or necessarily imply the doing of the stipulated acts successively, or as often as occasion may require, are continuing covenants; but the covenant to repair or insure on or before a time certain or forthwith, to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants. *McGlynn v. Moore*, 25 Cal. 384, 395.

CONTINUING GUARANTY.

A continuing guaranty is defined to be a guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied. *White Sewing Mach. Co. v. Courtney*, 75 Pac. 296, 297, 141 Cal. 674.

CONTRABAND.

The right of property in market quotations is not "contraband," because it is susceptible of bad uses, as well as good; hence the right of property in market quotations, based on the transactions of an exchange, and the right to be protected in such property, are not affected by the fact that such quotations may be used for unlawful, as well as lawful, purposes. *Board of Trade of City of Chicago v. L. A. Kinsey Co.* (U. S.) 130 Fed. 507, 513.

CONTRACT.

See "Constructive Contract"; "Entire Contract"; "Founded Upon a Contract"; "Gaming Contract"; "Liberty of Contract"; "Maritime Contract"; "Vicinity Contract."

See "Shall be Contracted."

A contract is a voluntary agreement between two parties; the coming together of two minds by a common intent. *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, 767, 135 N. C. 682.

"A writing is not a contract, when it fails to express that on which the minds of the parties met, and courts freely exercise the power to correct mistakes when the proof leaves no doubt that the real contract was something else." *Wolfgram v. Town of Schoepke* (Wis.) 100 N. W. 1054, 1056.

An ordinary passenger ticket is not necessarily a "contract," within the scope of the

rule excluding oral evidence of the contents of a written instrument. *Coine v. Chicago & N. W. R. Co.*, 99 N. W. 134, 135, 123 Iowa, 458.

The word "contracts," as used in the law of Illinois relating to the Chicago City Railways, and providing that all deeds of transfer of rights, privileges, or franchises between railway corporations, or any two of them, and all contracts, stipulations, licenses, and undertakings made, entered into, or given, and as made or amended by and between the common council of the city and any one or more of the railway corporations respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of the city, etc., refers to the stipulated arrangements between the railway companies and the city as to the manner of occupancy of the streets. *Govin v. City of Chicago* (U. S.) 132 Fed. 848, 857.

The term "contract or other obligation," in Const. art. 13, § 4, providing that a mortgage, deed of trust, or other obligation by which a deed is secured shall for the purpose of taxation be treated as an interest in property, were inserted to cover any and all possible contracts of lien upon realty which the ingenuity of lawyers might attempt to devise to evade the constitutional requirement. *Bank of Woodland v. Pierce* (Cal.) 77 Pac. 1012, 1013.

CONTRACT IN WRITING.

See "Unconditional Contract in Writing"; "Written Contract."

CONTRACT OF CARRIAGE.

"A contract of carriage" is, in effect, that the carrier, in consideration of the payment of the rate demanded, will use all possible care and diligence in delivering the passenger safely and promptly at the place of destination. The utmost care is contracted for, and, while the carrier is not an insurer of the safety of the passenger, he does guaranty that the passenger shall receive the utmost care, and any failure to provide the same is a breach of his statutory duty, and of the duty imposed by the contract of carriage, and negligence, for which he is liable. *Tailon v. Mears*, 74 Pac. 421, 423, 29 Mont. 161.

CONTRACT OF INSURANCE.

All contracts of insurance, see "All."

CONTRACT OF SALE.

By statute, to the completion of a contract of sale four things are essential: (1) Parties legally capable of contracting; (2) their consent legally given; (3) a thing; and (4) a price. *Werner Sawmill Co. v. O'Shee*, 35 South. 919, 920, 111 La. 817.

A contract of sale involves an offer to buy or to sell, and an acceptance of that offer. An offer may be withdrawn before acceptance, and a bare offer is ordinarily held to be withdrawn, unless accepted immediately. The offer may be accompanied by a promise not to withdraw it within a specified time. In that case it may be accepted within the time specified before an actual withdrawal. The promise not to withdraw is without consideration and cannot be enforced. The power to withdraw an offer or retract a promise to keep such offer open is a valuable advantage, which may itself be the subject of sale, and an option contract is the sale and purchase of this advantage or right belonging to the owner of the property. *Patterson v. Farmington St. Ry. Co.*, 57 Atl. 853, 858, 76 Conn. 628.

An agreement to sell realty, "cash on delivery of deed, or one-half on time, if terms can be agreed on," is a mere option, and not a contract for a sale. *Wallace v. Figone* (Mo.) 81 S. W. 492, 493.

An agreement between two persons that one shall purchase land on joint account is not a "contract for sale of lands," within the statute of frauds. *Evans v. Green*, 23 Miss. 294, 295.

The term "contract," in Gen. St. 1902, § 4864, providing that all conditional contracts for the sale of personal property shall be in writing, describing the property, was not used as meaning the particular form of instrument by which a conditional sale might be made. An order given for the purchase of a cash register, signed and acknowledged by the buyer, stating the names of the parties to the transaction, the price, etc., and that the title was to remain in the seller until paid for, when acknowledged and recorded, constituted a sufficient contract within such section. *National Cash Register Co. v. Leeko*, 58 Atl. 967, 77 Conn. 276.

CONTRACTOR.

See "Independent Contractor."

Although in a general sense every person who enters into a contract may be called a "contractor," yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as the means by which it is accomplished. *Jahn's Adm'r v. Wm. H. McKnight & Co.* (Ky.) 78 S. W. 862, 863 (quoting *Shear. & R. Neg.* § 164).

CONTRIBUTORY NEGLIGENCE.

See "Free from Contributory Negligence"; "Plea of Contributory Negligence."

Assumption of risk distinguished, see "Assumption of Risk."

Contributory negligence is the want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. *Hone v. Mammoth Min. Co.*, 75 Pac. 381, 383, 27 Utah, 168 (citing 7 Am. & Eng. Enc. Law, p. 371).

Negligence of the plaintiff, to constitute contributory negligence, must be such negligence as directly and proximately contributes to the infliction of the injury. *Brister & Co. v. Illinois Cent. R. Co.* (Miss.) 36 South. 142, 144.

An employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them, if in his power to do so. *Neeley v. Southwestern Cotton Seed Oil Co.*, 75 Pac. 537, 541, 13 Okl. 356, 64 L. R. A. 145 (citing *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91, 95, 9 Sup. Ct. 16, 17, 32 L. Ed. 339).

An instruction which, while purporting to give a legal definition of contributory negligence, demands that such negligence shall be found the sole and direct cause of the accident, is incorrect. *Hanheide v. St. Louis Transit Co.*, 78 S. W. 820, 822, 104 Mo. App. 323.

CONTROL

The charter of a city, authorizing the council to "direct and control" the location of railroad tracks, does not include the power to authorize the construction of railroads and the exercise of the right of eminent domain. It merely vests in the council as part of the police power, to be exercised in providing for the public safety and convenience in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists. *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 529, 46 N. W. 75.

The words "control and direction," in Laws 1859, p. 359, c. 143, as amended by Laws 1889, p. 7, c. 7, providing that the free bridge over the Mohawk river between certain towns shall be under the control and direction of the commissioners of highways of the towns, were of no broader significance, with reference to the duties and powers of

the commissioners of highways of the two towns in question, than the words "care and superintendence" in the highway law, with reference to the duties and powers of commissioners of highways in the towns of the state. *Town of Palatine v. Canajoharie Water Supply Co.*, 86 N. Y. Supp. 412, 414, 90 App. Div. 548.

The words "limit and control," as used in Acts 1902, p. 420, c. 300, entitled "An act to limit and control the expenditure of money upon public highways" by a designated county, are sufficiently broad to cover a provision in the body of the act prohibiting the county commissioners from levying taxes on the assessable property of the county for the purpose of constructing, maintaining, and repairing any highway bridge or public road not in whole or in part within the county; and hence the act is not in conflict with Const. art. 3, § 29, providing that every law shall express but one subject, which shall be described in its title. *Queen Anne's County Com'rs v. Talbot County Com'rs* (Md.) 57 Atl. 1, 3.

CONTROVERSY.

See "Amount in Controversy."

An appeal lies to the federal Supreme Court, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], from a judgment of a Circuit Court of Appeals, entered on an appeal from a judgment of a court of bankruptcy, sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention, raising a distinct and separable issue, since the controversy may be regarded as one of those "controversies arising in bankruptcy proceedings," over which the Circuit Court of Appeals could, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], exercise appellate jurisdiction as in other cases. *Hewitt v. Berlin Mach. Works*, 24 Sup. Ct. 690, 691, 194 U. S. 296, 48 L. Ed. 986.

A claim for damage for the flowage of land by a milldam under the mill acts is not a "controversy concerning property," within the meaning of Const. art. 1, § 20, declaring that in civil suits and in controversies concerning property the party shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. *Ingram v. Maine Water Co.*, 57 Atl. 893, 894, 98 Me. 568.

CONVENTION.

"A convention, within the meaning of the statute relating to nominations [for public office], is an organized assembly of delegates or electors representing a political party or principle. Such a convention may name candidates for public offices to be filled by

any public election within this state. All nominations made by such conventions are required to be certified in the prescribed manner." A county central committee of a political party called a convention for a certain time and place, and a majority of the committee thereafter selected a building for holding it, of which all had notice. A minority of the committee selected another building. At the first place a convention was had, which was called to order by the chairman of the committee, and, being organized in the usual manner, proceeded to make the nominations provided for in the call. At the second place certain delegates, who did not attend the other convention, met, were called to order by a member of the committee, organized, and made nominations for the same offices. The first convention was the regular convention, and its nominees were entitled to have their names placed on the ballot as the nominees of the party. *State v. Metcalf* (S. D.) 100 N. W. 923, 925.

CONVERSION.

See "Equitable Conversion."

Conversion may be shown by the exercise of control over the property inconsistent with the right of the owner, and by excluding him from the possession, or depriving him of it. *McGonigle v. Victor H. J. Belle Isle Co.*, 71 N. E. 569, 571, 186 Mass. 310.

The word "conversion" means "detaining goods, so as to deprive the person entitled to the possession of them of his dominion over them." Where, in an action for conversion of certain stock, defendant's answer expressly denied plaintiff's title, and alleged defendant's possession of the stock and dividends, and its refusal to surrender them to plaintiff, and the court found that the defendant had converted such stock and dividends to its own use, the finding was a sufficient finding that defendant was in possession of the stock and dividends, and that it denied and acted in defiance of plaintiff's title. *Eureka County Bank v. Clarke* (U. S.) 130 Fed. 325, 328 (quoting *Burroughs v. Bayne*, 5 Hurl. & N. 296).

The word "conversion," as used in an indictment of an officer of a national bank, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], for misapplication of the funds or property of the bank, means the officer's misapplication of the funds or property of the bank by unlawfully and fraudulently converting the same to his own use. *United States v. Eastman* (U. S.) 132 Fed. 551, 553.

Delay.

Mere delay in the delivery of goods by a carrier does not constitute a conversion. *St. Louis Southwestern Ry. Co. of Texas v. Tyler Coffin Co.* (Tex.) 81 S. W. 826, 827.

Delay on the part of a carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value.—*Ryland & Rankin v. Chesapeake & O. R. Co.* (W. Va.) 46 S. E. 923, 924.

Trespass distinguished.

"The distinction between trespass and conversion is this: That trespass is an unlawful taking, as, for example, the unlawful removal of the property, while conversion is an unlawful taking or keeping, in the exercise, legally considered, of the right of ownership. A mere seizure or unlawful handling may amount to trespass, while conversion is usually characterized by a usurpation of ownership." *Montgomery Water Power Co. v. William A. Chapman & Co.*, 126 Fed. 68, 72, 61 C. C. A. 124 (citing *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Bigelow on Torts* [7th Ed.] 510).

CONVEY.

See "Sell and Convey."

As used in a constitutional provision that the real and personal property of a married woman shall remain her sole and separate estate, shall not be liable for any debts of her husband, and may be devised and bequeathed, and, with the written consent of her husband, conveyed by her, as if she were unmarried, the word "convey" includes gift, and a married woman may dispose of her property by gift without the consent of her husband, except in those cases where a written instrument or conveyance is required to make a valid gift. *Vann v. Edwards*, 47 S. E. 784, 787, 135 N. C. 661.

By statute the words "grant or convey" in a deed carry with them an implied warranty that the estate conveyed is at the time of the execution of the deed free from incumbrances, unless restrained by express terms contained therein. *Rotan v. Hays* (Tex.) 77 S. W. 654, 655.

CONVEY AND WARRANT.

The words of a grant, "convey and warrant," convey the fee, unless they are limited to a lesser estate by words found in the granting clause or in the habendum of the deed, if it contain an habendum. They may be used, however, in conveying a life estate or an estate for years, and words limiting the estate conveyed to an estate of the character of either of the two last mentioned are not inconsistent with such words of grant; and where there is language, either in the granting clause or in the habendum of the deed, limiting the estate conveyed by such granting words to one less in extent than a fee, such words of limitation will be given

effect. *Walker v. Shepard*, 71 N. E. 422, 428, 210 Ill. 100.

CONVEYANCE.

The terms "conveyed" and "conveyance" are used in several senses. In the strict legal sense, the latter term imports a transfer of legal title to land; but it is also habitually used by lawyers to denote any transfer of title, legal or equitable, and the last is also the popular sense of the term. *Adams v. Hopkins*, 77 Pac. 712, 719, 144 Cal. 19.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not a "conveyance" within Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387]. *National Cash Register Co. v. New Columbus Watch Co.* (U. S.) 129 Fed. 114, 116, 63 C. C. A. 616.

CONVICT.

A person confined in state's prison under a sentence of death is a "convict" within Laws 1889, p. 511, c. 382, § 40, authorizing the superintendent of state prisons to make regulations for record of photographs and other means of identifying each convict. *Molineux v. Collins*, 69 N. E. 727, 728, 177 N. Y. 395, 18 N. Y. Cr. R. 201, 65 L. R. A. 104.

COPY.

A correct photographic copy of an application for life insurance, reduced in size, but legible, attached to the policy, constituted a compliance with the Pennsylvania laws (Act May 11, 1881, P. L. p. 20), requiring insurance companies to attach a "copy" of the application to policies, where such application is referred to and made a part of the policy. *Arter v. Northwestern Mut. Life Ins. Co.* (U. S.) 130 Fed. 768, 769.

CORPORATE FRANCHISE.

Whenever a corporation is legally formed, the right to be and exist as such, and, as a corporation, to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power—a valuable right, which is generally known as the "corporate franchise." *Bank of California v. City & County of San Francisco*, 75 Pac. 832, 834, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130.

CORPORATE PURPOSE.

The construction and maintenance of a bridge outside of the territorial boundaries of

a city, the purpose of which is not to serve the convenience of its inhabitants, but the convenience of the inhabitants of an outlying district, and to promote the business and commercial interests of the city by increasing the trade of its business men, is not such a "corporate purpose" as will sustain the exercise of the power of taxation. *Manning v. City of Devils Lake* (N. D.) 99 N. W. 51, 53, 95 L. R. A. 187 (quoting 2 Dill. Mun. Corp. [4th Ed.] § 736).

CORPORATION.

See "Manufacturing Corporation"; "Mechanical Corporation"; "Moneyed Corporation"; "Municipal Corporation"; "Private Corporation"; "Public Corporation"; "Quasi Corporation"; "Railroad Corporation."

As citizen, see "Citizen."

As person, see "Person."

A "corporation" is the creature of the state, and every corporation owes its existence and its right to incorporate to express legislative enactment. *Felner v. Reiss*, 90 N. Y. Supp. 568, 571.

A "corporation" is an artificial being, invisible, intangible, and existing only in contemplation of law. In *State v. Topeka Water Co.*, 61 Kan. 547, 558, 60 Pac. 337, 341, it is said: "A corporation exists by the will of a sovereign power. To this superior authority it owes an allegiance which it cannot abjure." *Williams v. Metropolitan St. R. Co.* (Kan.) 74 Pac. 600, 602, 64 L. R. A. 794.

"A corporation is an entirety, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make him and the corporation one and the same person." Control of the property of a corporation is not in its stockholders. A majority of the stockholders control the election of its officers and agents, but the control of the company's property is in the corporation itself, and its officers and agents, who are intrusted with such control by virtue of the by-laws. *Ulmer v. Lime Rock R. Co.*, 57 Atl. 1001, 1007, 98 Me. 579, 66 L. R. A. 387 (citing *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Exchange Bank v. Macon Construction Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 687, 50 Am. Rep. 131; *Mor. Priv. Corp.* § 227).

"A corporation is a creature of law. It has no powers except those expressly granted or necessarily implied, and none can be implied except such as are necessary to the exercise and enjoyment of those expressly granted. Powers which are not thus granted or implied are defined." *Cumberland Telephone & Telegraph Co. v. City of Evansville* (U. S.) 127 Fed. 187, 191 (quoting *Tippencanoe*

County Com'rs v. Lafayette, M. & B. Ry. Co., 50 Ind. 85).

The courts hold that the general word "corporation" must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations and bodies politic and corporate. *Emes v. Fowler*, 89 N. Y. Supp. 685, 688, 43 Misc. Rep. 603 (citing *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661).

Road district.

A road district is not a corporation. *Custer County Bank v. Custer County* (S. D.) 100 N. W. 424, 426.

CORPUS DELICTI.

The phrase "corpus delicti," as used in criminal law, means the substance of the crime. *State v. Knapp*, 71 N. E. 705, 707, 70 Ohio St. 380.

COST.

See "Actual Cost."

COSTS.

All costs herein expended, see "All."

The word "costs," as used in Highway Law, § 92, Laws 1890, p. 1195, c. 568, providing that, in all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be paid by the town, has a well-defined significance, and is not used as synonymous with "expense," but must be taken to mean costs which are recoverable under the statute requiring the amount to be paid by the unsuccessful party to the successful party. In *re Peterson*, 87 N. Y. Supp. 1014, 1015, 94 App. Div. 143.

Costs are part of the judgment, as interest is to the principal, and the costs are to be paid by the party cast to the judgment creditor, who has paid them, without reference to any right which the clerk may originally have had, and without being subject to the plea of prescription which may be pleaded against the clerk. *State v. New Orleans Debenture Redemption Co.*, 36 South. 205, 206, 112 La. 1.

Attorney's fees.

Attorney's fees cannot be taxed as "costs" under Ballinger's Ann. Codes & St. § 5604, authorizing taxation of costs in partition suits, including fees of referee and other disbursements. *Legg v. Legg*, 75 Pac. 130, 132, 34 Wash. 132.

COSTS AND DISBURSEMENTS.

The term "costs and disbursements" has a settled and technical meaning, and signi-

fies the statutory costs and the disbursements taxable in favor of the prevailing party in a civil action. *Brown v. Fitcher*, 97 N. W. 416, 417, 91 Minn. 41.

COUNT.

A "count" in a civil procedure in common law is sometimes synonymous with the "declaration," its original signification; but it is now generally considered as a part of a declaration wherein the plaintiff sets forth a distinct cause of action. *Ryan v. Riddle* (Mo.) 82 S. W. 1117, 1118.

"All of the Codes require that the different causes of action should be separately stated; in other words, each must be set forth in a separate and distinct division of the complaint or petition in such a manner that each of these divisions might, if taken alone, be the substance of an independent action. In fact, the whole proceeding is the combining of several actions into one. At common law these separate divisions of the declaration were termed 'counts,' and that word is still used by text-writers and judges, although, with one or two exceptions, it is not authorized by the Codes; and it tends to produce confusion and misapprehension, since the common-law 'count' was substantially a very different thing from the 'cause of action' of the new procedure." *First Nat. Bank v. D. S. B. Johnson Land Mortg. Co.* (S. D.) 97 N. W. 743, 749 (quoting *Pom. Rem. & Rem.* § 442).

COUNTERCLAIM.

As answer, see "Answer."

The word "counterclaim," as used in Court Rules, div. 5, § 3 (26 Atl. viii), which provides that the withdrawal of an action after a cross-complaint or counterclaim has been filed therein shall not impair defendant's right to prosecute such counterclaim as fully as if the action had not been withdrawn, includes defenses pleaded by way of set-off, and defendant is entitled to a trial thereof notwithstanding plaintiff's withdrawal of his cause of action. *Boothe v. Armstrong*, 57 Atl. 173, 174, 76 Conn. 530.

A counterclaim, when established, must in some way qualify or defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, he cannot demand a judgment against the plaintiff on a note, bond, or covenant. *Meyer v. Quiggle*, 74 Pac. 40, 41, 140 Cal. 495 (citing *National Fire Ins. Co. v. McKay*, 21 N. Y. 191).

Code Civ. Proc. § 101, defines a counterclaim as one arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. In an action to recover a sum subscribed by defendant to aid plaintiff in holding a street fair in a city, defendant answered, and alleged that he paid to plaintiff a certain sum for the privilege of operating his usual place of business in the city, and for the purpose of feet frontage, which plaintiff unlawfully forced him to pay, under threats of prosecution; that, when defendant paid said amount to plaintiff, plaintiff expressly agreed that no further saloons or other places for the sale of intoxicating liquors, other than those established, would be allowed to do business in such neighborhood; that the midway of said street fair was situated near the place of business of defendant, which fact was held out as an inducement for him to pay said amount to the plaintiff, as plaintiff then told him no intoxicating liquors would be sold therein; that plaintiff breached his agreement, thereby damaging defendant in a specified sum, for which amount he asked judgment. The contract or transaction set forth in the answer was wholly different from that set forth in the petition, and was in no way connected therewith, and hence not a counterclaim. *Mullins v. South Omaha Street Fair Ass'n* (Neb.) 99 N. W. 521, 522.

COUNTY.

As person, see "Person."

As quasi corporation, see "Quasi Corporation."

The county is a municipal body, and as such is an arm or instrument of the state to carry out purposes of government; but it is not so highly organized as the municipal corporation proper (town or city), which is also an arm of the state government. *Grain-ger County v. State* (Tenn.) 80 S. W. 750, 754.

"A county is one of the territorial divisions of a state, created for public political purposes connected with the administration of the state government, and, being in its nature and objects a municipal corporation, the Legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organizations." A county may be required to contribute towards the repair of a bridge abutting in such county, although it is located mainly within the statutory jurisdiction of the adjoining county. *Dodge County v. Saunders County* (Neb.) 100 N. W. 934.

A county organization is created almost exclusively with a view to the policy of the

state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. *People v. Sours*, 74 Pac. 167, 172, 31 Colo. 369 (citing 1 Dill. Mun. Corp. § 23).

COUNTY BUSINESS.

The building of a county courthouse is "county business," within the meaning of Const. art. 4, § 22, forbidding the passage of local or special laws regulating county business. *Newton County Com'rs v. State*, 69 N. E. 442, 443, 161 Ind. 618.

COUNTY PHYSICIAN.

Neither the person appointed to care for the hospital and poorhouse, nor a graduate of medicine appointed to attend to the indigent sick, is by the law designated as a "county physician," and the term could certainly have no proper application to the superintendent of the hospital and poorhouse. *People v. Shearer*, 76 Pac. 813, 814, 143 Cal. 66.

COUNTY ROAD.

See "Legal County Road."

COUNTY SEAT.

The term "county seat," as used in a constitutional provision prohibiting the creation of a new county, so that its boundaries will approach nearer than 12 miles to the county seat of the county from which such new county may be taken, has reference to the legal county seat, and not a mere de facto one, resorted to as such by common consent and usage. *Presidio County v. Jeff Davis County* (Tex.) 77 S. W. 278, 279.

COURT.

In Tenement House Act, Laws 1901, c. 334, § 2, providing that a court is an open, unoccupied space, other than a yard, on the same lot with a tenement house, the word "court" refers to open, unoccupied spaces which are wholly or partially inclosed at the end, rather than to spaces which are open to free access from both the street and yard of the premises, and which, if regarded as courts within the meaning of the law, are to be considered as in reality two or double courts. *Gutting v. Brennan*, 89 N. Y. Supp. 574, 575, 97 App. Div. 23.

COURT (Of Justice).

See "Inferior Court of Record"; "Officer of the Court"; "Open Court"; "Order of Court."

The word "court," as used in a statute authorizing an appellate court, upon reversal, to render such judgment as the court below should have rendered, means the body organized to administer justice, and includes judge and jury. *Henne & Meyer v. Moultrie* (Tex.) 77 S. W. 607, 608.

The commission provided for by Acts 1893, p. 386, c. 231, § 13, providing that if a municipal corporation, after deciding to establish a municipal lighting plant, refuses to purchase a private plant operated by a corporation incorporated by the General Assembly, it may be compelled to do so; and a commission appointed by the superior court to adjudicate whether the plant should be purchased, and what the price and conditions of sale should be, is not a court, nor its members judges, within the meaning of the constitutional provision prescribing the mode by which judges are to be appointed. The functions of the commission are but quasi judicial. *Norwich Gas & Electric Co. v. City of Norwich*, 57 Atl. 746, 749, 76 Conn. 565 (citing *State v. New Haven & Northampton Co.*, 43 Conn. 351; *New Milford Water Co. v. Watson*, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57).

COVENANT.

See "Continuing Covenant."

CREATE.

Amend distinguished, see "Amend."
Designate distinguished, see "Designate."

CREDIBLE.

"The word 'credible,' as used in a statute in reference to the attesting witness to a will, means competent; that is to say, the requirement of the statute is that the attesting witnesses to a will must be such persons as are not disqualified by mental imbecility, interest, or crime from giving testimony in a court of justice." *Savage v. Bulger* (Ky.) 77 S. W. 717 (quoting *Fuller v. Fuller*, 83 Ky. 345).

In an instruction that if the jury believe that any witness has sworn falsely, or that the testimony of any witness is inconsistent with other testimony which they believe to be true, or consistent with the circumstances proven on the trial, then the testimony of one credible witness would be of more value than the evidence of such other witnesses, the term "credible" could mean nothing more than such witnesses as the

jury gave credit for telling the truth, and is used in the abstract, without reference to any particular witness, who testified in the case. *Territory v. Garcia* (N. M.) 75 Pac. 34, 35.

CREDIT.

See "Full Faith and Credit."
As property, see "Property."

The word "credit," as used in *Sess. Laws* 1903, c. 73, providing that the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return, means "net credit." *State v. Fleming* (Neb.) 97 N. W. 1063, 1067.

A policy of insurance issued by a fraternal benefit society is, after the death of the insured, and before proofs thereof are made to the society, a "credit," within the meaning of 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3398-3406, cl. 1, § 1, requiring all credits to be assessed and taxed, and Revenue Act 1898, cl. 6, § 292 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3520), defining "credits" to be every claim or demand for money due or to become due, and not including money on deposit, though the policy makes the furnishing of proofs of death a condition precedent to liability of the society thereon, and provides that the amount thereof shall not be due until 60 days after proof of death is filed. *Cooper v. Board of Review of Montgomery County*, 69 N. E. 878, 879, 207 Ill. 472, 64 L. R. A. 72.

CREDITOR.

The word "creditor," as used in a statute declaring unrecorded chattel mortgages to be void as against creditors and bona fide purchasers for value, means creditors having some sort of lien fixed by law or legal proceedings upon the particular property, and does not include a mere general creditor. *Eason v. Garrison* (Tex.) 82 S. W. 800, 801.

A surety on a note is a "creditor" of the maker, within Code 1896, § 2158, making a conveyance of substantially all of a debtor's property to one or more creditors equivalent to a general assignment. *Smith v. McCadden & McElwee*, 36 South. 376, 377, 138 Ala. 284.

The term "creditor" is defined by Civ. Code, § 2686, as follows: "Whenever one person by contract or by law is liable and bound to pay to another an amount of money certain or uncertain, the relation of debtor and creditor exists between them." This definition is much broader than is generally supposed, and would seem to include a liability for a wrongful conversion of property, for which trover would lie. "In a multitude of cases it has been repeatedly adjudicated that a party bound by a contract upon

which he may become liable for the payment of money, although his liability be contingent, is a debtor, within the meaning of a statute avoiding all grants made to hinder or delay creditors. A surety is a creditor from the time the application is entered into or the bond signed, and the person whose claim arises from a tort, such as libel or slander, is a creditor." A plaintiff in a trover case is a creditor within the protection of a statute against fraudulent conveyances, even before judgment, and a surety on the defendant's bail bond in a trover case, who pays the judgment recovered by plaintiff, is also a creditor. *Banks v. McCandless*, 47 S. E. 332, 335, 119 Ga. 793.

A petitioner for condemnation is not in any sense a purchaser or creditor within the purview of the registration statutes. *Atlanta, K. & N. R. Co. v. Southern R. Co.* (U. S.) 131 Fed. 657, 666.

The holder of a claim under a bond, to which a testator was a party, which arose during his lifetime, is a "creditor" within the meaning of Gen. Laws. c. 215, § 2, providing that claims of creditors against estates of deceased persons must be presented to the executor within the period of six months from the date of the first advertisement of the notice of the executor's qualification. *Municipal Court v. Whaley* (B. L.) 57 Atl. 1061.

CREDITORS OF THE MORTGAGOR.

"Creditors of the mortgagor" does not mean any more than is expressed. It does not mean creditors of a third party to whom the mortgagor afterwards conveys the property, even if the third party assumes and agrees to pay the mortgage debt. The words of the statute are not to be extended by implication to other classes of persons than those named. *Talcott v. Hurlbert*, 76 Pac. 647, 649, 143 Cal. 4.

CRIME.

"A crime consists in something more than the commission of an act; there must be a union of act and intention." Hence a statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession of the commission of a crime; for one may admit that he took a horse from a stable of another, and at the same time explain that he purchased the horse from a person named, claiming to own the horse, and that there was no criminal intent on his part. *Owens v. State*, 48 S. E. 21, 23, 120 Ga. 296.

One who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law is not guilty of a "crime" under Act Aug. 2, 1866, 24 Stat. 209, c. 840 [U. S. Comp.

St. 1901, p. 2228], prescribing a penalty for such an act. *Schick v. United States*, 24 Sup. Ct. 826, 827, 195 U. S. 65, 49 L. Ed. —.

Fraud is in its essential elements a crime. *Prahar v. Tousey*, 87 N. Y. Supp. 845, 847, 93 App. Div. 507.

Sunday baseball.

The playing of baseball on Sunday is not in itself a "crime," but is only such when it interrupts the repose and religious liberty of the community. *People ex rel. Poole v. Hesterberg*, 89 N. Y. Supp. 498, 499, 43 Misc. Rep. 510.

CRIMINAL.

A prisoner under sentence of death is a "criminal" in the eye of the law so long as the sentence remains in force, because he has been adjudged guilty of crime. *Molineux v. Collins*, 69 N. E. 727, 728, 177 N. Y. 395, 18 N. Y. Cr. R. 201, 65 L. R. A. 104.

CRIMINAL ORDINANCE.

An ordinance relating to juvenile vagrants, and authorizing the commitment of such persons to the House of Good Shepherd, is not a criminal ordinance. It is a mere administrative police regulation, designed as a preventative against wrongdoing, and not as a punishment therefor. *State v. Marmouget*, 35 South. 529, 533, 111 La. 225.

CRIMINAL PROCEEDING

A proceeding under an ordinance relating to juvenile vagrants, and authorizing the commitment of such persons to the House of Good Shepherd, is not a criminal proceeding. *State v. Marmouget*, 35 South. 529, 533, 111 La. 225.

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remediable or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt. *Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co.* (U. S.) 129 Fed. 105, 106, 63 C. C. A. 607.

Proceedings under an act providing for the condemnation and summary destruction of liquor illegally kept for sale are civil in their nature, and not criminal. *Kirkland v. State* (Ark.) 78 S. W. 770, 773, 65 L. R. A. 76.

"A proceeding under our law to expel or exclude aliens is not a criminal prosecution or proceeding." Where, in proceedings for the exclusion of Chinese aliens, the only evidence of citizenship offered was unsatisfactory testimony of one witness that he was an uncle of defendants and that they

were both born in San Francisco, and defendants refused to be sworn in their own behalf, a finding against the aliens' right to remain was not erroneous. *United States v. Moy You* (U. S.) 126 Fed. 226 (citing, in support of definition, *Fong Yue Ting v. United States*, 149 U. S. 730, 13 Sup. Ct. 1016, 37 L. Ed. 905; *United States v. Lee Huen* [U. S.] 118 Fed. 456).

CROSS-BILL

The office of a cross-bill is to obtain affirmative relief upon the case stated in the bill, not to obtain relief with regard to other matters. A cross-bill is a defense to the original bill, or a proceeding necessary to a complete determination of a matter already in litigation. A bill by a testamentary trustee and beneficiary against his co-trustees and cestuis que trust sought to have certain portions of the trust estate divided from the residue and held separately for certain cestuis que trust, claiming that it would be for the benefit of the parties interested. The answer, besides joining issue on the propositions of law and fact, assumed the character of a cross-bill, and, alleging misbehavior and incapacity of complainant, prayed that he be removed. In so far as the answer sought affirmative relief it should be stricken out, because it introduced an issue not affecting nor depending on the question whether complainant was entitled to relief, and only tended to complication and delay. *Paine v. Sackett*, 57 Atl. 376, 377, 25 R. I. 561 (quoting *Story, Eq. Pl. § 399*; 5 *Ency. Pl. & Pr.* 641).

CROSSING.

Any road crossing, see "Any."

"What is the crossing of a railway right of way? Not alone, we think, the boards or other appliances which must be laid between the rails and adjacent to them on the outside, and cattle guards and wing fences to keep cattle from straying on the right of way beyond the crossing; but such structures, too, as will enable a wagon or team to go safely and conveniently on the track. This is said to be the legal definition of the word 'crossing' in an authoritative treatise on railroad law, and respectable authorities are cited in support of the text. 3 *Elliott, Railways*, § 1097. In contemplation of law, a crossing is not only that portion of the earth's surface immediately by or between the rails of a track, but the approaches on both sides of the track; and it is incumbent on a railroad company to construct approaches needed to make a crossing usable, and so courts of authority have decided." *Birlew v. St. Louis & S. F. R. Co.*, 79 S. W. 490, 491, 104 Mo. App. 561.

Code, § 2063, provides that a railway company desiring to cross another at grade

may be compelled by the other to interlock the crossing; section 2065 provides for the modification of any decree relating to the expense of interlocking crossings; and section 2064 provides that, on proceedings under section 2063, not less than one-third of the cost shall be apportioned to either road. The word "crossing," as used in the statute, is not the actual crossing, but includes the interlocking. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 99 N. W. 181, 182, 123 Iowa, 543.

A finding that plaintiff, when struck by a team, was "crossing the junction" of two streets, as alleged in the complaint, is authorized, although he was on the edge of the sidewalk, and for two or three seconds had stopped to look across. *Drew v. Farnsworth*, 71 N. E. 783, 784, 186 Mass. 365.

CRUEL AND INHUMAN TREATMENT.

Threats evidently intended to be executed, and so understood by the injured party to the marriage contract, inducing in the mind of the latter a reasonable apprehension of danger to life or health, rendering it extremely difficult to discharge the duties of the domestic relation, constitute such "cruel and inhuman treatment" as to justify a decree of divorce in a suit instituted for that purpose. *Benfield v. Benfield*, 74 Pac. 495, 44 Or. 94.

Where a husband had repeatedly falsely charged that his wife was unchaste, and that he was not the father of their youngest child, which charges had so injured the wife's health as to imperil her life, they constituted such cruel and inhuman treatment as to entitle her to a divorce. *Turner v. Turner*, 97 N. W. 997, 122 Iowa, 113.

The habitual refusal of a wife to accede to her husband's request for sexual intercourse is not "cruel treatment" of such a nature as to render their living together insupportable, within the meaning of the divorce statute, where the husband is old, his virility diminished, and amorous desires feeble. *Varner v. Varner* (Tex.) 80 S. W. 388.

CRUEL PUNISHMENT.

Assessing a penalty at 30 years' confinement in a penitentiary for burglary of a private residence at night is not cruel or excessive punishment, where the Legislature has provided that punishment for burglary at night shall not be less than 5 years. *Handy v. State* (Tex.) 80 S. W. 528.

CRUELTY.

"What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied by bodily injury,

either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm), do not amount to legal cruelty." *Levin v. Levin*, 46 S. E. 945, 946, 68 S. C. 123 (quoting *Evans v. Evans*, 1 Hagg. Const. 39).

CUMBERSOME PACKAGE.

A cage $2\frac{1}{2}$ feet high and 2 feet square is a "cumbersome package," within a rule of a street car company prohibiting passengers from carrying cumbersome packages into the cars. *Ray v. United Traction Co.*, 89 N. Y. Supp. 49, 51, 96 App. Div. 48.

CURE.

See "Gall Cure."

CURRENT MONEY.

See "Lawful Current Money."

CURRENT MONEY OF THE UNITED STATES.

The expression "current money of the United States" covers any kind of currency of the United States which is guaranteed by the government and passes as money. *Butler v. State (Tex.)* 81 S. W. 743, 744.

CURTESY.

Minor's Institutes, vol. 2, p. 103, thus defines "curtesy": When a man takes a wife seised during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue born alive, and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy, and the requisites of an estate by the curtesy are marriage, seisin of the wife, birth of issue alive, and death of the wife. *Dozier v. Tolson*, 79 S. W. 420, 421, 180 Mo. 546.

To curtesy there were four requisites: (1) Marriage; (2) seisin of wife during coverture; (3) birth of a child; (4) death of the wife. Decedent left, him surviving, his wife and four children. The latter conveyed to the widow a life estate in the real estate belonging to their deceased father. One of such children died prior to the widow, leaving a husband and children. On the widow's death the husband was entitled to an estate by the curtesy in two-thirds of the interest of the property in which his wife had seisin at the time of the death of her father. *Valentine v. Hutchinson*, 88 N. Y. Supp. 862, 963, 43 Misc. Rep. 314.

CUSTODY.

"Custody" means a keeping, guarding, care, watch, inspection, preservation, or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. *State v. Coffin (Idaho)* 74 Pac. 962, 968.

A person in prison under a conviction by a state court on an indictment charging him with being accessory to a murder, and pending an appeal from such conviction, is not "in custody" in violation of the Constitution or of a law or treaty of the United States. *Ex parte Powers (U. S.)* 129 Fed. 985, 986.

DAMAGE—DAMAGES.

See "Actual Damages"; "Consequential Damages"; "General Damages"; "Gross Damages"; "Nominal Damages"; "Nonpecuniary Damages"; "Pecuniary Damages"; "Punitive Damages"; "Special Damages."

All damages, see "All."

The word "damage," as used in Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, means every loss or diminution of what is a man's own, occasioned by the fault of another, whether this result directly to the thing owned, or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto—that is, if an injury not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted—then such property may be said to be damaged. A property owner is entitled to recover from a railroad which constructs its yards so near plaintiff's residence as that the noise, smoke, cinders, and gas from the operation by defendant of its locomotives injuriously affects the plaintiff's property. *Missouri, K. & T. Ry. Co. of Texas v. Calkins (Tex.)* 79 S. W. 852, 853.

The words "or damaged," as used in a constitutional provision that property shall not be taken or damaged for public use without just compensation, do not entitle a property owner to an injunction to prevent the improvement of a street until mere consequential damages to his property are ascertained and paid. *Clemens v. Connecticut Mut. Life Ins. Co. (Mo.)* 82 S. W. 1, 3.

"While in some cases the profits to be accounted for are spoken of as damages, yet

in no case that has been presented is it held that damages, as distinct from or additional to profits, can be decreed in equity in a copyright case, as in patent causes. While the word 'damages' is used in decrees, it is used synonymously with 'profits.' Confusion can be avoided by omitting the word 'damages,' since the word 'profits' is more accurate, and sufficient." *Social Register Ass'n v. Murphy* (U. S.) 129 Fed. 148.

The damages which are described in Rev. Code 1899, § 4978, declaring that for the breach of an obligation arising from contract the measure of damages, except when otherwise expressly provided by the code, is the amount which will compensate the party aggrieved for all the detriment approximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, are the damages which are the natural consequences of a breach of contract, and the statute authorizes compensation for all detriment which follows as a natural and proximate consequence of the breach, and prohibits a recovery for damages which are not natural and proximate consequences. In an action for damages for the breach of a contract to thresh grain, the loss of grain by exposure to storms is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery, in the absence of any special or exceptional circumstances. *Hayes v. Cooley* (N. D.) 100 N. W. 250, 251.

DANGER.

See "Seeming Danger."

DANGEROUS MACHINERY.

Machinery, or parts of machinery, is or are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. It cannot be said as a matter of law that a conveyor, consisting of an endless chain with metallic pan-shaped shelves about every 13 feet, moving about a foot a second, used for carrying tools from one floor to another of a factory, is not a "dangerous machine," within Laws 1897, p. 480, c. 475, § 81, providing that children under 16 years of age shall not be permitted to assist in operating dangerous machines of any kind. *Gallenkamp v. Garvin Mach. Co.*, 86 N. Y. Supp. 378, 380, 91 App. Div. 141.

DAY.

The term "three days," in Const. art. 4, § 12, providing that if any bill presented to the Governor is not returned to the house in which it originated within three days, Sundays excepted, it shall become a law, was not employed to denote in all cases three calendar days. It denotes a period which

cannot end except upon a day when the house to which the provision refers is or has been in session. *State v. Town of South Norwalk*, 58 Atl. 759, 760, 77 Conn. 257.

DE BENE ESSE.

See "Appearance De Bene Esse."

The right of an examination de bene esse should not be extended beyond the cases of a single witness, the age of 70, and dangerous illness to a prisoner charged with a capital felony. *Anonymous*, 19 Ves. 320. See, also, *Abraham v. Newton*, 8 Bing. 274; *Brown v. Southworth* (N. Y.) 9 Paige, 351; *Hall v. Stout*, 4 Del. Ch. 269, 273.

The commission to take the testimony of a nonresident witness cannot issue at the instance of the defendant in a criminal case. *State v. Fulford*, 33 La. Ann. 679, 684; *State v. Fahey*, 35 La. Ann. 9, 11; *Ex parte Harkins*, 6 Ala. 63, 64, 41 Am. Dec. 38.

A deposition de bene esse relating to a criminal charge under an order of the General Sessions previous to any indictment found in that court or sent there for trial is extrajudicial and void. *People v. Restell* (N. Y.) 3 Hill, 289, 294.

The jurisdiction which courts of equity exercise to perpetuate testimony is open to great objections: First, it leads to a trial on written depositions, which is much less favorable to the cause of truth than the viva voce examination of witnesses. But what is still more important, inasmuch as those written depositions can never be used until after the death of the witnesses, and are not indeed published till after the death of the witnesses, it follows, whatever perjury may have been committed in those depositions, it must necessarily go unpunished. And this testimony has therefore this infirmity: that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not entertain bills to perpetuate testimony, generally, for the purpose of being used upon future occasion, unless where it is absolutely necessary to prevent a failure of justice. If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained; but if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in possession), these courts of equity will entertain such a suit, for otherwise the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event. It is therefore ground of demurrer to a bill

to perpetuate testimony, generally, that it is not alleged by the plaintiff that the matter in question cannot be made by him the subject of present judicial investigation; but courts of equity do not merely entertain jurisdiction to take or preserve testimony, generally, to be used on a future occasion, where no present action can be brought, but also to take and preserve testimony, in special cases, in aid of a trial at law, where the subject admits of present investigation. At law, no commission to examine witnesses, who are abroad, for the purpose of being used at the trial, can go without the consent of the adverse party. Courts of equity will, upon a bill filed, grant such commission without the consent of the adverse party. So courts of equity will entertain a bill to preserve the testimony of aged and infirm witnesses, to be used at the trial at law, if they are likely to die before the time of trial can arrive; and will even entertain such a bill to preserve the testimony of a witness who is neither aged nor infirm, if he happen to be the single witness to support the case. *Angell v. Angell*, 1 Sim. & S. 83, 89.

To entitle a party to maintain a bill to take testimony *de bene esse*, plaintiff must aver: First, that there is a suit pending in which the testimony of the witnesses named will be material; second, that the suit is in such condition that the depositions cannot be taken in the ordinary methods prescribed by law, and that the aid of the court of equity is necessary to perpetuate the testimony; third, the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined, that the court may see that they are material to the controversy; fourth, the necessity for taking the testimony, and the danger that it may be lost by delay. *Richter v. Jerome* (U. S.) 25 Fed. 679, 680.

DE FACTO.

An "officer *de facto*" is "one who acts under color of title, which color can only be given by a power having authority to fill the office." Village Law, Laws 1897, p. 386, c. 414, § 68, provides that the board of water commissioners shall be appointed by the board of trustees, and section 43 provides that certain offices, not including water commissioners, shall be elective and the rest appointive, except that the offices of clerk and street commissioner may be made elective by adoption of a proposition to that effect. A village adopted a proposition to make the office of water commissioner elective, and elected a water commissioner, who assumed to act as such. Such commissioner did not hold office under color of title, so as to make him an officer *de facto*. *Village of Canaseraga v. Green*, 88 N. Y. Supp. 539, 542 (quoting *People v. Albertson* [N. Y.] 8 How. Prac. 363).

DE FACTO DISSOLUTION.

A "de facto dissolution" of a corporation means that dissolution which takes place in substance and in fact, in the case of corporations organized for pecuniary gain, when the corporation, by reason of insolvency, or for other reason, suspends all its operations and goes into liquidation. *Yoree v. Home Town Mut. Ins. Co. of Warrensburg (Mo.)* 79 S. W. 175, 176, 178.

DEADLY WEAPON.

A knife having a blade $2\frac{5}{8}$ inches long is a deadly weapon. *Baker v. State (Tex.)* 81 S. W. 1215, 1216.

A penknife may or may not be a deadly weapon. If the weapon is such that from the manner of its use it is likely to produce death, it is of course a deadly weapon. *State v. Roan*, 97 N. W. 997, 998, 122 Iowa, 136.

A heavy wooden stick is not *ex vi termini* a deadly weapon or a deadly instrument, within Pen. Code, § 245, subjecting to punishment every person committing an assault with a deadly weapon. *People v. Perales*, 75 Pac. 170, 171, 141 Cal. 581.

A pistol is a deadly weapon with which an aggravated assault may be committed. *Pace v. State (Tex.)* 79 S. W. 531, 533.

An instruction defining a "deadly weapon" to be a gun within carrying distance is erroneous when applied to a state of facts which show that defendant's gun was loaded with squirrel shot, and that at the time of the shooting the parties were from 125 to 200 yards apart, it not being possible that a serious injury could have been inflicted by the discharge of the defendant's gun at such a distance from the party alleged to have been assaulted. *Scott v. State (Tex.)* 81 S. W. 952, 953.

DEATH.

Accidental death, see "Accident—Accidental."

DEATH RESULTING FROM THE WOUND.

Disease brought about as the result of a wound, even though not the necessary or probable result, yet if it is the natural result of the wound, and not of an independent cause, is properly attributed to the wound; and death resulting from the disease is a "death resulting from the wound," even though the wound was not in its nature mortal or even dangerous. Even though the wound results in disease and death through the negligence of the injured persons in failing to take ordinary and reasonable precautions to avoid the possible consequence, the death is the result of the wound. *Delaney v.*

Modern Acc. Club, 97 N. W. 91, 93, 121 Iowa, 528, 63 L. R. A. 603.

DEBT.

In a broad and general sense, a debt is whatever one owes. In a purely technical sense, it is that for which an action of debt will lie—a sum of money due by certain and express agreement. A debt is not a contract, but it may be the result of a contract. *Hornbeck v. State* (Ind.) 71 N. E. 916, 917.

The term "debt," in Rev. Codes 1899, § 5352, subd. 6, provides that the plaintiff may have the property of the defendant attached when the debt upon which the action is commenced was incurred for property obtained under false pretenses, means a debt which has been assented to by the defendant, and an attachment cannot be had in an action to recover damages for tort. *Sonnesyn v. Akin*, 97 N. W. 557, 12 N. D. 227.

The word "debt," in Laws 1893, p. 200, c. 100, authorizing executors and administrators to compromise or compound any debt or claim owing by the estate of their testator or intestate, includes every claim and demand on which a judgment for a sum of money, or directing the payment of a sum of money, could be recovered in an action. In *re Gilman's Estate*, 87 N. Y. Supp. 128, 129, 92 App. Div. 462.

The word "debt," in Gen. Laws 1896, c. 260, § 1, allowing a citation to any person imprisoned for debt, is limited in its scope by section 10, which provides that no person who shall be committed on execution in any action of trover or detinue, or for any malicious injury to the person, health, or reputation of the plaintiff in such suit, shall be deemed to be within section 1. *Taylor v. Bliss* (R. I.) 57 Atl. 939.

The term "debt" is defined in Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], to include any debt, demand, or claim provable in bankruptcy. Prior to the filing of an involuntary bankruptcy petition the bankrupt made an assignment of his claim on insurance policies, constituting his sole assets, and the assignee rendered valuable services in attempting to collect the claims. On a trustee in bankruptcy being appointed, the assignee turned over to him the policies, with all proofs and claims, subject to a lien for allowances for the expenses incurred, and the trustee in bankruptcy subsequently settled the claims with the insurance companies. The claim of the assignee for expenses and services was not a debt. In *re Levitt* (U. S.) 126 Fed. 889, 891.

"Debt" is defined as a sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease,

where the amount is fixed and specific, and does not depend on any subsequent valuation to settle it. 3 Bl. Com. 154. Since the separate property of a married woman residing in Florida, under the laws of that state, is liable in equity for her business obligations, where she is engaged in business on her own account, though not a free trader, such obligations constitute "debts" within Bankr. Law, § 1 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), declaring the term "debt" to include any debt, demand, or claim provable in bankruptcy, and section 63 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), declaring that debts of a bankrupt may be proved and allowed against his estate which are founded on an open account, or on a contract, express or implied. *MacDonald v. Tefft-Weller Co.* (U. S.) 128 Fed. 381, 385, 63 C. C. A. 123, 65 L. R. A. 106.

The words "debt or debts," as used in a provision in a contract between a life insurance society and an agent to the effect that the society may offset against any claims for commissions under the contract any debt or debts due at any time by the agent to the society, apply only to such debts as arise out of the relation created by the contract, and do not entitle the society to offset against renewal premiums due thereunder advances made to the agent after the relation had ceased and the agent's rights under the contract had been assigned to a third person, of which the society had notice. *Campbell v. Equitable Life Assur. Soc.* (U. S.) 130 Fed. 786, 787.

DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

An oral agreement whereby one of the parties agrees with the other to pay his debt to a third person is not invalid as a promise to answer for the "debt, default, or miscarriage of another." *Fosha v. Prosser* (Wis.) 97 N. W. 924, 926.

DEBT DUE IN THE SAME RIGHT.

A debt is considered as "due in the same right" as one sued on when the plaintiff can sue, and the defendant be sued, in their own names, without specifying any representative character, and the party to the suit has a lien upon, or a legal right to the application or distribution of, the fund when collected. *McGehee v. Harrison*, 51 Ala. 522, 524.

DEBT DUE OR TO BECOME DUE.

The "debts due or to become due," under Rev. St. 1898, § 2768, relate to such as the garnishee owes absolutely, and have been construed to cover debts which are an absolute liability, though payable at some future date. *Mundt v. Shabow* (Wis.) 97 N. W. 897 (citing *Smith v. Davis*, 1 Wis. 447, 60 Am. Dec. 390; *Bishop v. Young*, 17 Wis. 46,

47; *Foster v. Singer*, 69 Wis. 392, 34 N. W. 395, 2 Am. St. Rep. 745; *Vollmer v. Chicago & N. W. Ry. Co.*, 86 Wis. 305, 56 N. W. 919; *Evans v. Rector*, 107 Wis. 286, 83 N. W. 292).

DEBT DUE TO THE PUBLIC.

Where a county treasurer deposited county funds in an unincorporated bank, the debts are, upon the death of the banker and the insolvency of his estate, debts due the public, within the meaning of a statute providing that such debts shall be paid in full before other debts. *Lockwood v. Lockwood* (S. C.) 47 S. E. 441.

DEBT INCURRED FOR AN IMPROVEMENT OF THE HOMESTEAD.

Where a building association, in loaning money to an individual, advanced part of the loan for a purpose other than for the improvement of the debtor's homestead, and held the balance until a building erected by the debtor was practically completed, when for its own protection it required releases of mechanics' liens and distributed the money to the contractor and subcontractor, the debt so created was not one incurred for an improvement of the homestead, within the meaning of the law making such debts first liens on property. *Steger v. Traveling Men's Building & Loan Ass'n*, 70 N. E. 236, 240, 208 Ill. 236, 100 Am. St. Rep. 225.

DEBTOR.

See "Solvent Debtor."

DECEASED PERSON.

See "Estate of Deceased Person."

DECEIT.

"Deceit," in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury, and fraudulent misrepresentations by which one man deceives another to the injury of the latter, are deceit. Where a person is induced to change her status from that of an unmarried to that of a married woman, with all of the duties and obligations pertaining to the changed relationship, if this result is accomplished by deceit, she has, within the law, been deceived; she has been induced to do that which, but for the false practice, she would not have done, and has been led to change her position in most vital respects—respects which may affect her financially, as certainly as they affect her social and domestic status. *People v. Chadwick*, 76 Pac. 884, 886, 143 Cal. 116 (citing *Anderson*, Law Dict.).

DECISION.

See "Final Decision."

The term "decision," in *Burns' Ann. St. 1901*, § 568, authorizing a new trial to be granted on the ground that the verdict or "decision" is not sustained by a sufficient evidence, necessarily embraces a general finding when the case is tried by the court and includes a special finding. *Wolverton v. Wolverton* (Ind.) 71 N. E. 123, 125.

DECISION AGAINST LAW.

The expression "decision against law," in *Code Civ. Proc.* § 657, providing that a new trial may be granted on certain grounds, among others, that the verdict is against the law, includes a case where the decision is based on findings which do not determine all the material issues of fact raised by the pleading. *Hamilton v. Murray*, 74 Pac. 75, 76, 29 Mont. 80 (citing *Knight v. Roche*, 56 Cal. 15).

DECISION AND DECREE ALLOWING A FINAL ACCOUNT.

A decree in a probate proceeding, reading, "It is ordered, adjudged, and decreed that the said final account of said administrator be, and the same is, settled, allowed, and affirmed," is a "decision and decree allowing a final account" of an administrator, within *Comp. Laws 1900*, § 3041, which authorizes an appeal from such a decision and decree. *Bowman v. Bowman* (Nev.) 76 Pac. 634, 636.

DEDICATION.

Land is held to be dedicated when it is set apart by the owner for a public use. A dedication may be either express or implied. It is express when there is an express manifestation on the part of the owner of his purpose to devote the land to the particular public use, as in the case of a grant evidenced by writing. It is implied when the acts and conduct of the owner clearly manifest an intention on his part to devote the land to the public use. *Culmer v. Salt Lake City*, 75 Pac. 620, 621, 27 Utah, 252; *Utah Stove & Hardware Co. v. Same*, Id. (citing *Schettler v. Lynch*, 23 Utah, 305, 313, 64 Pac. 955).

It is a well-settled doctrine that where the owner of land, which has been laid off, mapped, and platted into blocks, lots, and streets as an addition to a city by a map placed on the public records, sells and conveys the lots or blocks by deeds referring to the map in the description thereof, it constitutes dedication to the public of such streets, and the rights in such streets become thereby vested in such purchasers and in

the public. *City of Corsicana v. Anderson* (Tex.) 78 S. W. 261, 263.

"Dedication is the deliberate act by which the owner of real property, without remuneration, devotes the fee or an easement therein to the use of the public." Where a city, with power to purchase and hold real estate for the use of the city, purchases land for a valuable consideration, it takes an absolute title, though the deed recites that it is understood that the premises are deeded to the city for city hall purposes only. *City of Huron v. Wilcox* (S. D.) 98 N. W. 88, 89.

A sale of lots by reference to a plat constitutes a good dedication, even if the dedication by the plat itself has been incomplete. *Kansas City & N. Connecting R. Co. v. Baker*, 82 S. W. 85, 88, 183 Mo. 312.

A dedication of an easement to a public use may be by parol. *Halley v. Scott County Fiscal Court* (Ky.) 78 S. W. 149, 150.

DEED.

See "Good and Effectual Deed."

A deed of conveyance is a contract of conveyance, and the grantor will not be permitted to say that it is not. *Wishart v. Gerhart*, 78 S. W. 1094, 105 Mo. App. 112.

A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and ipso facto operates to transfer or convey the title of the property described to the grantee. *Alferitz v. Arrivillaga*, 77 Pac. 657, 658, 143 Cal. 646.

An instrument cannot be given the effect of a conveyance unless it contains words of grant. The use of the word "deed" by witnesses is a mere conclusion of the witnesses, and it cannot be presumed that a written instrument was a deed of conveyance, at least without proof that it contained sufficient words of grant. *Capell v. Fagan* (Mont.) 77 Pac. 55, 58.

Comp. St. 1903, c. 73, § 46, defines the term "deed" to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or less. Section 12 provides that every officer who shall take the acknowledgment of any deed shall indorse a certificate thereof, signed by himself, on the deed. Section 4 provides that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed is executed and acknowledged by both husband and wife. The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead is an essential step in the due

execution of such instrument, which acknowledgment should appear from the instrument itself, in the form of a certificate of the officer before whom the acknowledgment was taken. *Solt v. Anderson* (Neb.) 99 N. W. 678, 679.

DEED OF RELEASE.

The words "deed of release," as used in Civ. Code, § 3845, providing that an entry of satisfaction of a mortgage in the margin of a record shall have such effect, means simply the release of the mortgaged property from the lien of the mortgage. *Swain v. McMillan* (Mont.) 76 Pac. 943, 945.

DEED OF TRUST.

The use of the phrase "deed of trust" in Const. art. 13, § 4, providing that a deed of trust by which a debt is secured shall, for the purpose of taxation, be treated as an interest in property, had reference to those deeds of trust in common use which answer the purpose, and have many of the attributes, of a strict mortgage on realty. *Bank of Woodland v. Pierce* (Cal.) 77 Pac. 1012, 1013.

DEFAULT.

See "Debt, Default, or Miscarriage of Another"; "Willful Default."

"Default" means anything wrongful—some omission to do that which ought to have been done by one of the parties; and a mere allegation that "because of the default of the defendant said premises were not conveyed" does not state the necessary facts to show to the court that the defendant did omit to do anything that she was called upon to do. *Davis v. Silverman*, 90 N. Y. Supp. 589, 590.

DEFEATED.

A portion of the heirs at law of a decedent employed an attorney to render services in a contest against the probate of an alleged will of the decedent, by which the heirs agreed to pay the attorney a stipulated fee "in case the will is defeated." The will was defeated, within the meaning of the contract, where a decree was entered by the probate court in accordance with a stipulation between all the parties in interest, secured with the aid of the efforts of the attorney, and of his advice, fixing the basis of distribution of the property of the decedent in kind, which, with the exception of some inconsequential bequests, was wholly at variance with the provisions of the will, and under which the clients of the obligors in the contract received a larger part of the estate than their share as heirs at law. *Ingersoll v. Coram* (U. S.) 127 Fed. 418, 431.

A plea that plaintiffs "were defeated" in another action between the parties involving the same controversy is insufficient as a plea of *res adjudicata*, as not showing that they were defeated on the merits. *Goff v. Wilburn* (Ky.) 79 S. W. 232, 233.

DEFECT OF PARTIES.

"A nonjoinder, or, as expressed in the Code, 'a defect, of parties plaintiff or defendant,' means sufficient parties, and has no application to a case of too many parties, or the joining of a person having no interest in the litigation." *Mader v. Plano Mfg. Co.* (S. D.) 97 N. W. 843, 845.

DEFECTIVE.

A writ is defective when it lacks something which the law requires it to contain; and the defect, as in other cases where amendments are allowed, must appear on its face. *McArthur v. Boynton* (Colo.) 74 Pac. 540, 542.

A pulley with a small piece broken out of its rim is defective, and, in an instruction in an action for personal injuries alleged to have been caused by such defect, it is proper to refer to the break as a defect, the jury being instructed at the same time that plaintiff could not recover unless the break or defect caused the injuries sued for. *Eagle & Phenix Mills v. Herron*, 46 S. E. 405, 408, 119 Ga. 389.

DEFEND.

The word "defend," as used in a policy of employer's liability insurance providing that the insurer, if suit was brought against the insured to enforce a claim for damages on account of an accident covered by the policy, on notice thereof, would take charge of the litigation, and on behalf of the insured defend against such proceedings, means, necessarily, that all the proceedings in the suit founded on the claim for damages against the insured must be taken care of by the insurer; and, after taking control of the proceedings, the insurer cannot thereafter be discharged except by payment of the indemnity to the assured, or securing his discharge. *Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 57 Atl. 655, 658, 72 N. H. 485.

DEFENSE.

See "Equitable Defense"; "F frivolous Defense"; "Pretermitted Defense"; "Self-Defense."

Any defense, see "Any."

DEFINED TERRITORY.

By the terms of a contract plaintiff was appointed by defendant an agent for the sale of machinery at De Pere, such agent to

have the privilege of making sales in the vicinity of De Pere. On the back of the printed form of contract was the following indorsement: "The design of a vicinity contract is to pay an agent the stipulated commission on whatever machinery he may sell under the provisions of the contract, not in the territory of another agent who had the exclusive right to sell in a defined territory." The agent's territory is not a "defined territory" within the meaning of the indorsement on the contract. The business of these agents is not to sit still at some place and sell machinery to those who come to the agent and want to buy it, but to canvass or work their territory; and these "vicinity contracts" are made, rather than those of a definite territory, on purpose to meet cases of this kind, where a locality may be more closely connected in a business way with any one village than one near by, and to avoid conflict between different agents from border territory. *McGeehan v. Gaar, Scott & Co.* (Wis.) 100 N. W. 1072, 1074.

DEFINITE.

The word "definite," as used in Acts June 4, 1901 (P. L. 450), providing that from any definite judgment, order, or decree entered by the court of common pleas an appeal may be taken by the party aggrieved to the Supreme Court or superior court, is not used in the sense of "clear" or "unambiguous," but it is used in the same sense as "definitive" is used when prefaced to a decree, order, or judgment; that is, opposed to "interlocutory." Where a subcontractor agrees that no lien shall be filed by him, and that, if any is filed, any attorney may appear and strike it off, and a receiver for the owner of the building takes a rule to show cause why an attorney should not enter an appearance for the lien claimant and discontinue a lien proceeding begun by him, an order discharging the rule is interlocutory and not appealable, and not a "definite" order within the meaning of the word as used in the statute. *Kurrie v. Cottingham*, 57 Atl. 1106, 1107, 209 Pa. 12.

DEFRAUD.

As defined by lexicographers, the word "defraud" means to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully; to defeat or frustrate wrongfully. The meaning of the word "defraud," when used in the common law or in a statute, is largely influenced by the sense in which it is used and the subject to which it relates. The term "defraud," as used in Rev. St. 5440 [U. S. Comp. St. 1901, p. 3673], prohibiting, and providing for the punishment of, conspiracies to defraud the United States, should not be construed as limited only to frauds respecting personal rights, but to include the deprivation of a right by deception or arti-

vice. Defendant H., desiring to procure appointment as a letter carrier, a position in the classified civil service of the United States, unlawfully agreed with defendant C. that the latter should falsely impersonate H. at a civil service examination, and do all the acts required by the examiners, and sign H.'s name to the examination papers to be delivered to C. for examination while he should impersonate H. C., in pursuance of such conspiracy, gained entrance to the examination, and falsely signed H.'s name to a declaration sheet which was required to be in the handwriting and on the honor of the applicant. Such facts constituted a conspiracy to defraud the United States within the meaning of the statute. *Curley v. United States* (U. S.) 130 Fed. 1, 7, 12.

DEGREE.

See "Material Degree."

DELAY.

As conversion, see "Conversion."

DELIBERATE—DELIBERATION.

The word "deliberate," in the statute making it murder in the first degree for any person purposely and in his deliberate and premeditated malice to kill another, means the mental state or condition of the mind in considering, weighing, and deliberating on the motive which prompts or induces a certain act or line of action. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

One of the ingredients of the crime of murder is that it must be deliberate. To deliberate is to reflect, with a view to make a choice. If a person reflects, though but for a moment, before he acts, it is unquestionably a sufficient "deliberation." *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289.

"Deliberation" and "premeditated" are synonymous. *Cook v. State* (Fla.) 35 South. 665, 676.

DELIRIUM TREMENS.

"Delirium tremens" is defined as a violent delirium induced by the excessive and prolonged use of intoxicating liquors. A person suffering under or afflicted with delirium tremens for the time being may be as absolutely insane as an idiot or a maniac. *Parrish v. State*, 36 South. 1012, 1022, 139 Ala. 16 (citing Webster).

DELIVER—DELIVERY.

See "Constructive Delivery"; "Immediate Delivery."

"The acts that will constitute a delivery will vary with the different classes of cases,

and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case." *Rapple v. Hughes* (Idaho) 77 Pac. 722, 725 (citing *Lay v. Neville*, 25 Cal. 545).

As used in an ordinance providing that any person who shall sell, give away, furnish, or cause to be furnished or delivered any intoxicating liquors on Sunday shall be fined, the word "delivered" implies other and more general meaning than the specific or particular words "sell" or "give away"; and one who, at the request of a saloonkeeper, procures liquor from the saloon, which they use together, cannot be fined, since the word "delivered" must be held to extend only to a disposition ejusdem generis with a sale or gift. *Norris v. Oakman*, 35 South. 450, 451, 138 Ala. 411.

"Delivery," within Civ. Code, § 1147, making a delivery essential to the validity of a gift, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject. *Driscoll v. Driscoll*, 77 Pac. 471, 473, 143 Cal. 528.

The manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give such paper effect as a deed, and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor, although some condition is imposed precedent to final delivery to the grantee which may serve to prevent vesting of actual title in him meanwhile. There must be physical tradition of the deed out of the grantor's possession, and there must be the intent to place it out of his control for the benefit of the grantee, in order to constitute delivery. *Kittos v. Willey* (Wis.) 99 N. W. 337.

"Retention by the grantor of power of control over the papers in the possession of a depositary deprives the manual tradition of effect as a delivery. The papers are still held by the latter merely as agent for the former, and therefore, in legal effect, by him." *Ward v. Russell*, 93 N. W. 939, 940, 121 Wis. 77.

Where the owner of a mercantile business decided to incorporate the same, and, on doing so, one-third of the stock was issued to an employé who had formerly been given one-fourth of the profits of the business in lieu of a salary, the owner taking the employé's notes for the stock and retaining the stock as security, but subsequently speaking of the employé's valuable services, and declaring his intention to give him the stock, and delivering the certificate to him and tearing up the notes, there is a sufficient delivery of the subject-matter to constitute a

gift inter vivos. *Denunzio's Receiver v. Scholtz* (Ky.) 77 S. W. 715, 716.

DELIVERY IN ESCROW.

A delivery in escrow presupposes a valid contract pursuant to which the deposit is made. And if the condition of the escrow is performed, but the deed is not delivered during the lifetime of the grantor, the delivery is nevertheless sustained. *Bosea v. Lent*, 90 N. Y. Supp. 41, 44 Misc. Rep. 437.

DELUSION.

See "Insane Delusion."

DEMAND.

The words "demand" and "claim" are often interchangeable, and are taken as synonymous. But "demand" is not used in its broadest sense as equivalent with "claim" in Greater New York Charter, § 101, Laws 1901, p. 426, c. 466, providing that interest shall cease to run on sums awarded as damages six months after the date of the confirmation of the report, unless within that time demand therefor be made on the comp-troller. It refers to a request made by the payee for money which has theretofore been legally determined as then payable to him, and which is specifically held for payment to him by the city. In re City of New York, 86 N. Y. Supp. 1035, 1038, 91 App. Div. 532.

A statute requiring "demands" against a city to be presented to the city council for rejection or allowance does not apply to, nor require presentation of, claims for damages for personal injuries. *Gallamore v. City of Olympia*, 75 Pac. 978, 979, 34 Wash. 379 (citing *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 273, 43 Am. St. Rep. 847).

DEMENTIA.

"Dementia" is but another word for "crazy"; and when an expert witness said in effect that if he was required to give a name to the disease under which a man over 80 years of age, "practically crazy on the subject of marriage," was laboring, he would call it "senile dementia," he only substituted a technical name for a common one. *Hamon v. Hamon*, 79 S. W. 422, 426, 180 Mo. 685.

DEMONSTRATIVE LEGACY.

A demonstrative legacy is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security. In re Fisher, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277).

Where it appears that a legacy of bonds or securities is intended merely as the primary source for the payment of a legacy in

money which is to be paid at all events, the legacy is demonstrative, and, on failure of the primary source of payment, the legacy, as one of money, is payable from the general estate. *Blair v. Scribner*, 57 Atl. 318, 326, 63 N. J. Eq. 498.

DEMURRAGE.

Demurrage is an allowance made to the master of a ship by the freighters for staying longer in a place than the time first appointed for his departure. It generally depends on positive contract, and is inserted in the charter party; but it may also arise from the customs and usages of particular countries. *Duff v. Lawrence* (N. Y.) 3 Johns. Cas. 162, 168.

Railroad cars.

A railroad may impose reasonable demurrage charges for delay in unloading cars. *New Orleans & N. E. R. Co. v. George*, 35 So. 193, 196, 82 Miss. 710.

It is competent for a common carrier whose customers, at their option, have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free from any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded. A railroad may demand reasonable charges for demurrage, although there is no stipulation therefor in the bill of lading. *Miller v. Georgia R. & Banking Co.*, 88 Ga. 563, 573, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170.

A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage, or delivery of freight, within Code, §§ 1202, 1203, which declare that no charge other than that provided by law shall be made. *Norfolk & W. R. Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916.

"The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by seagoing vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract

for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 588, 599 (cited in *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 393, 19 N. W. 451).

DEMURRER.

See "Parol Demurrer."

DEMURRER TO THE EVIDENCE.

The purpose of a demurrer to the evidence is not to bring before the court an investigation of facts in dispute, nor the weight of evidence, but to refer to the court questions of law arising on the facts as ascertained. Where the parol evidence in a cause is indeterminate or circumstantial, the defendant cannot demur to the evidence, and oblige the plaintiff to join in a demurrer without distinctly admitting on the record every fact which plaintiff's evidence conduces to prove. *Bass v. Rublee* (Vt.) 57 Atl. 965, 966.

DENIAL OF KNOWLEDGE OR INFORMATION.

A "denial of knowledge or information" includes a denial of any knowledge or information. Hence an answer denying knowledge and information sufficient to form a belief as to the allegations contained in specified paragraphs of the complaint is in substantial compliance with Code Civ. Proc. § 500, providing that the answer must contain a denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. *Hidden v. Godfrey*, 85 N. Y. Supp. 197, 198, 88 App. Div. 496.

DEPARTMENT REPORT.

A report made by a court or by its direction, or in obedience to some requirement of the law, is a "department report." The reports enumerated in Const. arts. 4, 6, requiring all officers of executive departments and public institutions to make full and complete reports to the Governor, and requiring the judges of courts inferior to the Supreme Court to report in writing to the judges of the Supreme Court, are "department reports" contemplated by article 5, § 29, relating to the printing and distribution of department reports. *Gillette v. Peabody* (Colo.) 75 Pac. 18, 20.

DEPARTURE.

A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made, and has recourse to another. It occurs when the replication or rejoinder, etc., contains matter

not pursuant to the declaration or plea, etc., which does not support and fortify it. *Nelson v. First Nat. Bank*, 36 South. 707, 710, 139 Ala. 578 (citing *McAdem v. Gibson*, 5 Ala. 341).

DEPOSIT.

See "Special Deposit."

A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor; for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 201, 192 U. S. 138, 48 L. Ed. 380.

DEPOSITION.

"Depositions are a species of evidence of a secondary character, admissible where the viva voce testimony of the deponent is not attainable." Under Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 224, providing that, where a corporation is a party, the president, managing agent, or agent, or employé of the corporation may be examined before trial, depositions of mere employés of a defendant corporation, taken before trial, are not admissible, where deponents are present at the trial, subject to be called and examined as witnesses. *Hughes v. Chicago, St. P., M. & O. R. Co.* (Wis.) 99 N. W. 897, 902 (quoting *Weeks, Depositions*, §§ 4-6).

DEPOT.

See "Oil Depot."

DEPRIVED OF EMPLOYMENT.

Under Greater New York Charter, § 1090 (Laws 1897, p. 394, c. 378, as amended by Laws 1901, p. 472, c. 466), providing that, in case of the discontinuance of any school, teachers who may be thereby deprived of employment shall be preferred in appointments to be made, a teacher employed in both day and night schools, whose night employment was terminated by discontinuance of the school in which he was employed, but whose employment in day school continued, was not "deprived of employment," so as to be entitled to preference in appointment. *Cusack v. Board of Education of City of New York*, 85 N. Y. Supp. 991, 993, 89 App. Div. 355.

DERAIL SWITCH.

A derail switch is a device which when set will cause a car running loose on the side track to run off its rails to the ground before reaching the main track. *Jones v. Kansas*

City, Ft. S. & M. R. Co., 77 S. W. 890, 892, 178 Mo. 528.

DERECHO.

"Derecho," in Spanish law, is the impost laid upon goods or provisions, persons or lands, by way of tax or contribution. *Noe v. Card*, 14 Cal. 576, 608.

DESCENDANT.

The word "heirs" or "descendants," used in the creation of a separate estate of a married woman, will not, at her death, exclude the marital rights of the husband, except as to the children. *Wood v. Reamer* (Ky.) 82 S. W. 572, 574.

DESCENT.

See "Indians by Descent."

DESCRIPTION.

Any description, see "Any."

DESERTION.

See "Continued Desertion"; "Willful Desertion."

"Desertion," when applied to the relation of husband and wife, has a well-defined legal meaning, and signifies the act by which a man quits the society of his wife and children, or either of them, and renounces his duties towards them. *State v. Baker*, 36 South. 703, 704, 112 La. 801 (citing Black).

"Desertion" is the willful separation of one of the married parties from the other, without legal cause. A separation by mutual consent is not desertion on the part of either, unless one of the parties offers to resume cohabitation and the offer is refused. *Burnett v. State* (Ark.) 81 S. W. 382, 383.

Although a husband, after separating himself from his wife and children without lawful excuse, still provides for their support, his conduct may constitute the matrimonial offense of desertion. *Power v. Power* (N. J.) 58 Atl. 192, 194.

Where the husband establishes a new home, and requests his wife to follow him to the new domicile, and furnishes her the means with which to travel, and she declines to take up her residence with him, the husband is not thereby guilty of deserting the wife. *Roby v. Roby* (Idaho) 77 Pac. 213, 214.

DESIGN.

See "Premeditated Design."

"Intent to kill" means just what the ordinary signification of the words suggest.

Whether it be described by the words "actual intent," "design," or "premeditated design" makes no difference. When we leave entirely out of view those subtleties, often indulged in in discoursing on the meaning of "premeditated design," and giving words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated or thought of, because without mental action the purpose could not be formed. So when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design or premeditated design. That the word "premeditated," as used in the statutes of the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design," where used inclusively in murder in the first degree, as to "design," where that word alone is used exclusively in murder in the third, and manslaughter in the first, second, and third, degrees. *Cupps v. State* (Wis.) 98 N. W. 546, 549.

DESIGNATE.

The word "designate," as used in a constitutional provision, directing the Legislature to enact a law whereby any county, justice precinct, town, city, or such subdivision of the county as may be designated by the commissioners' court of the county, may determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits, has not the same meaning as the word "create," and the Legislature is not authorized to empower the commissioners' court to combine two or more political subdivisions of a county into a local option district, thus creating a new subdivision. *Ex parte Heymen* (Tex.) 78 S. W. 349, 352.

DESIRE.

The words "desire" and "request" do not import a trust where testatrix devised certain real estate to her husband, and stated that it was her desire and request that he should convey the same to a lodge, so as to impose on it the duty to properly care for the cemetery lot in which she might be buried. They should be understood in their usual sense, in the absence of anything in the will to indicate that they were used in any other than their ordinary sense. *Kauffman v. Gries*, 74 Pac. 846, 848, 141 Cal. 295.

"The mere use in a will of the precautionary words 'desire' and 'request' will not be

sufficient to create an enforceable trust or a power in the nature of a trust, when the context clearly shows that the testator's intention was contrary." A testator made a devise to an educational institution, and provided that in case the devise should fail for any cause the same should go to the children of his two brothers. In a codicil he authorized, empowered, and requested his daughter, his only lineal descendant, to ratify and confirm the devise to the institution, declaring that in case she complied with the request the gifts over should be revoked. The daughter executed the power by a deed to the institution, and the gift over was thereby revoked. *Thomas v. Board of Trustees of Ohio State University*, 70 N. E. 896, 899, 70 Ohio St. 92.

The words "I desire" that my real estate shall be sold are the equivalent of the words "I will" that it be sold. In *re Pforr's Estate*, 77 Pac. 825, 827, 144 Cal. 121; *Thornagel v. Pforr*, Id.

DETAINDER.

See "Forcible Entry and Detainer"; "Unlawful Detainer."

DETERMINATION.

See "Complete Determination."

DEVELOPMENT.

See "Further Development."

DEVICE.

See "Gaming Device."

DEVISE.

See "Executory Devise"; "Specific Devise."

Devise to a class, see "Class."

A devise is a gift of real property by a last will and testament. In *re Dailey's Estate*, 89 N. Y. Supp. 538, 541, 43 Misc. Rep. 552.

DEVOLVE.

An estate is said to "devolve" upon another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Instances of its appropriate

use are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, where by the act or operation of law the estate of the bankrupt devolves upon his assignee. A transfer by a debtor of property not accompanied by change of possession is not void as against the assignee for the benefit of the debtor's creditors, under Civ. Code, § 4491, declaring such transfer void as against any one on whom the debtor's estate devolves in trust for the benefit of others, as the estate does not devolve by such assignment, but is granted by it. *Babcock v. Maxwell*, 74 Pac. 64, 66, 29 Mont. 31.

DIAGRAM.

A diagram is simply an illustrative outline of a tract of land, or something else capable of linear projection, which is not necessarily intended to be perfectly correct and accurate. *Shook v. Pate*, 50 Ala. 91, 92.

DICTA.

See "Judicial Dicta"; "Obiter Dicta."

DIE.

When a devise or bequest to children is made with a provision over "if either of my children should die," the courts will assume that the testator had in mind something less than merely to provide for the case of the legatee dying at some time, and in such cases the courts will construe the bequest over as intended to take effect in case the death referred to should occur in the testator's lifetime or before some fixed period for the enjoyment of the estate or gift which is in such event to go over. *McClellan v. MacKenzie* (U. S.) 126 Fed. 701, 704, 61 C. C. A. 619 (citing 2 Williams, Ex'rs, 1126; In *re Haywood*, L. R. 19 Ch. D. 470).

DIE WITHOUT ISSUE.

The words "die without issue" are equivalent to die without leaving heirs of the body, contemplating what is known as an indefinite failure of issue. *Gilkie v. Marsh*, 71 N. E. 703, 704, 186 Mass. 336.

A testator devised land to his son, with a proviso that "should my son die without issue then the said realty shall revert to my lawful heirs." In the same will he devised real estate to others of his children in language clearly signifying a definite failure of issue. The devise to the son imported an indefinite failure of issue, and he took an estate tail, which, by Act April 27, 1855 (P. L. 368), was enlarged into an estate in fee simple. *Graham v. Abbott*, 57 Atl. 178, 179, 208 Pa. 68.

DIFFERING IN PHASE.

"Differing in phase," as used in the definition of multiphase system in the transmission of electric power, as consisting of the use of two or more alternating currents of equal period, but differing in phase, means that the two alternations or current waves do not come together, but one after or at a different time from the other. *Harrison v. Detroit, Y., A. A. & J. Ry. (Mich.)* 100 N. W. 451, 452.

DIFFICULT.

The words "difficult" and "extraordinary," as used in Code Civ. Proc. § 3253, authorizing the court to grant an additional allowance where the action is difficult and extraordinary, must be given their usual and accepted meaning. A general rule specifying the precise limitation that they impose upon the power of courts to grant an additional allowance may be difficult to formulate, but every application to the facts of a particular case when presented is not troublesome. The section does not authorize an additional allowance in an action for personal injuries where the only question for the court is the amount of the damages, and no difficult questions of law are involved. *Standard Trust Co. v. New York Cent. & H. R. R. Co.,* 70 N. E. 925, 926, 178 N. Y. 407.

DILIGENCE.

See "Due Diligence."

DIMENSION STONE.

The terms "dimension stone" and "footing stone" are synonymous, but neither is the synonym of "rubblestone." *Nugent v. Armour Packing Co. (Mo.)* 81 S. W. 506, 507.

DIRECT.

The charter of a city authorizing the council to "direct and control" the location of railroad tracks does not include the power to authorize the construction of railroads and the exercise of the right to eminent domain. It merely vests in the council as part of the police power, to be exercised in providing for the public safety and convenience in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists. *Chicago, B. & N. R. Co. v. Porter,* 43 Minn. 527, 529, 46 N. W. 75.

The words "control and direction," in Laws 1859, p. 359, c. 143, as amended by Laws 1889, p. 7, c. 7, providing that the free bridge over the Mohawk river between cer-

tain towns shall be under the control and direction of the commissioners of highways of the towns, were of no broader significance with reference to the duties and powers of the commissioners of highways of the two towns in question than the words "care and superintendence" in the highway law with reference to the duties and powers of commissioners of highways in the towns of the state. *Town of Palatine v. Canajoharie Water Supply Co.,* 86 N. Y. Supp. 412, 414, 90 App. Div. 548.

A provision in a will that "I hereby direct my executors to sell" and dispose of all my real estate gives no discretionary authority, but the direction is imperative, and the executors are absolutely obliged to make the conversion, and its proceeds are thereafter to be held and treated as personal property. *Thissell v. Schillinger,* 71 N. E. 300, 301, 186 Mass. 180.

DIRECT ATTACK.

A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of same in a proceeding instituted for that purpose, such as a motion for a rehearing and appeal, some form of writ of error, a bill of review, or an injunction to restrain its execution. *Scudder v. Cox (Tex.)* 80 S. W. 872, 873.

DIRECT EVIDENCE.

"Direct evidence" is defined to be that which proves the fact in dispute directly, without an inference or presumption, and which, in itself, if true, conclusively establishes that fact. *Lake County v. Neilson,* 74 Pac. 212, 214, 44 Or. 14.

DIRECT INTEREST.

If the legal effect of a judgment will be to establish a claim against the witness, he has a "direct interest" in the event of the suit, within Laws 1867, p. 183, removing the disqualification of witnesses on account of their interest in the event, except that a party interested shall not be allowed to testify of his own motion. A judgment against a street railway company for death caused by the alleged negligence of a motorman in an action to which the motorman was not a party would not be evidence against the motorman in a suit by the railway company to recover over against him, and hence such motorman was not interested in the suit against the railway company so as to be an incompetent witness for the defendant therein within such statute. *Feitl v. Chicago City R. Co.,* 71 N. E. 991, 994, 211 Ill. 279.

DIRECT LEGAL INTEREST.

The interest of the president of a bank as a stockholder is a "direct legal interest,"

within Code Civ. Proc. § 329, which prohibits a person having such an interest from testifying as to a contract or transaction had with a decedent. *Dickenson v. Columbus State Bank* (Neb.) 98 N. W. 813, 814.

DIRECT LOSS.

The word "direct," as used in a fire policy, insuring a stock of merchandise in a described building against "all direct loss or damage by fire," except as provided therein, means no more and no less than proximate and immediate. *Insurance Co. of North America v. Leader* (Ga.) 48 S. E. 972, 974.

DIRECT PAYMENT OF MONEY.

The word "direct," as defined by Webster, is immediate, express, absolute; and if it is to be given any meaning as used in the attachment statute referring to actions on contracts for the payment of money it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term "direct" has no meaning whatever. An action against sureties on a bond conditioned to be void if the principal performed his contract is not an action on a contract for the "direct payment of money," within Code Civ. Proc. § 890, authorizing an attachment in such an action. *Ancient Order of Hibernians v. Sparrow*, 74 Pac. 197, 199, 29 Mont. 132, 64 L. R. A. 128.

DISABILITY.

Other disability, see "Other."

The contract of an employé with the relief department of a railroad provided for payment for each day of disability by reason of accident. The regulations of the department provided that the word "disability" should be held to mean physical inability to work. It is held that the decision of the medical examiner that the employé who had suffered amputation of a leg by reason of his injury was "able to work" will not be construed to mean that the employé has recovered from his disability, when it is shown by the evidence that the examiner at the same time declared plaintiff "able to do light work at present, * * * but he is still disabled." *Chicago, B. & Q. R. Co. v. Olson* (Neb.) 97 N. W. 831, 833.

DISAGREEMENT.

There is a "disagreement" within the meaning of the term as used in the arbitra-

tion clause of an insurance policy, providing that in the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, so as to necessitate arbitration, where insured and the insurer have in writing stated their disagreement as to the amount of the loss, and have each selected an arbitrator. *Fowble v. Phoenix Ins. Co. of Hartford, Conn.*, 81 S. W. 485, 487, 106 Mo. App. 527.

DISBURSEMENTS.

See "Costs and Disbursements."

DISCHARGE.

"Any form of words which convey to the servant the idea that his services are no longer required are sufficient to constitute a discharge." *Johnson v. Crookston Lumber Co.* (Minn.) 100 N. W. 225 (citing 20 Am. & Eng. Enc. Law [2d Ed.] p. 26).

The words "removal" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office without exonerating them from liability to account. Code Civ. Proc. § 1805, requiring action on a guardian's bond to be commenced within three years from the "discharge or removal" of the guardian, applies to an action after a final order of the court removing or discharging the guardian, and does not include termination of the guardianship by the ward attaining majority. *Cook v. Ceas*, 77 Pac. 65, 143 Cal. 221.

DISCOUNTED.

A note given to a bank in payment of a debt, including interest for the ensuing year, is not "discounted," within a provision of the bank's charter that notes discounted by it are placed on the same footing as foreign bills of exchange. *Bramblette v. Deposit Bank of Carlisle* (Ky.) 79 S. W. 193, 194.

A petition alleging that an obligation was during business hours at the plaintiff's regular place of business, and before its maturity, "discounted" at, by, and to plaintiff, is sufficiently explicit, as the term "discounted" has a well-known legal definition, which involved the statement that the note had been bought by the bank and paid for, it deducting and reserving interest. *Davis v. Boone County Deposit Bank* (Ky.) 80 S. W. 161, 162.

DISCOVERY.

See "Prior Discovery."

DISCRETION.

See "Judicial Discretion."

DISEASE.

The word "disease," as used in an accident policy providing that no recovery should be had in case of death resulting from disease in any form, either as cause or effect, does not apply to a temporary derangement of the stomach, so as to preclude a recovery for insured's death by being thrown from the platform of a railway train whence he had gone for the purpose of vomiting. Preferred Acc. Ins. Co. of New York v. Muir, 128 Fed. 926, 929, 61 C. C. A. 456.

Blood poisoning is a disease, just as many other pathological conditions of the human system resulting from the introduction therein of other specific bacilli are diseases. It is, indeed, wholly immaterial whether the pathological condition which results in death is due to bacilli or not. Delaney v. Modern Acc. Club, 97 N. W. 91, 93, 121 Iowa, 528, 63 L. R. A. 603.

DISGUISE.

See "In Disguise."

DISMISSAL.

"In those jurisdictions where the rule indicated by the word 'retraxit' has been recognized, the substance of the matter seems to be that a dismissal by agreement of the parties is equivalent to and is treated as a public renunciation on the part of the complainant of the claim asserted by him in his pleadings against the defendant, and he is thereafter estopped to bring it forward again." Lindsay v. Allen (Tenn.) 82 S. W. 171, 174.

DISMISSAL WITHOUT PREJUDICE.

The effect of a dismissal without prejudice in a decree of dismissal is to prevent such decree from constituting a bar to another bill brought upon the same title; but it by no means compromises the court as a judicial determination in favor of such title. Lang's Heirs v. Waring, 25 Ala. 625, 639, 60 Am. Dec. 533.

DISPUTE.

See "Amount in Dispute"; "Matter in Dispute."

DISQUALIFIED.

Under Rev. St. c. 3, § 18, which provides that administration shall be granted to the husband upon the estate of his wife if he

will accept the same and is not "disqualified," a postnuptial contract by which a husband relinquishes all his right and interest in his wife's estate does not justify the county court in refusing him letters of administration on her estate, since his right to administer does not depend on his interest in the estate, but upon the mandatory provision of the statute. Orear v. Crum, 25 N. E. 1097, 1098, 135 Ill. 294.

DISSOLUTION.

See "De Facto Dissolution."

By a dissolution in law is meant a dissolution which may take place either by a judgment of a court of competent jurisdiction, or by a legislative repeal of a charter of a corporation where the right of repeal has been reserved in the statute granting the charter, or in the Constitution or in the general law, or by the expiration of the period named in the charter as the period of the duration of the life of the corporation. Youree v. Home Town Mut. Ins. Co. of Warrensburg, 79 S. W. 176, 178, 180 Mo. 153 (citing Thomp. Corp.).

A dissolution of a corporation, within the contemplation of the law, is the death of the corporation. It means a disintegration, a separation, a going out of business. Theis v. Spokane Falls Gaslight Co., 74 Pac. 1004, 1006, 34 Wash. 23.

DISTRIBUTE.

The words "heir" and "distributee," as used in Rev. St. 1893, § 2316, relating to actions for wrongful death, and declaring that every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and, if there be none such, then for the benefit of the heirs at law or distributees of the person whose death shall have been so caused, etc., mean the same thing. Kitchen v. Southern Ry., 48 S. E. 4, 6, 68 S. C. 554.

DISTRICT.

See "School District."

The word "district," as used in Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], providing that, where any offender is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where the offender is imprisoned to issue a warrant for his removal to the district where the trial is to be had, applied, at the time of the original act, to one of the judicial districts into which, by that act, the United States was divided; but by virtue of Act Feb. 21, 1871, c. 62, 16

Stat. 426, declaring that the Constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States, the word "district" includes the District of Columbia, and hence section 1014 authorizes the removal of a federal offender to the District of Columbia for trial of an offense committed there. In *re Benson* (U. S.) 130 Fed. 486, 488.

To give the word "district" its common meaning, it would unquestionably embrace a township as well as many other subdivisions of territory, although in its application it would in many cases include less territory than a township, such as an election district or a school district. The word "district," as used in Act May 8, 1889 (P. L. 136), providing for the incorporation of electric light companies, and section 2, authorizing such corporations to supply light, heat, and power to the public in the borough, town, city, or district where it may be located, includes a township. *Brown v. Radnor Tp. Electric Light Co.*, 57 Atl. 904, 905, 208 Pa. 453.

DITCH.

No technical effect in conveyancing has been attributed to the word "ditch." Plaintiffs declared in ejectment for a strip of land 14 feet wide and about 600 feet long, extending to tidal waters, and designated in their deed as "a certain ditch." At the trial their claim of title rested on a deed containing the following clause: "And also the said party of the second part [the plaintiffs] is to have the exclusive privilege and use of a certain ditch that leads," etc. The grant of this exclusive privilege was not a conveyance of land, for the recovery of the possession of which the action could be maintained. *Conover v. Atlantic City Sewerage Co.* (N. J.) 57 Atl. 897, 898.

DIVIDE.

See "Equally Divided."

Where the Legislature, after fixing the boundaries of counties, refers to "streams which divide counties," it must be understood as meaning streams in which are situated the boundary lines which divide counties. *Dodge County v. Saunders County* (Neb.) 97 N. W. 617, 618.

DIVISION.

See "Subdivision."

The circuit court of the city of St. Louis, which is the Eighth Judicial Circuit, is one court, composed of many parts, called "divisions"; each division being, for certain

purposes, in itself a complete court, and independent of the other divisions. A suit is not begun in any division. It is begun in the circuit court, and, under rules of the court, is assigned to a division. When a cause is assigned to a division, that division becomes as to that cause a whole court, and has as exclusive jurisdiction of it as a circuit court of an adjoining county has of a cause pending in it. *Goddard v. Delaney* (Mo.) 80 S. W. 886, 891.

DIVISION FENCE.

The words "division fence" in Civ. Code, § 1301, relating to division fences between coterminous owners, means that the fence is to be one dividing the contiguous property. *Hoar v. Hennessy*, 74 Pac. 452, 454, 455, 29 Mont. 253.

DIVORCE PROCEEDING.

As civil action, see "Civil Action—Case—Suit—etc."

DOCK.

See "Dry Dock."

"A dock is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks." *Perry v. Haines*, 24 Sup. Ct. 8, 13, 191 U. S. 17, 48 L. Ed. 73.

DOCUMENT.

The indictments against a person are "records or documents filed in a public office under authority of law." Code Cr. Proc. § 272; Code Civ. Proc. § 866. They are the property of the state, and a willful and unlawful removal of them constitutes a crime under Pen. Code, § 94. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274, 18 N. Y. Cr. R. 269.

DOING BUSINESS.

See, also, "Carrying on Business"; "Transacting Business."

"It is impossible to assent to the proposition that 'doing business' within a state means a persistent or continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state." An officer and authorized agent of defendant, a manufacturing corporation of another state, was in Connecticut on business connected with a contract made with

[Appendix.]

Plaintiff by the predecessor of defendant, to whose rights and liabilities it had succeeded, when he was served with summons in an action brought by plaintiff against defendant in the federal court for Connecticut for breach of the same contract. Neither defendant nor its predecessor had ever maintained an office or agent in Connecticut, but they had made a number of sales in the state, including the one to plaintiff which was in controversy. Held, that the service was good, and gave the court jurisdiction of defendant. *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.* (U. S.) 130 Fed. 605, 608.

Defendant, a Virginia railroad company, neither owned nor operated any railroad located in Pennsylvania, and maintained no office in that state, though three directors and its assistant secretary resided there, who may, at various times, have received and given information indirectly affecting the corporation's business elsewhere. Defendant's cars, both freight and passenger, were transported through Pennsylvania by other railroads, for the convenience of passengers and shippers, such railroads, however, paying for the use of the cars, and receiving the freight and passenger rates for that portion of the haul that was done in Pennsylvania. Defendant was also a member of a freight transportation line which maintained an agency in Pennsylvania for the solicitation of freight to be shipped under through bills of lading, each line receiving a proportionate share of the freight, and each contributing to the expenses of the agency; and another railroad located in Pennsylvania sold coupon tickets in connection with its own tickets only, good over defendant's road, accounting each month to defendant for its proportion of the proceeds. The facts did not justify a finding that defendant was doing business in Pennsylvania, so as to authorize it to be sued in that state. *Earle v. Chesapeake & O. Ry. Co.* (U. S.) 127 Fed. 235, 237.

A foreign insurance company, though it has ceased to solicit new business, is still doing business in the state, so that jurisdiction may be acquired by service on an agent, where it still has outstanding policies in the state, on which it collects dues, and, in case of losses thereunder, adjusts them and makes remittances. *Johnston v. Mutual Reserve Fund Life Ins. Co.*, 87 N. Y. Supp. 438, 441, 43 Misc. Rep. 251.

A foreign corporation, the office of which is in another state, and which merely has an agent in this state, who maintains an office for his own convenience, and does not have exclusive control of the business in the state, and keeps no books nor bank account, and makes no contracts for the sale of goods, but reports everything to the home office, and who usually makes sales to parties out-

side the state, and, while a particular sale was made of coal situated in the state to a resident, it had been previously sold to a party without the state, who had rejected it, is not doing business in the state within Laws 1892, p. 1805, c. 687, as amended by Laws 1901, p. 1326, c. 538, prescribing the conditions on which foreign corporations may do business in the state. *Penn Collieries Co. v. McKeever*, 87 N. Y. S. 869, 93 App. Div. 303.

A corporation, to be "doing business," must transact within the state some substantial part of its ordinary business, continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligation. Where a foreign railroad corporation only maintained an advertising agent within the state, whose duties were only to explain to intending travelers and shippers of freight the advantages of traveling and shipping over such railroad, and the agent possessed no power to sell tickets or contract on behalf of the railroad company, the railroad was not doing business within the state, so as to authorize service of summons on it by delivering a copy to such agent. *Rich v. Chicago, B. & Q. R. Co.*, 74 Pac. 1008, 1009, 34 Wash. 14.

A single transaction by a foreign corporation may constitute a "doing of business in this state" within the meaning of section 1283, Gen. St. 1901, making certain requirements of foreign corporations doing business in the state, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of its dealings here. *John Deere Plow Co. v. Wyland* (Kan.) 76 Pac. 863.

DOMESTIC BILL

A domestic bill, under the Mississippi statutes, is one drawn by a person in the state, or dated at a place in the state, or a person living therein. *Ragsdale v. Franklin* 25 Miss. 143, 145.

DOMICILE.

See "Change of Domicile."

Domicile is the place where one has his true fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the animus manendi. Residence within the district, to give the court jurisdiction of proceedings in bankruptcy, must be bona fide; and the removal of a person from one district to another, for the express purpose of filing a petition in bank-

ruptcy therein, and with the intent of leaving the district as soon as he obtained a discharge, does not make him a resident, so as to confer jurisdiction on the court. *In re Garneau* (U. S.) 127 Fed. 677, 678, 62 C. C. A. 403.

Every person must have a domicile. He can have but one, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact, and it is often difficult to determine. A person who has left his home in the country, and moved with his family to a city, where he has a residence, with no fixed intention of returning to his country home, which he has rented on shares, reserving three rooms in the house for his own use, becomes a resident of the city, and is liable to be taxed as such. *City of Lebanon v. Biggers* (Ky.) 78 S. W. 213, 214.

Residence distinguished.

"The distinction between 'residence' and 'domicile,' in the law of process and attachment, is very clearly marked by the decisions. 'Domicile' is a much broader term than that of 'residence.' A man may have his domicile in one state, and actually reside in another, or in a foreign country. If he has once had a residence in a particular place, and removed to another, but with the intention of returning after a certain time, however long that may be, his domicile is at the former residence, and his residence at the place of his habitation." *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (quoting *Drake*, Attach. § 59).

The word "domicile," in a statute which provides that no person who is an inhabitant of the state shall be sued out of the county in which he has his domicile, except in certain cases, is used in the sense of "residence." There may, however, be a difference between a man's residence and his domicile. He may have his domicile in one place, and still may have a residence in another; for, although a man for most purposes can be said to have but one domicile, he may have several residences. *Pearson v. West* (Tex.) 77 S. W. 944, 945 (quoting *Brown v. Boulden*, 18 Tex. 431, 434).

Of corporation.

The "domicile of a corporation" is within the jurisdiction that creates it, but it is a well-settled principle that foreign corporations seeking to do business within another jurisdiction, with some exceptions, can only enter it for the purpose of doing business under a permit, when it is required, and the law granting the permission can impose conditions that practically submit such corporation to the jurisdiction of the state, so far as pertains to the business there carried on. *State v. Fidelity & Deposit Co. of Maryland* (Tex.) 80 S. W. 544, 550.

DONATIO CAUSA MORTIS.

See "Gift Causa Mortis."

DONATIO INTER VIVOS.

See "Gift Inter Vivos."

DONE.

See "Business Done."

DORMANT JUDGMENT.

The word "dormant," as applied to judgments, is broad enough to cover judgments which have not wholly lost their vitality, but which cannot support an execution for want of necessary parties. *Manley v. Mayer* (Kan.) 75 Pac. 550, 556.

DOUBT.

See "Reasonable Doubt."

DOWER.

See "Election Dower."

Dower accrues to the widow, and not to the wife, and until she becomes a widow her right is inchoate and contingent. Her claim can only become effective on the death of her husband and her survival. *Sherman v. Hayward*, 90 N. Y. Supp. 481, 482.

DRAINAGE OF LAND.

The term "drainage of land" has practically the same application as "reclamation." The one is the means employed, the other the result. *Laguna Drainage Dist. v. Charles Martin Co.*, 77 Pac. 933, 935, 144 Cal. 209.

DRAWING A PRIZE.

"Drawing a prize" is the ascertainment, by chance or otherwise, of who is entitled to a particular result or a particular thing, by means of some prearranged mode of ascertaining the result; and as soon as the number which entitles the ticket holder to the money or article is drawn from the wheel, or otherwise ascertained, the prize is said to be "drawn." The drawing and receiving are independent acts. *People v. Kent*, 6 Cal. 89, 90.

DRAWING THE STUMPS.

Where the coal in any division or section of a mine has been exhausted, all the miners are withdrawn from that particular place, and the stumps or pillars of coal supporting the roof over the room in which the

miners work are taken out for the coal they contain. In removing them, props of timber are used to support the roof. The removing of these pillars or stumps is called "drawing the stumps." *East Jellico Coal Co. v. Golden* (Ky.) 79 S. W. 291, 292.

DRESS GOODS.

Wool dress robes or dress patterns, consisting of women's dress goods of wool, embroidered with silk, imported in single patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, are "dress goods." *Thomas v. Wanamaker* (U. S.) 129 Fed. 92, 63 C. C. A. 594.

Embroidered dress goods of wool are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 369, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], as "dress goods * * * of wool, and not specially provided for," rather than as "articles embroidered by hand or machinery * * * made of wool," under paragraph 371 of said act (30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]). *Hall & Bishop v. United States* (U. S.) 131 Fed. 648.

DRUGS.

Fresh leaves of aconite and belladonna, and fresh roots of bryonia, immersed in their natural condition in alcohol for preservation, are not "drugs advanced in value or condition," as used in paragraph 20, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1628]. *Boericke & Runyon Co. v. United States* (U. S.) 126 Fed. 1018.

DRUMMER.

The word "drummers," as used in Rev. St. Mo. §§ 1024-1026, requiring foreign corporations for pecuniary profit doing business in the state to file articles of incorporation and be subject to local visitation and the payment of taxes on its business, and expressly excepting from the operation of the statute "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident," means employes of such corporations employed to go into other states and communities to drum up and solicit business for the houses they represent. *Strain v. Chicago Portrait Co.*, 126 Fed. 831, 835.

DRUNKENNESS.

As temporary insanity, see "Temporary Insanity."

DRY DOCK.

A dry dock differs from an ordinary dock only in the fact that it is smaller, and pro-

vided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock. Proceedings in rem to enforce a lien for repairs furnished to a vessel which was at the time engaged in navigating the Erie Canal are no less within the exclusive admiralty jurisdiction of the federal courts because such repairs were made in dry dock. *Perry v. Haines*, 24 Sup. Ct. 8, 13, 191 U. S. 17, 48 L. Ed. 73.

DUE.

See "Debt Due or to Become Due"; "Now Due and Payable."

"Due" means owed or owing to. It implies an obligation or duty imposed by law—the duty to pay what is owed—but it does not of itself imply a promise to do so. *In re McGuire & Hanlein* (U. S.) 132 Fed. 394, 395.

DUE CARE.

The expression "due care" is not the equivalent of "ordinary care." *City of San Antonio v. Talerico* (Tex.) 78 S. W. 28, 32.

DUE COURSE OF LAW.

The expressions "due course of law" and "law of the land" do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. *Hanson v. Krehbiel* (Kan.) 75 Pac. 1041, 1042, 64 L. R. A. 790.

DUE DILIGENCE.

A passenger in such a stupor that he could not be waked up either by shaking or kicking could not have been found to have been a person "in the exercise of due care and diligence," had an indictment been resorted to, and therefore he could not be found to have been in the exercise of due diligence, as was alleged in an action to recover a penalty for wrongfully causing his death. The court continued: "We use the words 'due diligence' in place of the words 'due care' found in Rev. Laws, c. 111, § 267, merely because those are the words of the count in question, and of St. 1886, p. 117, c. 140, under which the action was brought, and not because there is any distinction between those words and the words of Rev. Laws, c. 111, § 267." *Hudson v. Lynn & B. R. Co.*, 71 N. E. 66, 70, 185 Mass. 510.

DUE IN THE SAME RIGHT.

See "Debt Due in the Same Right."

DUE PROCESS OF LAW.

Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an exercise of power "as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs," it is due process of law. *Leigh v. Green*, 24 Sup. Ct. 390, 392, 193 U. S. 79, 4 L. Ed. 623 (quoting *Cooley*, Const. Lim. [7th Ed.] 506).

To say that the law of the land, or due process of law, may mean the very act of the Legislature which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights unless the Legislature shall pass a law to effect the wrong, and this would be throwing the restraint away. It follows that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution. *King v. Hatfield* (U. S.) 130 Fed. 564, 579 (quoting *Wynehamer v. People*, 13 N. Y. 378).

"Due process of law in a criminal case requires a law describing the offense. The offense must be described in the accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice." *Jamison v. Wimbish* (U. S.) 130 Fed. 351, 358 (quoting 10 Am. & Eng. Enc. of Law [2d Ed.] p. 303).

"Due process of law" means an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard; and, where such opportunity is granted by the law, the citizen cannot complain of the procedure to which he is required to conform. *State v. District Court of St. Louis County*, 97 N. W. 132, 134, 90 Minn. 457.

Due process of law requires that the owner be given an opportunity to be heard at a trial before his private property be taken and adjudged forfeited for his misconduct or for a protection of the public health. He cannot be deprived of the right, either before or after such taking of the property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law. *Lowe v. Conroy* (Wis.) 97 N. W. 942, 944, 66 L. R. A. 907.

By "due process of law" is meant notice and an opportunity to be heard. *Beebe v. Magoun*, 97 N. W. 986, 122 Iowa, 94.

"Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained." *Reed v. Reed* (Neb.) 98 N. W. 73, 76.

"Due process of law" means according to the settled course of judicial proceedings." *City of St. Louis v. Galt*, 77 S. W. 876, 879, 179 Mo. 8, 63 L. R. A. 778.

A jury trial is not necessary to constitute "due process of law" in every case. A defendant is not deprived of due process of law, in a proceeding under an act providing for the condemnation and destruction of liquor illegally kept for sale, by the fact that he was denied a jury trial. *Kirkland v. State* (Ark.) 78 S. W. 770, 772, 65 L. R. A. 76.

The expression "due process of law," as used in the Constitution of the United States, does not require that the assertion of the rights of the public against the individual, or the imposition of burdens on his property for the public use, shall in all cases be done by resort to courts of justice. *McMillan v. City of Butte* (Mont.) 76 Pac. 203, 205 (citing *Murray v. Hoboken Land & Improvement Co.*, 59 U. S. [18 How.] 272, 15 L. Ed. 372).

Due process of the law includes every step from summons to judgment, and, if a party is deprived of any right usually accorded to others, it is not "due process of law." *Riglander v. Star Co.*, 90 N. Y. Supp. 772, 776.

DUE TO THE PUBLIC.

See "Debt Due to the Public."

DUEBILL.

"When the court, in *Fleming v. Burge*, 6 Ala. 373, said that a duebill was, in legal effect, a promissory note, it only announced a well-recognized principle that from a duebill the law implies an obligation to pay the amount acknowledged by it to be owing, as the law implies from a promissory note an obligation on the part of the promisor to pay the amount promised to be paid; yet a duebill and a promissory note are in many respects unlike. A duebill is not assignable by indorsement; a promissory note is. A duebill is not entitled to days of grace; a promissory note is. A duebill is a brief acknowledgment of a debt; a promissory note is a promise in writing to pay a specified sum at a time therein fixed. They are, however, in legal effect, the same, for the law implies a like obligation from each—the obligation to pay the debt acknowledged to be due by the one, and the debt promised to be paid by the other." In *re McGuire & Hanlein* (U. S.) 132 Fed. 394, 395.

DULY AUTHORIZED AGENT.

A receiver for collection and enforcement of the liability of stockholders, appointed by the court, pursuant to the statutes of Minnesota, in a suit by creditors of the insolvent corporation against it and its stockholders to charge the stockholders with their liability for its debts, is a duly authorized agent of the corporation's creditors to prove their debt against the estate of a bankrupt stockholder. *Dight v. Chapman*, 75 Pac. 585, 588, 44 Or. 265, 65 L. R. A. 793.

DULY PROTESTED.

"Duly protested" is equivalent to an averment that a bill was presented at maturity at the place of payment named in it. *Battle v. Weems*, 44 Ala. 105, 107.

DUPLICATE.

"The meaning of the word 'duplicate,' in legal phraseology, is the same as that in its use among business men. It is tersely and correctly stated in 10 Am. & Eng. Encycl. of Law, 318, as follows: "'Duplicate' is defined as a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and operation.' A substantially like definition is given of the word in all the law dictionaries in common use. In Burrill's Dictionary, verbum 'Duplicate,' is given the following ample definition: 'A duplicate is sometimes defined to be a copy of a thing, but, though generally a copy, a duplicate differs from a mere copy in having all the validity of an original. Nor, it seems, need it be an exact copy. Defined also to be the counterpart of an instrument; but in indentures there is a distinction between counterparts executed by the several parties, respectively, each party affixing his or her seal to only one counterpart, and duplicate originals, each executed by all the parties.'" In paragraph 6 of Schedule A of the war revenue act of June 13, 1898, c. 448, 30 Stat. 458 [U. S. Comp. St. 1901, p. 2304], which requires a stamp to be affixed to each bill of lading, manifest, etc., "and to each duplicate thereof," the word "duplicate" is to be defined, in accordance with the meaning given it generally in business, as one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and not as meaning merely a copy. *Wright v. Michigan Cent. R. Co.* (U. S.) 130 Fed. 843, 846.

DURESS.

"To constitute 'duress' sufficient to avoid a contract in this state, the means adopted need only be of a character necessary to overcome the will and desire of the injured

party, whether that person be below or above the average person in firmness and courage, and whether the means employed come clearly within the common-law definition of 'duress' or otherwise. In other words, the law extends its protection to an individual, without reference to whether he is strong or weak, intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of ordinary intellect, firmness, and courage." *Nebraska Mut. Bond Ass'n v. Klee* (Neb.) 97 N. W. 476, 478 (citing *First Nat. Bank v. Sargent*, 91 N. W. 595, 65 Neb. 594, 59 L. R. A. 296; *Galusha v. Sherman*, 81 N. W. 495, 501, 105 Wis. 263, 47 L. R. A. 417).

"Duress exists when one, by an unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of his free will." Where plaintiff admitted that no threats were made to induce her to sign a chattel mortgage, which was given on an exchange of houses between herself and defendant, but, after holding out for several hours and refusing to sign the mortgage, she did so finally on the insistence of defendant and his brother that a valid trade had been made, and that if she refused to sign she would become liable for a larger amount than that for which the mortgage was given, the mortgage was not void for duress. *Knight v. Brown* (Mich.) 100 N. W. 602, 603 (quoting *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511).

"To be duress, the act must be physical violence, threats of violence or harm, or imprisonment or threat of imprisonment." One of three brothers, who owned all their property in a partnership, died, leaving his estate by will to his two brothers equally, and requesting them to adopt his children, which they did. They continued to hold their property in common, and the estate had been largely increased in value, when, more than 20 years later, the second brother died intestate, leaving a widow and children. The surviving brother then proposed the formation of a corporation to take the common property, and that a division be made between the persons in interest, who were then all adults, by the allotment of stock to each. Though there was some opposition, he insisted and declared that otherwise he would administer the estate as surviving partner, and the others would get only what the courts allowed them. After the matter had been under consideration for six months, an agreement for the formation of a corporation and the allotment of the stock was signed by the persons in interest, except one, whose interest was bought by the others. The agreement was carried out, and the common estate was owned, and the business managed, by the corporation with marked success. The agreement for division of the stock as a family settlement would not be set aside,

after a lapse of 12 years, on the ground that the acts and threats of the surviving brother amounted to duress. *Burnes v. Burnes* (U. S.) 132 Fed. 485, 493.

DUTY.

See "Public Duty."

Other duties, see "Other."

There are instances where the word "duty" may be used in a pleading, although perhaps not with the utmost propriety, in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the work which he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect his locomotive. In such an instance the allegation is one of ultimate fact, and is partially descriptive of what his contract was. *Pittsburgh C. & St. L. Ry. Co. v. Lightheiser* (Ind.) 71 N. E. 218, 220.

DWELLING HOUSE.

See "One Dwelling House."

"Dwelling house," as used in Civ. Code, § 1237, providing that the homestead consists of the dwelling house in which the claimant resides and the land on which it is situated, means the building which is occupied as a dwelling house by the family, and not such portion of the building as may be actually used by the family for residence purposes. In *re Levy's Estate*, 75 Pac. 301, 302, 141 Cal. 646, 99 Am. St. Rep. 92.

Uncompleted buildings not furnished with either doors or windows, and not occupied nor reasonably capable of occupancy for dwelling purposes, are not "dwelling houses" within Gen. St. p. 2838, § 167, providing that nothing in the act (the road act) shall be construed to extend to pulling down or removing any dwelling house which may encroach on any highway. *Whittingham v. Hopkins* (N. J.) 57 Atl. 402, 404.

An owner of an adjoining lot sued a church corporation to enforce a building restriction in defendant's deed providing that no building or part of a building should be erected in the rear end of the lot conveyed to be used other than a dwelling house, and that no building should be erected within 10 feet of the line of the north side of a 34 feet wide street. The rear end of the lot was the north side of the 34 feet wide street. To the east of the church was a parish building. The church began to build an addition to such building, no portion of which was within the 10 feet back of the line of such street. The building contained living rooms, bedrooms, and studies for the clergy, and was to be used as their residence. Held,

that the addition was not a "dwelling house" within the language of the restriction. *Crofton v. St. Clement's Church*, 57 Atl. 570, 572, 208 Pa. 200.

An awning in front of a building extending thirteen feet from the house line to the curb, supported by five posts and covered with a roof of transparent glass, is not covered by the words "dwelling house or other building" in a deed providing that the front line of any messuages, dwelling houses, or other buildings shall recede eight feet from the street line. *Olcott v. Sheppard, Knapp & Co.*, 89 N. Y. Supp. 201, 202, 96 App. Div. 281.

EACH.

In a tax deed reciting the sale of several tracts, the use in the granting clause of the words "and each and every separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all the land sold. *Gibson v. Kueffer* (Kan.) 77 Pac. 282.

EARNING CAPACITY.

See "Capacity to Earn Money."

EARNINGS.

The word "earnings," as used in Gen. St. 1902, § 836, declaring that no assignment of future earnings shall be valid as against an attaching creditor of the assignee, unless made to secure a bona fide debt or unless recorded, is used in the same sense as the word "wages." *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 57 Atl. 275, 276, 76 Conn. 477.

EASEMENT.

As land, see "Land."

An easement implies necessarily a fee in another, and it follows that it is a right by reason of such ownership to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee; his property rights, however, to be exercised in such way as not to unreasonably interfere with the special use for which the easement was acquired. *Cincinnati, H. & D. R. Co. v. Wachter*, 70 N. E. 974, 975, 70 Ohio St. 113.

An easement "in a public street or highway is the public and common right to use the same for the passage of persons and property, and purposes incidental thereto." *L. Realty Co. v. Johnson* (Minn.) 100 N. W. 94, 95, 66 L. R. A. 439 (citing *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112, 27

N. W. 839, 59 Am. Rep. 303; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389).

"Strictly speaking, a right to cut and take ice is perhaps more in the nature of a profit a prendre than an easement, though it comes within the definition of an 'easement' which was given by Chief Justice Shaw in *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744, and which was quoted with approval by the court in *Owen v. Field*, 102 Mass. 90." A lease, for a round sum, of premises on the shores of a pond, to be used for a dwelling house, and other buildings for the ice business, and providing that the lessor leases to the lessee the right to cut and take ice from the pond, and that the lessee, in addition to the rent, shall deliver to the lessor as much ice as shall be required for two families during the lease, annexes the right to take ice to the leased premises as an easement or a profit a prendre. *Walker Ice Co. v. American Steel & Wire Co.* 70 N. E. 937, 939, 185 Mass. 463.

License distinguished.

"A license is an authority given to do some act or acts on the land of another, without giving any estate in the land itself. It differs from an easement in that the latter is a permanent interest, with a right at all times to enter and enjoy it, while the continuance of the former depends on the will of the person who has created it." There is a distinction between an easement and a license, although in some cases it is difficult to see a substantial difference between them. An easement is a privilege in land founded upon a deed or other writing, or upon a prescription. It is a permanent interest in another's land, with the right to enjoy it fully and without objection. It may attach to the land, and pass with the dominant tenement as an appurtenant thereto. *Asher v. Johnson* (Ky.) 82 S. W. 300, 301 (quoting 5 *Lawson, Rights, Rem. & Pr.* § 2608).

Servitude distinguished.

Though "servitude" and "easement" are often used indiscriminately, the latter term generally refers to a burden imposed. *Scudder v. Watt*, 90 N. Y. Supp. 605, 608.

EAST HALF.

See "Half."

EATING HOUSE.

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and saloons" cannot be lawfully granted permits for the sale of liquor. In re *Henry* (Iowa) 100 N. W. 43, 44.

EDUCATION.

See "Board of Education"; "Institution of Education."

Education includes moral as well as intellectual and physical instruction. In its broadest sense, the word "education" comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical. *People v. Mezger*, 90 N. Y. Supp. 488, 489 (citing *Bouvier*; *Ruohs v. Backer*, 53 Tenn. [6 Heisk.] 395, 19 Am. Rep. 598).

EDUCATIONAL PURPOSES.

See "Exclusive Educational Purposes."

EFFECT.

See "Take Effect."

EFFECTUAL DEED.

See "Good and Effectual Deed."

EFFICIENT CAUSE.

It is only when something occurs subsequent to the defendant's act which makes it result in what would not otherwise have happened that the latter or intervening cause is said to be the "efficient cause," and for the result of which the original actor is not responsible in law. *Central Coal & Iron Co. v. Pearce* (Ky.) 80 S. W. 449, 450.

EJECTMENT.

See "Justice Ejectment."

EJUSDEM GENERIS.

By the rule "ejusdem generis," where there is an enumeration of particular things, followed by general words, the latter shall be construed as having reference only to things of the same kind or class with those specifically mentioned. *Cutshaw v. City of Denver* (Colo.) 75 Pac. 22, 25.

ELECTION.

See "General Election"; "Local Option Election."

The word "election" is generally used as indicating the expression of choice by vote, regardless of whether the choice to be made is as to the selection of an officer or the adoption of a proposition. The word "election" as used in Code, § 1900, providing that each member of a building and loan association shall have one vote for each \$100 of stock, par value, owned or held by him at any election, refers to the selection of the

stockholders or adopting a proposition submitted to them, and need not be limited to the selection of officers, and the proposition for voluntary liquidation and the appointment of a trustee is an election. *McKee v. Home Savings & Trust Co.*, 98 N. W. 609, 610, 122 Iowa, 731.

The word "election," as used in a statute which declares that bets on any election authorized by the Constitution and laws of the state are gaming, is used in its political sense, and not in the same sense in which it is used in the Constitution, and means an election for public office, and does not include a primary election for the purpose of nominating a candidate for public office. *Dooley v. Jackson*, 78 S. W. 330, 334, 104 Mo. App. 21.

In equity.

An "election" is the choice between two or more courses of action, rights, or things by one who cannot enjoy the benefit of both. *Allis v. Hall*, 56 Atl. 637, 644, 76 Conn. 322.

A mortgage of a specified number of cattle on a certain farm is good, to the number specified, against a purchaser from the mortgagor, although there are more cattle of the same description on the farm, which fact is not disclosed by the mortgage, since the mortgagee is permitted, by what is called the doctrine of selection or election, to select the specified number from the whole number. *Sparks v. Deposit Bank*, 78 S. W. 171, 115 Ky. 461.

"The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatever." *Stone v. Cook*, 78 S. W. 801, 803, 179 Mo. 534, 64 L. R. A. 287 (citing *Fox v. Windes*, 127 Mo. 502, 511, 30 S. W. 323, 325, 48 Am. St. Rep. 648).

Election goes not to the form, but to the essence, of the remedy. It applies only where the law supplies to a party two or more modes of procedure predicated upon inconsistent and conflicting theories. If the remedies afforded are predicated upon consistent theories, the suitor may use one or all of the

remedies. There can be but one satisfaction. *Sweet v. Montpelier Sav. Bank & Trust Co.* (Kan.) 77 Pac. 538, 539.

ELECTION CONTEST.

As civil case, see "Civil Action—Case—Suit—etc."

Condemnation suit distinguished, see "Condemnation Proceeding."

An election contest is a special statutory proceeding designed to contest the right of a person, declared elected, to enter upon and hold office. *Maddux v. Walthall*, 74 Pac. 1036, 1027, 141 Cal. 412.

ELECTION DOWER.

The "election dower" provided for by a statute to the effect that, if a husband dies without any descendants capable of inheriting, the widow is entitled to one-half of the real and personal property belonging to the husband at the time of his death absolutely, subject to the payments of his debts, being a creature of statute, differs from the dower allowed under another statute entitling a widow to one-third of the land owned by the husband, free from liability for her husband's debts. The principal difference is that ordinary dower is one-third of the estate for life, freed from liability for debts, while election dower is one-half absolutely, subject to debts, which may turn out to be so great as to wipe out the election dower absolutely. *Adams v. Adams*, 82 S. W. 66, 69, 183 Mo. 396.

ELECTRIC CAR.

Ordinances making it unlawful to operate or run any "street car" unprovided with a car fender of the most improved design and construction, and providing that no "electric car" shall be propelled or operated without having one conductor and one motorman thereon, require a fender, conductor, and motorman only on motor cars, and not on trailers. *Von Diest v. San Antonio Traction Co.* (Tex.) 77 S. W. 632, 633.

ELEVATOR.

As storehouse, see "Storehouse."

Owner of elevator as common carrier, see "Common Carrier."

EMBANKMENT.

An "embankment" is defined as a mound, bank, or dike of earthwork raised for any purpose, as to carry a canal, road, or railway over a valley. Cent. Dict. But so far as the danger to highway travel is concerned, it cannot matter whether the raised condition above the adjoining soil is produced

by filling the roadway or digging away the soil adjoining. A road along the side of an excavation may be a dangerous embankment within the statute. *Wilder v. City of Concord*, 56 Atl. 193, 196, 72 N. H. 259.

EMBEZZLEMENT.

The crime of embezzlement differs in its essential ingredients from the crime of larceny in this: that in larceny the gravamen of the offense is the unlawful and felonious taking of personal property with the intent to convert and steal the same, while in embezzlement the taking is lawful, because of the trust reposed in the agent, servant, or trustee receiving it, and the gist of the offense consists of the conversion of the property so received with a felonious and fraudulent intent of converting the same to the use of the agent, servant, or trustee. *State v. Culver* (Neb.) 97 N. W. 1015, 1018.

"Where the property is taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession and intrust the property to another, in such cases there is no embezzlement." *People v. Dougherty*, 77 Pac. 466, 143 Cal. 593 (citing *People v. Johnson*, 91 Cal. 265, 27 Pac. 663).

EMBRACERY.

Embracery consists in all such practices as tend corruptly to influence a juror. The crime is made up of the attempt thus to influence a juror. Upon such attempt being made, whether successful or not, the crime is consummate. The corpus delicti, the essence and body of the offense, being a corrupt attempt, it is wholly immaterial whether the would-be corrupter gains his point or not, or whether the juror thus approached gives any verdict or not, or whether the verdict be true or false. *State v. Woodward*, 81 S. W. 857, 861, 182 Mo. 391 (quoting *State v. Williams*, 136 Mo. 303, 38 S. W. 75).

EMINENT DOMAIN.

The right of eminent domain is not a right belonging to individuals or corporations, but is only conferred by special enactment, and, before a plaintiff should be allowed to absorb the property of another by condemnation, it is not asking too much of him that he affirmatively show that he is authorized by the law to condemn land at all. *State v. Superior Court for Stevens County*, 74 Pac. 686, 688, 33 Wash. 542.

EMPLOYE.

While the word "employé" is not to be read with full generic force, it has been adjudicated to embrace more than the words

"operative" and "laborer." It may be said generally that the term "employé" includes persons employed by the corporation in comparatively subordinate positions, which cannot correctly be described as either "operatives" or "laborers." *Hopkins v. Cromwell*, 85 N. Y. Supp. 839, 840, 89 App. Div. 481 (citing *In re American Lace & Fancy Paper Works*, 30 App. Div. 321, 323, 51 N. Y. Supp. 818, 820).

A health officer is not an "employé," as that word is used in Mun. Code, § 129, declaring that all employés now serving in the health department shall continue to hold their positions, and shall not be removed from office or reduced in rank or pay, except for cause assigned, and after hearing has been afforded them before the board. *State v. Craig*, 69 N. E. 228, 230, 69 Ohio St. 238.

EMPLOYED.

See "Capital Employed."

A finished manufactured product entirely completed in the fall of one year, and as to which nothing further remained to be done except to be sold when the opportunity offered, and which is stored because not sold until the following April, is not "employed in the mechanic arts" on the 1st day of that April, within the meaning of Rev. St. 1883, c. 6, § 14, providing that all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts shall be taxed in the town where so employed. *Inhabitants of New Limerick v. Watson*, 57 Atl. 79, 80, 98 Me. 879.

EMPLOYMENT.

See "Deprived of Employment"; "Permanent Employment."

END.

See "At the End."

The word "end," as used in a restriction in a deed providing that no building should be erected in the rear end of the lot conveyed within 10 feet from the line of the north side of a street, means the extremity, termination, limit. *Crofton v. St. Clement's Church*, 57 Atl. 570, 572, 208 Pa. 209.

ENFORCE.

See "Proceed to Enforce."

ENGAGED.

See "Principally Engaged."

"One cannot properly be said to be engaged in a business unless there is to some extent a continuous occupation of his facul-

ties and powers directed toward the carrying on of the business as an object or purpose. The extent of continuity implied when the word 'engaged' is employed depends upon the thing which engages. A man may be engaged in prayer, although the engagement may occupy but a few minutes. A man may be engaged in building a house, which cannot occupy, in the natural course of things, more than a few months. A man also may be engaged in any occupation or pursuit for a limited time." One who has sold his business and good will, and has covenanted not to engage as agent or servant in that business, may not, though he is not engaged in any way in the prohibited business, hold himself out to the world as the manager or superintendent of a similar business carried on under his wife's name, as one giving to that business the benefit of his special skill and personal attention, and thereby attract to it the good will which he has sold. *Fleckenstein Bros. Co. v. Fleckenstein* (N. J.) 57 Atl. 1025, 1027.

"To say that one is 'engaged' in an occupation signifies much more than the doing of one act in the line of such occupation. It is an expression in common use, and well understood—that one is engaged in merchandising or in practicing law. Webster, Int. Dict., defines 'engage': 'To embark in a business; to employ or involve oneself; to enlist.' Cent. Dict.: 'To occupy oneself; be busied.' An indictment that defendant, "at," etc., "did engage in procuring laborers for employment out of the state, without having first paid the license tax" prescribed, etc., sufficiently charged that defendant "engaged in the business of procuring laborers," within Pub. Laws 1903, p. 347, c. 247, § 74, prohibiting persons from engaging in the business of procuring laborers, etc., without first having paid the tax imposed. *State v. Roberson* (N. C.) 48 S. E. 595.

ENGAGED CHIEFLY IN FARMING.

See, also, "Person."

"Where one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not a person chiefly engaged in farming." A man whose products from land cultivated by him amount to not more than \$1,500 to \$1,800 per year, while during the same time he expends in the purchase of live stock, and feed for the same, something near \$15,000 per year, and who has become indebted, mainly through his live stock transactions, to the amount of more than \$50,000, is not "chiefly engaged in farming," within the meaning of the bankruptcy act, and is not exempt from proceedings in involuntary bankruptcy. *Bank of Dearborn v. Matney* (U. S.) 132 Fed. 75, 82 (quoting

Wulbern v. Drake, 120 Fed. 495, 56 C. C. A. 643).

Where an alleged bankrupt for three years resided on a farm of 300 acres, which he had bought but on which he had paid little, and he farmed less than 100 acres himself, but expended large sums in the purchase of high-bred cattle, which he kept on the farm for a time, and then sold them at auction sales, and in such business became largely indebted, his farming debts being merely nominal, he was not "engaged chiefly in farming" within the national bankruptcy act, and was subject to proceedings in involuntary bankruptcy. *In re Brown* (U. S.) 132 Fed. 706, 707.

ENGAGED PRINCIPALLY IN MANUFACTURING, ETC.

A corporation chartered to construct and repair vessels, carry on a general ship-building and ship repairing business, construct and operate a marine dry dock, etc., and whose main business consisted in the building of large steel vessels and in repairing others, is a corporation engaged principally in manufacturing and mercantile pursuits, within Bankr. Act July 1, 1898, c. 541, § 4, subsec. "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that such a corporation may be adjudged an involuntary bankrupt. *Columbia Iron Works v. National Lead Co.* (U. S.) 127 Fed. 99, 102, 62 C. C. A. 99, 64 L. R. A. 645.

The phrase "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," as used in Bankr. Act 1898, limiting corporations which may be forced into bankruptcy to such as are engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, is to be taken in its natural and usual meaning, and any corporation which does not come within such meaning cannot be put into bankruptcy. A building and loan association organized to accumulate a fund from contributions of its members from which loans were to be made to assist members in purchase of real estate, the profits of which business were divided among its members, is not a corporation engaged principally in trading or mercantile pursuits within the act. *In re New York Building Loan Banking Co.* (U. S.) 127 Fed. 471, 472.

The phrase "manufacturing pursuits," as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], providing that any corporation engaged principally in manufacturing or mercantile pursuits may be declared a bankrupt, is used for the purpose of describing the kind of a corporation which may be put into bankruptcy, and that it is not intended that the operation of the bankruptcy law on a corporation of a kind within the meaning of the statute

should depend on the question whether it was actually engaged in manufacturing at the particular time when the petition is filed. A suspended concern which has been engaged in manufacturing or trade or mercantile pursuits is subject to the bankruptcy law. A corporation organized for the purpose of manufacturing paper from wood pulp, which had purchased woodland and other property for the commencement of its business, was subject to bankruptcy proceedings under the statute, though it had never, in fact, started its factory. *In re White Mountain Paper Co.* (U. S.) 127 Fed. 180, 181.

A corporation organized for the purpose of manufacturing and dealing in paper and pulp, which had bought large tracts of timber land and expended some \$500,000 in the erection and equipment of buildings for paper and pulp mills, and which had hired cut several thousand cords of wood in lengths suitable for the use in the manufacture of paper, was "engaged in manufacturing" within Bankr. Act July 1, 1898, c. 541, § 4 "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and subject to proceedings in involuntary bankruptcy, though it had never operated its mills nor completed the manufacture of either paper or pulp, where it had engaged in no other business. *White Mountain Paper Co. v. Morse & Co.* (U. S.) 127 Fed. 643, 644, affirming 127 Fed. 180.

A corporation engaged in constructing buildings and bridges by contract, furnishing the labor while others furnish the materials, is a manufacturing corporation, and subject to be adjudged an involuntary bankrupt under Bankr. Act July 1, 1898, c. 54, § 4 "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. *In re Niagara Contracting Co.* (U. S.) 127 Fed. 782, 783.

A corporation incorporated to do a general manufacturing business, and to manufacture, construct, repair, and equip, and buy and sell ships and vessels of all kinds, and parts and furniture therefor, and which since its organization has carried on the business of constructing completed boats, and parts and furniture for vessels, such as boilers, masts, tanks, desks, tables, etc., for the most part made from raw material in its own shops, is engaged principally in manufacturing pursuits within Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 447 [U. S. Comp. St. 1901, p. 3423], and subject to proceedings in involuntary bankruptcy. *In re Marine Const. & Dry Dock Co.* (U. S.) 130 Fed. 446.

A corporation conducting a laundry, the largest part of its business being the washing, starching and ironing, and polishing of collars, cuffs, etc., for manufacturers before they are put on the market, is engaged principally in manufacturing, within the meaning of the national bankruptcy act, and is subject to proceedings in involuntary bank-

ruptcy. *In re Troy Steam Laundering Co.* (U. S.) 132 Fed. 266, 268.

ENGINE.

See "Lone Engine"; "Steam Farm Engine."

ENTERPRISE.

See "Gift Enterprise."

ENTICE.

The word "entice," as used in Or. Code, § 20, declaring that any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or entice away any child under the age of 18 years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, must be given its ordinary and usual meaning, which is to draw on; to instigate by inciting hope or desire; to allure, especially in a bad sense; to lead astray; to tempt; to incite. Its synonyms are "to allure"; "to coax"; "to destroy"; "to seduce"; "to tempt"; "to inveigle"; "to persuade"; and "to prevail on." *Gould v. State* (Neb.) 99 N. W. 541, 543.

ENTIRE CHARGE.

See "Take Entire Charge."

ENTIRE CONTRACT.

Where an insurance policy is issued, and different classes of property are insured, each class being separated from the others and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered not as one entire in itself, but as one which is severable. *Miller v. Delaware Ins. Co. of Philadelphia* (Okla.) 75 Pac. 1121, 1123, 65 L. R. A. 173.

ENTITLED.

See "Beneficially Entitled."

In a statute providing that a married woman is not entitled to letters testamentary unless her husband consent in writing, the expression "is not entitled" means that she has no claim, no right to be appointed; it does not import the absolute disqualification and incapacity of a married woman to take administration without his consent; such an appointment would be revocable, but not absolutely void. *English's Ex'r v. McNair's Adm'rs*, 34 Ala. 40, 49.

ENTRY.

See "False Entry"; "Forcible Entry"; "Lawful Entry."

ENUMERATED.

In order to remove an imported article from the operation of a tariff provision for merchandise "not enumerated," it is not necessary to show that there is an enumeration of the article according to its chief use. It is enough if there is an enumeration describing any minor use. *Dodge & Olcott (U. S.)* 130 Fed. 624, 625; *Lueders v. Same (Id.)*.

EQUAL AND UNIFORM.

The requirement that all taxation shall be "equal and uniform" means, with reference to taxes on occupations, that the burden imposed shall fall alike on all persons who are in substantially the same situation—a rule generally recognized, even in the absence of an express constitutional requirement as to uniformity. Within the boundaries of this limitation lie broad fields of legislative discretion, which should not be invaded by the court. In seeking to secure equality and uniformity, the Legislature may tax some trades and not others; it may—indeed, must—classify occupations for the purpose of taxation; and the more exhaustive its system of arrangement, the more nearly similar will be the situation of all who are embraced within any designated class. In *re Watson (S. D.)* 97 N. W. 463, 465.

EQUALLY DIVIDED.

It is a general rule that, when a bequest is made to several persons of income to be divided "equally" among them, they take as tenants in common, and not as a class or as joint tenants. *Loomis v. Gorham*, 71 N. E. 981, 982, 186 Mass. 444.

The phrase "equally share and share alike," as used in a will whereby a testator bequeathed his residuary estate, without lawful heirs, and directed that the same should be equally divided among the heirs, share and share alike, meant that in the distribution of the estate the testator's lawful heirs took per capita, and not per stirpes. *Mooney v. Purpus*, 70 N. E. 894, 896, 70 Ohio St. 57.

Under a bequest of property to be equally divided between the children of two of testator's brothers, the nieces and nephews take per capita, and not per stirpes. *Hughes v. Hughes (Ky.)* 82 S. W. 408, 409.

EQUITABLE ASSIGNMENT.

"In order to constitute a valid assignment in equity, all that is necessary is an order from the person to whom the money is due or coming on the person in whose hands or under whose control it may be to pay to the payee." *Mack Mfg. Co. v. Smoot*, 47

S. E. 859, 861, 102 Va. 724 (quoting *Chesapeake Classified Bldg. Ass'n v. Coleman*, 94 Va. 433, 26 S. E. 843).

An agreement to pay a certain sum out of, or that one is entitled to receive the same from, a designated fund when received, does not operate as an "equitable assignment." The test, even of an equitable assignment, "is whether the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be the assignee." *Donovan v. Middlebrook*, 88 N. Y. Supp. 607, 608, 95 App. Div. 365 (citing *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475).

EQUITABLE CONVERSION.

In order to work a conversion of testator's lands into money from the time of his death, there must be either a positive direction to sell or an absolute necessity to sell, in order to execute the will, or such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath it as money. In *re Cooper's Estate*, 56 Atl. 67, 68, 206 Pa. 628, 98 Am. St. Rep. 799 (citing *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436).

EQUITABLE DEFENSE.

In Code Civ. Proc. § 507, authorizing the defendant in an action to interpose any defense he may have, either legal or equitable, "equitable defense" means a defense which a court of equity would recognize, or a defense founded on some distinct ground of equitable jurisdiction. *City of New York v. Holzderber*, 90 N. Y. Supp. 63, 64, 44 Misc. Rep. 509.

EQUITABLE ELECTION.

See "Election."

EQUITABLE ESTOPPEL.

See "Estoppel in Pais."

EQUITABLE JOINTURE.

When the statutory requisites are not all found in a provision by a husband for the wife by will or otherwise, yet it is manifest that the husband did not intend her to have the provision and her dower also, she will be compelled in equity to elect between them, which election is known as "equitable jointure." A contract, made in contemplation of marriage, by which a woman purports to release her claim to her intended husband's lands, but in which it is nowhere declared to be in satisfaction of her dower, and in which no provision is made for her support

after the husband's death, but simply permits her to receive the rents out of her dower in a former husband's estate, does not constitute an equitable jointure. *King v. King* (Mo.) 82 S. W. 101, 103.

EQUITABLE LIEN.

"An equitable lien arises where there is some personal obligations or duty to be enforced." Where testator bequeathed to his wife and daughter the use of his estate for life, with remainder, subject to a power of sale in the life tenants, over to defendants, one of the life tenants, by temporarily waiving her right to share in the estate so that a sale of the property was avoided, was not entitled to an equitable lien on the property so as to be able to reach defendant's remainder interest through that medium, but was, as to defendant, a mere volunteer. *Hare v. Congregational Soc. of Ferrisburg* (Vt.) 57 Atl. 964, 965.

"Where in terms the parties agree that one making advances for the purchase of merchandise to be shipped to him shall have a lien on the same, the lien arises upon the purchase of the merchandise before it is consigned to the creditor. The lien, in such case, attaches to the merchandise purchased, and in the hands of the debtor at the time of his bankruptcy, and may be asserted against the debtor's assignee in bankruptcy. Judge Story said that the possession of the property by the debtor was not a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of his general creditors, and therefore the agreement to give a lien or equitable charge was binding upon the property in the hands of the assignee." *Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee* (Ky.) 78 S. W. 413, 415, 64 L. R. A. 219 (quoting *Jones, Liens*, § 63).

EQUITABLE PROCEEDING.

Mandamus is not an equitable proceeding, and a mandamus issued after judgment against a county, to compel the levy of a tax to pay the same, is not a proceeding in equity, but one at law, in the nature of an execution to enforce satisfaction. *Carter County v. Schmalstig* (U. S.) 127 Fed. 126, 127, 62 C. C. A. 78 (citing *Riggs v. Johnson County*, 73 U. S. [6 Wall.] 166, 18 L. Ed. 768; *Heine v. Levee Com'rs*, 86 U. S. [19 Wall.] 655, 22 L. Ed. 223).

EQUITY.

"Equity is, as we are told, the correction of that wherein the law, by reason of its universality, is deficient. He who asks its aid must present himself with clean hands. Its special mission is to relieve from fraud and

to enforce the observation of broad and just principles." *Theis v. Spokane Falls Gaslight Co.*, 74 Pac. 1004, 1006, 34 Wash. 23.

Equity is a system, both in England and this country, of well-established law. Equity is not a chancellor's mere notions of what is equality. *Laird v. Union Traction Co.*, 57 Atl. 987, 208 Pa. 574.

"Equity is the correction of that wherein the law, by reason of its universality, is deficient." *Mutual Life Ins. Co. v. Blair* (U. S.) 130 Fed. 971, 974.

EQUITY OF REDEMPTION.

An "equity of redemption" is defined to be a right which the mortgagor of an estate has of redeeming it after it has been forfeited at law by nonpayment, at the time appointed, of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs. *Ebelharr v. Tennelly* (Ky.) 80 S. W. 459, 460 (citing *Bouv.*).

ERROR.

See "Invited Error"; "Writ of Error."

ERROR CORAM NOBIS.

See "Writ of Error Coram Nobis."

ERROR OF LAW.

An "error of law" is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law, which is properly before it and within its jurisdiction to make. *Pratt v. Pratt*, 74 Pac. 742, 743, 141 Cal. 247.

ESCHEAT.

The words "escheat" and "forfeiture" have a distinct and definite legal meaning, and can never be construed to mean "sale" and "purchase." *Woodrough v. Douglas County* (Neb.) 98 N. W. 1092, 1094.

ESCROW.

See "Delivery in Escrow."

ESTABLISHMENT.

See "Manufacturing Establishment."

ESTATE.

See "Contingent Estate"; "Vested Estate."

The word "estate" includes all species of property, applicable alike to real and per-

sonal, and in its broadest sense is held to include choses in action. *State v. Fidelity & Deposit Co. of Maryland (Tex.)* 80 S. W. 544, 553.

The direction in a will that the testator's business shall be carried on with his "estate and property" comprehends the use of all his real and personal property for that purpose. It would seem to be evident that to use, in carrying on the business, the testator's estate and property, is to apply thereto all income, however it may be produced, from either form of property. *Thorn v. De Breteuil*, 71 N. E. 470, 473, 179 N. Y. 64.

Where a will provides for the management and devise and distribution of the said estate, the words "the said estate" refer to an estate consisting of both the real and personal property. *Dickson v. New York Biscuit Co.*, 71 N. E. 1053, 1064, 211 Ill. 468.

ESTATE OF DECEASED PERSON.

As person, see "Person."

The phrase "estates of deceased persons," as used in Gen. St. 1902, §§ 2367-2377, imposing a succession tax on any property within the jurisdiction of the state which shall pass by will or inheritance, refers to the residuum of the decedent's property inventoried under the law remaining after claims of creditors and charges of administration have been satisfied. *Appeal of Gallup*, 57 Atl. 699, 702, 78 Conn. 617.

ESTATE TAIL.

A conveyance to a grantee and to the heirs of her body, reciting that if she should die without issue then the lands should revert to the grantor's heirs at law, created an "estate tail," and vested in the grantee a life estate only, under *Sand. & H. Dig. § 700*, providing that when by the common law any person, who would become seised in fee tail of any lands or tenements by virtue of a conveyance, such person, instead of being or becoming seised thereof in fee tail, shall be adjudged to be seised for life only, and that the remainder shall pass in fee simple absolute to the person to whom the estate tail would have first passed, according to the course of the common law. *Black v. Webb (Ark.)* 80 S. W. 367, 368.

ESTIMATED REVENUE.

The words "estimated revenue," as used in the Baltimore city charter, providing that in case of any surplus arising in any fiscal year by reason of an excess of income received from the estimated revenue over expenditures for such year the surplus shall be passed to the commissioners of finance, to be credited to the general sinking fund, do not include a loan authorized by the city to be

procured for the purpose of extending the water service and constructing a reservoir. *Callaway v. City of Baltimore (Md.)* 57 Atl. 661, 663.

ESTOPPEL

"According to my Lord Coke, an estoppel is that which 'shuts a man's mouth from speaking the truth.' With this forbidding introduction a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system. The harsh words which the very learned commentator upon Littleton uses in giving a definition of this principle are to be attributed to the fact that before his day 'the scholastic learning and subtle disquisition of the Norman lawyers (in the language of Blackstone) had tortured this principle so as to make it the means of great injustice; and the object of my Lord Coke was to denounce the abuse which he says had got to be "a very cunning and curious learning" and "was odious," and thereby restore the principle and make it subserve its true purpose as a plain, practical, fair, and necessary rule of law.' Estoppels must be mutual; that is, if one side is bound, the other must be. It only includes parties and privies, and does not extend to a stranger." *Allred v. Smith*, 47 S. E. 597, 599, 135 N. O. 443, 65 L. R. A. 924 (quoting *Armfield v. Moore*, 44 N. C. 157).

The essential and necessary elements of an "estoppel" are that it must have been made with the intention that the other party should act on it, and the other party must have been induced to act on it. *Beaman v. Stewart (Colo.)* 74 Pac. 342, 344 (citing *Patterson v. Hitchcock*, 3 Colo. 533, 536).

ESTOPPEL BY CONDUCT.

The doctrine of "estoppel by conduct" rests upon the principle that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted so that injury would befall such others if the truth of the fact or previous declarations should afterwards be denied. *Dreyfus v. W. A. Gage & Co. (Miss.)* 36 South. 248, 250.

"The cases, when carefully analyzed, show that all of the following elements must actually or presumably be present in order to an estoppel by conduct: First, there must have been a false representation or a concealment of material facts; second, the representation must have been made with a knowledge of the facts; third, the party to whom it was made must have been ignorant of the truth of the matter; fourth, it must have been made with the intention that the other party should act upon it; fifth, the

[Appendix.]

other party must have been induced to act upon it." *Harrison v. McReynolds*, 82 S. W. 120, 125, 183 Mo. 533 (quoting *Bigelow, Estop.* [3d Ed.] 484).

ESTOPPEL BY JUDGMENT.

See, also, "Res Adjudicata."

As a general rule, an "estoppel by judgment" resides in the judgment itself, and not in the reason for rendering it, and when the decree is definite and certain the opinion of the court cannot be used to show what matters were considered or determined. *Gentry v. Pacific Live Stock Co. (Or.)* 77 Pac. 115, 117

"The doctrine of estoppel (that is, the conclusiveness of a former judgment) is restricted to facts directly in issue, and does not extend to facts which rest in evidence and are merely collateral." *People v. Albers* (Mich.) 100 N. W. 908, 910 (quoting *Freem. Judgm.* § 257).

ESTOPPEL IN PALS.

"The important and primary ground of estoppel by matter in pals is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted." *Spence v. Renfro*, 78 S. W. 597, 598, 179 Mo. 417 (citing *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Campbell v. Johnson*, 44 Mo. 247; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Taylor v. Zepp*, 14 Mo. 482, 55 Am. Dec. 113; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 378).

"Estoppels in pals are called equitable estoppels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just." The defense of equitable estoppel is as available at law as in equity. *Hoge v. Fidelity Loan & Trust Co. (Va.)* 48 S. E. 494, 495 (quoting *Barnard v. German American Seminary*, 49 Mich. 444, 13 N. W. 811).

"Estoppels by matter in pals, as distinguished from estoppels by record or deed, are sometimes called 'equitable estoppels,' because they originated in courts of equity. But it is not meant by this that they are not available in courts of law, or are cognizable only in courts of equity. Such estoppels were early recognized in courts of law, and came to be so readily and freely sustained as matter of defense at law that it is neither necessary nor permissible to resort to equity for the mere purpose of obtaining the benefit of such an estoppel, when there is not otherwise a ground of equitable jurisdiction." *Anglo-American Land, Mortgage & Agency Co. v. Lombard* (U. S.) 132 Fed. 721, 733 (citing *Barnard v. German-American Seminary*,

49 Mich. 444, 13 N. W. 811; *Vermont Copper Mining Co. v. Ormsby*, 47 Vt. 709, 713; *Martin v. Maine Cent. Ry. Co.*, 83 Me. 100, 21 Atl. 740; *Drexel v. Berney*, 122 U. S. 241, 253, 7 Sup. Ct. 1200, 30 L. Ed. 1219; *Dickerson v. Colgrove*, 100 U. S. 578, 584, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 76, 78, 28 L. Ed. 79; *Wehrman v. Conkin*, 155 U. S. 314, 327, 15 Sup. Ct. 129, 39 L. Ed. 167; *Bigelow on Estoppel* [4th Ed.] pp. 543, 544; 2 *Herman on Estoppel*, §§ 1297, 1298).

ETC.

The term "etc." is defined in the *Century Dictionary* as: "And others; and so forth; and so on; generally used when a number of individuals of a class have been specified to indicate that more of the same sort might have been mentioned, but for shortness are omitted." As used in an act of sale of property, describing the property sold by enumerating various articles, and concluding with the term "etc.," the vendor does not intend that the description shall be regarded as complete and exhaustive and as exclusive of everything not expressly mentioned, but, on the contrary, that other articles exist, which for brevity are not mentioned. *Bagley v. Rose Hill Sugar Co.*, 35 South. 539, 548, 111 La. 249.

EUNUCH.

The primary and general definition of the word "eunuch" given in all the dictionaries is "a castrated male of the human species." It must be given its usual and ordinary sense, as understood in the place where used. A newspaper publication that a man is a eunuch is actionable per se. *Eckert v. Van Pelt* (Kan.) 76 Pac. 909, 910, 66 L. R. A. 266.

EVERY.

In a tax deed reciting the sale of several tracts, the use in the granting clause of the words, "and each and every separate tract and parcel thereof," in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described," indicates a purpose to convey all the land sold. *Gibson v. Kueffer* (Kan.) 77 Pac. 282, 283.

EVIDENCE.

See "Best Kind of Evidence"; "Demurrer to the Evidence"; "Direct Evidence"; "Indirect Evidence"; "Preponderance of the Evidence"; "Prima Facie Evidence"; "Traditionary Evidence"; "Unequivocal Evidence."

"Technically there is a difference between evidence and proof. Evidence tends

to establish or disprove an alleged matter of fact in issue. Proof is an effect of evidence, while evidence is merely the means of making proof. A fact is not proved unless it is established." *Oliveros v. State*, 47 S. E. 627, 629, 120 Ga. 237.

EXCEPTION.

Technically the words "exception" and "reservation" are different in meaning, but have often been used as synonymous. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193.

If A. owns ten acres of land and conveys it all to B. except one acre, upon which his mansion stands, that is an "exception." *Dozier v. Toalson*, 79 S. W. 420, 422, 180 Mo. 546.

EXCESS.

See "To Excess."

EXCESSIVE PUNISHMENT.

See "Cruel Punishment."

EXCLUSIVE.

The word "exclusive" in a contract between a city and a certain person purporting to grant the exclusive privilege of laying and maintaining water pipes in its streets, and by which it agreed to pay certain rentals for hydrants, such contract to continue in force for 20 years, was insufficient to raise the implication that the city by the use of the word thereby agreed to renounce its power to construct the water-works itself, because such is not the ordinary meaning of the word, and because the word "exclusive," if given its usual interpretation, would render the exclusive feature of the contract void. *Farmers' Loan & Trust Co. v. City of Sioux Falls* (U. S.) 131 Fed. 890, 899.

EXCLUSIVE EDUCATIONAL PURPOSES.

"Exclusive educational purposes," when applied to an academy, is broad enough to cover the buildings and grounds which form a part of the foundation, and which are exclusively used for the school life, whether the lads are at study or at recitations, or are eating, reading, sleeping, drilling, or at play. *People v. Mezger*, 90 N. Y. Supp. 488, 489.

EXCUSE.

As used in an instruction that malice means the doing of a wrongful act intentionally, without justification or excuse, the language, "without any justification or ex-

cuse," not only excludes justifiable and excusable homicide, but homicide extenuated to manslaughter, because done in sudden heat and passion upon sufficient legal provocation. It must not be supposed that the word "excuse" is only applicable to excusable homicide, as homicide in self-defense. It would therefore be wrong to hold that the word "excuse" was intended by the court to be used in the absence of something which renders one wholly excusable or justifiable, but, on the contrary, it should be held to include also any legal extenuation of the offense charged. *State v. McDaniel*, 47 S. E. 384, 387, 68 S. C. 304.

EXECUTION.

"Execution" and "signing" are not synonymous terms. Execution implies complete execution—signing, sealing, and delivery—whereas signing implies only one of the steps towards execution. *Hayes v. Ammon*, 85 N. Y. Supp. 607, 608, 90 App. Div. 604.

EXECUTOR IN HIS OWN WRONG.

An executor in his own wrong is one who wrongfully intermeddles with the goods of the deceased, or does any other act characteristic of the office. *Allen v. Hurst*, 48 S. E. 341, 342, 120 Ga. 763 (citing 1 Wms. Ex'rs, p. 298).

EXECUTORY DEVISE.

As remainder, see "Remainder."

An executory devise is such a limitation of a future interest in lands or personal chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. *Stallcup v. Cronley's Trustee* (Ky.) 78 S. W. 441, 442.

EXERCISING CORPORATE FRANCHISES.

"Exercising corporate franchises" and "carrying on business" in a corporate or organized capacity mean the same thing, under Laws 1896, p. 859, c. 908, as amended by Laws 1901, p. 297, c. 118, authorizing an annual state tax on life insurance companies for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within the state. *People v. Miller*, 71 N. E. 930, 932, 179 N. Y. 227.

EXPECTANCY.

An expectancy or hope is defined as "a mere hope unfounded in any limitation, possession, trust, or legal act whatever, such as

the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility. It is a possibility, in the popular sense of the term. But it is less than a possibility in the specific sense of the term "possibility"; for it is no right at all, in contemplation of law, even by possibility, because in the case of a mere expectancy nothing has been done to create an obligation in any event, and where there has been no obligation there can be no right, for right and obligation are correlative terms." The interest of a contingent remainderman is not an expectancy. *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 1026, 123 Iowa, 413 (quoting 2 Fearn, Remainders, p. 23).

EXPECTATION.

The term "expectation," as used in *Hurd's Rev. St. 1901*, c. 120, § 366, imposing a tax on the transfer of property by will, where one becomes beneficially entitled in possession or expectation to any property or income thereof, is used "not to denote an expectation of becoming vested both with the title and the possession where neither is now vested, but to denote a condition where the title is vested and the possession is deferred. The term 'in expectation' is used in contradistinction to 'in possession.' Both contemplate a title vested and indefeasible; but in one instance the right of enjoyment is immediate 'in possession,' in the other it is postponed 'in expectation.' As used in this statute, these words last quoted refer to the future possession of an estate now vested, and which is subject to the immediate enjoyment of another." *People v. McCormick*, 70 N. E. 350, 353, 208 Ill. 437, 64 L. R. A. 775.

EXPEDIENTE.

"Expediente," in Mexican law, means all the papers or documents constituting a grant or title to land from government. *Vanderslice v. Hanks*, 3 Cal. 27, 38.

EXPENSE.

See "Actual Expense."
All expenses, see "All."

Of court.

Any expense lawfully incurred is an expense of holding court. Expenses of a committee of citizens of a creditor appointed by a grand jury to inspect and examine the offices, papers, books, and records of county officers, and to make a full and complete report of the result of such investigation to the next succeeding grand jury, are expenses of the court, the grand jury being a component part of the court. *Chatham County v. Gaudry*, 47 S. E. 634, 635, 120 Ga. 121.

Of family.

The phrase "expenses of the family," as used in 3 Mills' Ann. St. 1891 (2d Ed.) § 3021a, providing that the expenses of the family are chargeable on the property of both husband and wife, is not limited to necessities, and what shall be included in the term must be determined by the facts of each case, subject to the limitations that the articles must have been purchased for and used in or by the family or some member thereof. *Gilman v. Matthews* (Colo.) 77 Pac. 366.

EX POST FACTO.

"An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed." *State of Iowa v. Jones* (U. S.) 128 Fed. 626, 628 (citing *Fletcher v. Peck*, 10 U. S. [6 Cranch] 87, 3 L. Ed. 162).

A statute which deprives the accused of any substantial right which he possessed when the offense was committed, or which after that time changes the punishment of his offense, is as to him ex post facto. *People v. Johnson*, 90 N. Y. Supp. 134, 136, 44 Misc. Rep. 550.

A retrospective criminal or penal law is not "ex post facto" where it does not deprive the party of some additional right to which he was entitled under the law at the time the offense was committed, or does not alter his situation to his disadvantage. *State v. Tyree* (Kan.) 77 Pac. 290, 291.

EXPOSE.

See "Voluntary Exposure."

EXPOSE TO UNNECESSARY DANGER.

Voluntary exposure to unnecessary danger, see "Voluntary Exposure."

In construing a clause in an accident policy exempting the insurer from liability in a greater sum than \$100 in case insured lost his life from unnecessary exposure to danger or to obvious risk of injury, the court said: "Apart from the adjudications on the question, I should be inclined to the opinion that, as a main purpose in taking a policy of accident insurance is to procure indemnity against the consequences of the insured party's carelessness and oversights, a stipulation against 'exposure to unnecessary danger or to obvious risk of injury' excludes from the force of the policy accidents occasioned by that positive sort of negligence which in personal injury litigation falls within the doctrine of assumed risk, and consists of knowledge of a danger, and willingness to encounter it, but does not exclude such as happen from the mere failure of the

insured to shun a danger unknown to him, which might have been known by due care, or what is denominated 'contributory negligence.' This view would require, to bring into operation the minimum indemnity clause of the policy, volition on the part of the insured in needlessly exposing himself to danger as in cases where the word 'voluntary' is used. It seems to me the intention of the contract implies liability for an accident unless there was a voluntary assumption of unnecessary risk—an assumption of the risk, not, of course, in the expectation of being hurt, which would amount to self-inflicted injury, but in the expectation of encountering the danger and avoiding injury from it." It was held that such a limitation did not apply to a death from a casualty to which insured was exposed in the performance of his duties as a bridgeman. *Jamison v. Continental Casualty Co.*, 78 S. W. 812, 814, 104 Mo. App. 306.

EXPRESS DEDICATION.

See "Dedication."

EXPRESS MALICE.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof, such as previous difficulties; preparation to commit the offense; threats. *Henderson v. State*, 48 S. E. 167, 168, 120 Ga. 504.

Express malice is proved by evidence of a sedate, deliberate purpose and formed design to kill another; and such purpose and design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, knowing it to be such, stealthily lying in wait, preconcerted plans or the previous procurement or preparation of instruments, contrivances, or other means for slaying or doing great bodily harm to the deceased victim. *State v. Brinte* (Del.) 58 Atl. 258, 262.

EXPRESS TRUST.

See "Trustee of Express Trust."

EXPRESS WARRANTY.

To constitute an "express warranty," the word "warrant" need not be used, nor are any particular words necessary. Whatever representations are made by the seller at the time of the sale as to the quality of the article is an express warranty. *Cummins v. Ennis* (Del.) 56 Atl. 377 (citing *McLennan v. Ohmen*, 75 Cal. 553, 17 Pac. 687).

In a case involving the question of whether or not representations made by a seller of goods amounted to a warranty, the

court, in passing on the issue raised, said: "Perhaps no subject in the entire domain of law has produced more contrariety of opinion than has the subject of warranty in sales of personal property. Not only have the courts differed in deciding cases, but courts and authors have often failed to discriminate between warranties and deceit or fraudulent representations. As an illustration, it is often said, in considering the subject of express warranty, that it is not necessary that the seller should have intended, by the language used, to warrant the thing sold, and that, in order to create a warranty, the purchaser must be influenced by the statement alleged to constitute the warranty. Both of these propositions are correct, as applied to a question of fraud, based upon a statement made by the seller, but neither is correct in determining whether or not a statement constitutes an express warranty. Such a warranty is entirely a matter of contract, and the contract which creates it must, like all other contracts, embody the mutual intentions of the parties. Nor is it necessary that the buyer must have been deceived before he can recover for the breach of an express warranty." In a written agreement plaintiff agreed to sell an entire crop of cane, to be grown by him on his plantation for four years, and to cultivate all cane in a good manner, and to deliver it clean for the mill, "said cane to be sound, ripe, and merchantable." Held, that there was an express warranty, and that plaintiff was not entitled to recover the stipulated price for all the cane if it was not sound and merchantable. *Ellis v. Riddick* (Tex.) 78 S. W. 719, 721.

In insurance.

"An express warranty [in insurance] is an agreement expressed in the policy whereby the assured stipulates that certain facts are or shall be true, or certain acts shall be done relative to the risk. It may relate to an existing or past fact, or be promissory and relate to the future." A stipulation in a fire policy that the insurance company should not be liable for loss caused, directly or indirectly, by order of any civil authority, is not a warranty, within Civ. Code Cal. §§ 2607, 2608, providing that a statement in a policy of a matter relating to the thing insured or to the risk as a fact, and a statement which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty, the statute not creating any new definition of warranty in insurance. *Conner v. Manchester Assur. Co.* (U. S.) 130 Fed. 743, 744 (quoting *Phillips on Insurance*, § 754).

EXTEND—EXTENSION.

The word "extend," both by etymology and by common usage, is an exceedingly

flexible term, lending itself to a great variety of meanings, which must in each case be gathered from the context, which is owing to the fact that it is essentially a relative term, referring to something already begun; hence, in a concrete sense, it has no persistent meaning, although abstractly it always implies increase or amplification as distinguished from inception; as, for instance, "the extension of a man's business," or "of his line of credit," or "of the due time of his debts." Extension in space may be in any direction. It is not confined to mere linear prolongation. *Middlesex & S. Traction Co. v. Metlar* (N. J.) 58 Atl. 142, 143.

The word "extend" implies something to be extended, and therefore there can be no inference that the Legislature intended by Laws 1902, p. 1748, c. 600, entitled "An act to extend and regulate the liability of employers," to abrogate any right of action existing under the statutes or common law, unless such an intention is clearly to be drawn from the language of the act itself. *Rosin v. Lidgerwood Mfg. Co.*, 86 N. Y. Supp. 49, 51, 89 App. Div. 245.

The term "extension" conveys to the mind an enlargement of the main body; the addition of something of less import than that to which it is attached. *New York Cent. & H. R. R. Co. v. Buffalo & W. Electric Ry. Co.*, 89 N. Y. Supp. 418, 421, 96 App. Div. 471.

EXTENDER.

"Extender" in Spanish law means to commit to writing at length. *Beach v. Gabriel*, 29 Cal. 580, 584.

EXTENT.

See "Appreciable Extent."

EXTENUATE.

As used in an instruction relating to manslaughter, which tells the jury that implied malice would be inferred when the killing took place without any cause which would in law justify, excuse, or extenuate the homicide, the word "extenuate" has the same meaning as "mitigate," and refers to the reduction of the grade of the offense, as well as to a reduction of the punishment. *Connell v. State* (Tex.) 81 S. W. 746, 748.

EXTINGUISHMENT.

"An extinguishment is a discharge by operation of law." *Woodrough v. Douglas County* (Neb.) 98 N. W. 1092, 1095.

EXTRA BRAKEMAN.

An "extra brakeman" is one who has no regular employment, but takes the place of a
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regular employé when off duty. *Louisville & N. R. Co. v. Mulfinger's Adm'x* (Ky.) 80 S. W. 499.

EXTRA GOOD ORE.

The words "extra good ore," in a contract to indemnify for the expense of sinking a mining shaft, if the drill hole was not as represented, the representation being "1 to 8 feet soil and clay, 110 to 117 feet dark flint, with extra good ore," do not refer merely to the quality of the ore, but require a quantity sufficient to justify mining. *Hall v. Chitwood*, 81 S. W. 208, 209, 106 Mo. App. 568.

EXTRALATERAL.

See "Extraliminal."

EXTRALIMINAL.

"Extraliminal," or "extralateral," with reference to the rights conferred by a lode location, while depending for its existence on something within the boundaries, may, nevertheless, be exercised under certain conditions beyond those boundaries. *Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co.* (Colo.) 75 Pac. 1070, 1073, 64 L. R. A. 925.

EXTRAORDINARY.

The words "difficult" and "extraordinary," as used in Code Civ. Proc. § 3253, authorizing the court to grant an additional allowance where the action is difficult and extraordinary, must be given their usual and accepted meaning. A general rule specifying the precise limitation that they impose upon the power of courts to grant an additional allowance may be difficult to formulate, but every application to the facts of a particular case, when presented, is not troublesome. The section does not authorize an additional allowance in an action for personal injuries, where the only question for the court is the amount of the damages, and no difficult questions of law are involved. *Standard Trust Co. v. New York Cent. & H. R. R. Co.*, 70 N. E. 925, 926, 178 N. Y. 407.

F. O. B.

The term "f. o. b." cars, in mercantile contracts, means "free on board" cars at the place of shipment. Such term means that the seller will, without expense or act of the buyer, deliver to the latter the subject of the sale on cars at such place. All the authorities declare that a sale f. o. b. cars so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars, ready to be taken out by the carrier, that the term is not open to construction. *Vogt v. Shienebeck* (Wis.) 100 N. W. 820, 822.

FACTOR.

As trustee of an express trust, see "Trustee of Express Trust."

Where plaintiff, at defendant's request, delivered to it a car of lemons for the purpose of completing a sale already effected by defendant at a stated price, defendant to receive a certain commission on the sale, though it was not, in the transaction, within the technical definition of a factor, in that the lemons were not first placed in its possession for the purpose of a sale, but were delivered to it for the purpose of completing a sale already effected, defendant's relation to the plaintiff, after he had delivered them to it, was substantially that of a factor. *Betts v. Southern California Fruit Exch.* (Cal.) 77 Pac. 993, 994.

FAIR.

See "Unfair."

FAIR CONSIDERATION.

See "Present Fair Consideration."

The term "fair consideration," as used in Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that all conveyances made by a bankrupt within four months next preceding his bankruptcy, with intent to defraud his creditors, shall be void, except as to purchasers in good faith and for a present, fair consideration, does not make it necessary that the consideration for the transfer should be a just equivalent of the thing bought. The word "fair," as used in the section, signifies no more than honest or free from suspicion. It is evidently not intended as the equivalent of "adequate," unless the inadequacy is such as to indicate a purpose on the part of the vendor to cheat his creditors; and until one is declared a bankrupt third persons may deal with him as with any other, save that all transfers made by him within four months next preceding his bankruptcy, with intent on his part to hinder, delay, and defraud his creditors, shall be void, except as to good-faith purchasers for a present fair consideration. *Myers v. Fultz* (Iowa) 100 N. W. 351, 352 (citing *Dunlop v. Thomas*, 68 Pac. 909, 28 Wash. 521).

FAIR GROUNDS.

The words "fair grounds," in Gen. St. 1902, § 1358, declaring a punishment for any one who shall, within one mile of the fair grounds of any incorporated society, expose for sale, from any wagon or temporary stand, any article of provision without the consent of the society, are used as the equivalent of the words "exhibition or fair," used in the

original act (Pub. Acts 1868, p. 147, c. 14), so that the prohibition extends only to a sale while a fair is being held. *State v. Reynolds*, 58 Atl. 755, 756, 77 Conn. 131.

FAITH.

See "Full Faith and Credit"; "Good Faith."

FALL.

The word "fall," as used in a complaint in an action on an accident policy, alleging that insured fell from the cars and received injuries, from which he died, implies the happening by chance of an undesigned and involuntary event, which resulted in bodily injuries effecting the death of the insured through external, violent, and accidental means, within the terms of the policy. *Richards v. Travelers' Ins. Co.* (S. D.) 100 N. W. 428, 429.

FALSE AFFIDAVIT.

Where the statements made in an affidavit in support of a pension claim are true, it is not a "false or fraudulent affidavit," the making of which constitutes a crime, under Rev. St. § 4746 [U. S. Comp. St. 1901, p. 3279], merely because it was not in fact sworn to on the date shown in the notary's certificate. *United States v. Wood* (U. S.) 127 Fed. 171, 173.

FALSE ENTRY.

An entry on the books of a national bank by the cashier as a cash item of a check which actually entered into a transaction of the bank is not making a "false entry," under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], though he knew the check to be worthless and fraudulent, and made the entry with the intent to deceive, as the entry is a truthful statement of the actual transaction. *United States v. Young* (U. S.) 128 Fed. 111, 113.

FALSE IMPRISONMENT.

False imprisonment is the unlawful detention of the person of another against his will. The gist of the action is the unlawful detention. *Marshall v. Cleaver* (Del.) 56 Atl. 380, 381; *McCaffrey v. Thomas*, Id. 282, 283.

A case of false imprisonment is made out when it is shown that plaintiff was intentionally detained as a prisoner by defendant without any warrant therefor. He is not required to prove malice or want of probable cause. *Thompson v. Bucholz* (Mo.) 81 S. W. 490, 491.

FALSE PRETENSE.

A "false pretense," such as falls within the statute relating to the offense of obtaining property under false pretenses, is a false representation relating to some existing or past fact, and must actually mislead. To constitute the offense, it is enough if a material part of the pretense be false, that it be made with the intent to defraud, and that it induces the person sought to be wronged to part with his property; and these are inquiries proper for the jury under appropriate instructions from the court. *Wilkerson v. State*, 36 South. 1004, 140 Ala. 155.

The pretenses relied on to constitute the crime of false pretenses must relate to a past event or an existing fact, and any representation or assurance or promise in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute. *Cook v. State* (Neb.) 98 N. W. 810 (citing Maxwell's Cr. Proc. 129; *Dillingham v. State*, 5 Ohio St. 284).

The essence of the crime of obtaining money or property by false pretenses is that the false pretense should be of a past event, or of a fact having a present existence, and not of something to happen in the future, and that the prosecutor believed that the pretense was true, and that, confiding in the truth of the pretense and by reason thereof, he parted with his money or property. *State v. Bohle*, 81 S. W. 179, 180, 182 Mo. 58 (quoting *State v. Evers*, 49 Mo. 545).

FALSE REPRESENTATION.

The same statements may be regarded as false representations or mere expressions of opinion, according to the circumstances of the particular case. An opinion falsely expressed, with intent to deceive, and which does deceive, is an actionable false representation. A party having superior knowledge of the property sold, and giving a false opinion in regard to a matter of fact, with intent to affect the price to be paid, is guilty of fraud. *Schneider v. Schneider* (Iowa) 98 N. W. 159, 163.

FALSIFY.

To surcharge or falsify is to allege an omission in an account or deny the correctness of some or all of the items rendered. One who objects to a stated account must surcharge or falsify it, and an account rendered by an administrator is a stated account. *Tate v. Gairdner*, 46 S. E. 73, 74, 119 Ga. 133.

FAMILY.

See "Head of a Family."

Family expense, see "Expense."

The word "family" has its root in the Oscan word "famul," which signifies a slave.

Much of this primary meaning was applicable to the status of married women at the common law with reference to property. If a husband and wife occupy land belonging to him as a homestead, she is a "family" of the owner. *Cross v. Benson* (Kan.) 75 Pac. 558, 560, 64 L. R. A. 560.

A "family" has been defined as "a collective body of persons, who live in one house, under one head or manager." A person furnishing a home for himself, his mother, two minor brothers, and an invalid sister, and furnishing the groceries and money for their support, is the head of a "family," within the statute, fixing the amount of wages which shall be exempt. *Jarboe v. Jarboe*, 79 S. W. 1162, 1163, 106 Mo. App. 459.

The word "family" is too indefinite to describe a party to a contract, and hence an allegation that defendant let certain premises to plaintiff and his family did not describe the parties to the contract with sufficient certainty. *Davis v. Smith*, 58 Atl. 630, 632, 28 R. I. 129, 66 L. R. A. 478.

A widow, who continues to occupy the homestead, and whose children have all arrived at majority and moved away, is the "family of the owner," within the constitutional provision exempting as a homestead the residence occupied by the family of the owner. *Aultman, Miller & Co. v. Price* (Kan.) 75 Pac. 1019.

FARM.

My farm, see "My."

FARMING.

See "Engaged Chiefly in Farming."

The term "farmer" is not synonymous with a tiller of the soil. To constitute one a farmer, it is not essential that he in person should till the soil, or that his operations should be limited to agricultural planting, sowing, and cultivation of the soil. The terms "farming" and "tilling of the soil," as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], providing that any natural person, except a wage earner or a person engaged chiefly in farming and the tilling of the soil, etc., may be adjudged an involuntary bankrupt, are more or less closely allied. The term "farming" is doubtless employed in the act, as a generic term, in a comprehensive sense. It is reasonable to conclude that the term was not limited merely to the production of grains and grasses, and the like. The farmer may cultivate all or a part of his land. He may be general or special. He may devote his cultivation to the production of corn, or wheat, or oats, or rye, or grasses, whichever in his judgment may be the more useful or profitable. He may include with those breeding, feeding, and rearing of live stock, embracing cattle, horses, mules, sheep, and

hogs, for domestic use and for market; and, if he find it more profitable to feed his agricultural products to his live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purposes to what he may breed or rear upon his farm. For this purpose he may rely entirely upon the purchase of his live stock from his neighbors or on the markets, and utilize his farm products in feeding and fattening such feeders for market. *Bank of Dearborn v. Matney* (U. S.) 132 Fed. 75, 76.

FATHER.

The word "father," as used in section 21 of the act concerning wills, by virtue of the provisions of Rev. St. 1874, p. 833, relative to statutes, includes "mother." *Walker v. Hyland* (N. J.) 56 Atl. 268, 271.

FEE SIMPLE.

Generally the words "fee simple" mean an absolute estate of inheritance, but not necessarily so. A title in fee simple determinable is in a qualified sense a fee simple; and, where the language in a will is followed by a clearly expressed qualification, it must be held that the testator used the first words in that sense. *Orr v. Yates*, 70 N. E. 731, 735, 209 Ill. 222.

"Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies an indefeasible legal title—the entire title and estate in land." *United States v. Hyde* (U. S.) 132 Fed. 545, 550.

FEED ROLL.

A feed roll, or automatic feeder, used in connection with a rip saw, is a toothed appliance, something like a saw, but working in front of the saw proper, and feeding the board to it automatically, and tending to prevent the board from being thrown against the sawyer by the hold its teeth take. *Dean v. St. Louis Woodenware Works* (Mo.) 80 S. W. 292, 294.

FELLOW SERVANT.

Where two persons are both engaged in the common service of a master, in conducting and carrying on the same general business, and neither is in any sense under the control or direction of the other, they are fellow servants. *Sauls v. Chicago, R. I. & T. Ry. Co.* (Tex.) 81 S. W. 89, 90.

Whenever co-employees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are "fellow servants." *Donnelly v.*

Cudahy Packing Co. (Kan.) 75 Pac. 1017, 1018.

The presumption is that all who enter the service of a common master, and engage in a common service or in the same general undertaking, are "fellow servants." *Weeks v. Scharer* (U. S.) 129 Fed. 333, 335.

FELONY.

See, also, "Misdemeanor."

A felony is a crime punishable with death or imprisonment in the state prison. *People v. Smith*, 77 Pac. 449, 450, 143 Cal. 597.

As adultery may be punished by imprisonment in the penitentiary, it is a felony, as Code, § 5093, defines a felony as a public offense, which may be punished by imprisonment in the penitentiary. *State v. Clemenson*, 99 N. W. 139, 123 Iowa, 524.

FENCE.

See "Division Fence"; "Legal and Sufficient Fence."

As building, see "Building."

Under a statute declaring that, if a railroad company fence in its track, it shall only be liable in case of injury to stock resulting from want of ordinary care, a railroad track is not "fenced in," where it is inclosed on two sides and on one end, leaving the other end open. To fence in a place, as against live stock, means to surround it by a fence, so as to prevent the intrusion of such animals upon the inclosed premises. *Ft. Worth & R. G. Ry. Co. v. Swan* (Tex.) 78 S. W. 920, 922.

FERRULE.

"Knight's Mechanical Dictionary describes a ferrule as 'a metallic ring or sleeve on the handle of a tool or the end of a stick to keep the wood from splitting.' The Imperial Dictionary defines a ferrule to be 'a ring of metal put around a column, cane, or other thing, to strengthen it or prevent its splitting.'" The common understanding is that a ferrule for an umbrella or cane is a ring or short tube of metal fitted on or inclosing the lower end of a cane or umbrella stick. It is in that sense that the term is employed in a patent, the specification of which describes a ferrule as primarily a tube open at both ends. *Evans v. Newark Rivet Works* (U. S.) 126 Fed. 492, 494, 61 C. C. A. 474.

FERRY.

See "Private Ferry."

In one sense a ferry is a continuation of the highway from one side of the water

over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them. In a strict sense the ferry business is confined to the transportation of persons, with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way. *St. Clair County v. Interstate Sand & Car Transfer Co.*, 24 Sup. Ct. 300, 304, 192 U. S. 454, 48 L. Ed. 518.

FIDUCIARY CAPACITY.

A laundry agent in a country town, whose duties are to collect articles, forward them to the laundry in the city, receive them back, and distribute them, make collections, and remit to his principal, after deducting his commissions, is acting in a "fiduciary capacity," within Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that a discharge shall not affect debts created by the bankrupt's misappropriation or defalcation while acting in any fiduciary capacity. *Shipley v. Platts* (S. D.) 97 N. W. 1, 2.

FIGS.

Figs, preserved whole, as nearly as possible in their natural condition, are dutiable under the enumeration of "figs," under paragraph 264, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]. *Reiss & Brady v. United States* (U. S.) 126 Fed. 578.

FINAL.

The word "final," in an agreement for arbitration which provided that the controversy between the parties under the arbitration agreement should be submitted to the circuit court, and that its decision should be final, necessarily implies that the decision of the circuit court shall not be reviewed by another court. *Hoste v. Dalton* (Mich.) 100 N. W. 750, 751, 11 Detroit Leg. N. 392.

The word "final," in Laws 1894, c. 556, tit. 15, art. 1, §§ 4-7, providing that the decision of a county judge, in a proceeding by a school district trustee to compel reimbursement for expenses incurred by him in litigation affecting the interests of the district, allowing or disallowing the claim, shall be final, was merely intended to give the order the effect of a final order in a special proceeding, and, like other orders of that class, it is subject to review. *Anderson v. School Dist. No. 15*, 85 N. Y. Supp. 943, 945, 89 App. Div. 231.

FINAL ACCOUNT.

See "Decision and Decree Allowing a Final Account."

FINAL CONFIRMATION.

The final confirmation to which the act of Congress of 1851 refers is the final adjudication of the tribunals of the United States upon the validity of the title of the claimant under the Mexican grant. Until the survey which follows such adjudication is made and approved, the title is not definitely confirmed to any particular premises. *Davis v. Davis*, 26 Cal. 23, 46, 85 Am. Dec. 157 (citing *Johnson v. Van Dyke*, 20 Cal. 228; *Richardson v. Williamson*, 24 Cal. 289).

FINAL DECISION.

The words "final decisions," as used in Act March 3, 1891, c. 517, § 6, cl. 1, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], which provides that the Circuit Courts of Appeal established by the act shall exercise appellate jurisdiction by appeal or by writ of error to review final decisions in the District Court and the existing Circuit Courts in all cases other than those provided by law, do not include an order denying the application of one not a party for leave to intervene, when discretionary with the court, nor an order refusing to entertain an appeal from the decision of receivers with reference to proof of a claim before them, where it was discretionary, and did not deprive the claimant of any substantial right. *Land Title & Trust Co. v. Asphalt Co. of America* (U. S.) 127 Fed. 1, 20, 62 C. O. A. 23.

FINAL JUDGMENT.

See, also, "Interlocutory Judgment"

A judgment is final, for the purpose of an appeal, when it determines the rights of the parties. *Lemmons v. Huber* (Or.) 77 Pac. 836, 837.

A judgment, to be final, must not only decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt. *Reed v. Reed* (Ky.) 80 S. W. 520, 522 (citing *Bondurant v. Apperson*, 61 Ky. [4 Metc.] 30).

If a judgment is not one that disposes of the whole case on its merits, it is not final. *Heinze v. Butte & Boston Consol. Min. Co.* (U. S.) 129 Fed. 337, 340.

FINAL JURISDICTION.

The words "final jurisdiction," as used in Gen. St. 1902, § 1483, relating to prosecuting attorneys of criminal courts of common pleas filing informations for offenses occurring within the period within which such courts respectively have final jurisdiction, mean a jurisdiction to try the cause and upon conviction to impose the full penalty prescribed, as distinguished from a jurisdiction

tion given in respect to offenses the punishment whereof may be greater or less than that which a justice court can impose. *State v. Compaine*, 57 Atl. 164, 76 Conn. 549.

FINDING.

Though a motion for a new trial because "the finding and judgment of the court is not sustained by the evidence" and "is contrary to law" might have been overruled because of its form, yet, where it was granted, the defect in form is not available on appeal. "The court could have concluded, the trial having been by the court, that the word 'finding' in the motion was equivalent to the word 'decision,' and, having done so, the court might have treated the word 'judgment' as surplusage." *Balph v. Magaw* (Ind.) 70 N. E. 188, 189 (citing *Rodefer v. Fletcher*, 89 Ind. 563; *Rosenzweig v. Frazer*, 82 Ind. 342; *Christy v. Smith*, 80 Ind. 573; *Wilson v. Vance*, 55 Ind. 384; *Gates v. Baltimore & O. S. W. Ry. Co.*, 154 Ind. 338, 56 N. E. 722).

An inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county, and their certificate that said person therein named is insane and a proper subject for treatment in the hospital for the insane, is not a judgment of a court or equivalent thereto; nor is such finding and certificate equivalent to a verdict of a jury or a finding of a court that such person is of unsound mind and incapable of managing his own estate, its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment. *Leinss v. Weiss* (Ind.) 71 N. E. 254-256.

FIRST TEN YEARS.

The phrase "the first ten years," as used in a franchise granted by a municipality to a waterworks company, providing that the privileges granted to the company shall continue for a term of 25 years from and after the passage of the ordinance, and the municipality agreeing to lease the company's fire hydrants for said term, and pay a rent per year, and the municipal taxes assessed on the property for the first 10 years, etc., points to the first period of 10 years in the period of 25 years, and, there being no period of 25 years except the one commencing with the life of the franchise, the 10-year period will commence at that time. *Town of Washburn v. Washburn Waterworks Co.* (Wis.) 98 N. W. 539, 541.

FISH SKINNED OR BONED.

Cream of codfish, consisting of codfish skinned and boned, and subjected to the further process of cutting or shredding, is dutiable as "fish skinned or boned," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par.

261, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]. *H. B. Teed & Co. v. United States* (U. S.) 126 Fed. 447.

FIXTURE.

Whenever chattels have been placed in and annexed to a building by their owner as a part of the means by which to carry out the purposes for which the building was erected or to which it has been adapted, and with the intention of permanently increasing its value for the use to which it is devoted, they become, as between the owner and his mortgagee, fixtures, and as much a part of the realty as the building itself; and this is true, notwithstanding that such chattels may be severed from and taken out of the building in which they are located, without doing any injury either to them or to it, and advantageously used elsewhere, and notwithstanding that the building itself may thereafter readily be devoted to a use entirely different from that which was contemplated when the annexation was made. *Knickerbocker Trust Co. v. Penn Cordage Co.* (N. J.) 58 Atl. 409, 410.

There must be an actual annexation of the chattel to the realty, with an intention of making a permanent accession to the freehold, and the application of the chattel to the use for which the realty in connection with which it is used is appropriated; and, in determining the question of annexation, more weight is to be given to the intention of the owner than to the method adopted in making the annexation. *Security Trust Co. v. Temple Co.* (N. J.) 58 Atl. 865, 866.

FLOUR.

See "Blended Flour."

FOOTING STONE.

Dimension stone synonymous, see "Dimension Stone."

FOR.

The word "for," as used in the statute requiring that notice be given for at least a specified number of days prior to the meeting of the city council as a board of equalization, means "during." *Shannon v. City of Omaha* (Neb.) 100 N. W. 298, 299 (citing *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524).

FOR THE PRESENT.

Where one interested in a corporation agreed with an advertising agent that advertising for the corporation might be charged to him "for the present," it meant so long as there was no termination of the con-

tract by notice, for a period of an indefinite length, with an implied condition that it should not be unreasonably long. *Lewis v. Worrell*, 71 N. E. 73, 185 Mass. 572.

FORCE.

See "Be in Force."

Any force, see "Any."

FORCIBLE ENTRY.

A forcible entry is an entry without the consent of the person having the actual possession (Civ. Code Prac. § 452, subsec. 1). *Robinson v. Marshall* (Ky.) 78 S. W. 904, 905.

"A forcible entry is not proved by evidence of a mere trespass. There must be proof of such force, or at least such show of force, as is calculated to prevent any resistance." There is no such force or violence used as is necessary to make one guilty of forcible entry and detainer where defendant, in the absence of prosecutrix, merely unlocked and took off the lock she had put on, and then put his own lock on, without breaking anything or doing any violence, and committed no violence on the return of the prosecutrix. *State v. Leary* (N. C.) 48 S. E. 570, 571 (quoting 2 Bish. Cr. Law, 509).

FORCIBLE ENTRY AND DETAINER.

The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. *Gore v. Altice*, 74 Pac. 556, 557, 33 Wash. 335 (citing *McCauley v. Welles*, 12 Cal. 500).

FORECLOSURE PROCEEDING.

See "Commencement of Foreclosure Proceedings."

As action, see "Action."

FOREIGN INSURANCE COMPANY.

The words "foreign insurance company," as used in Rev. St. Me. c. 49, § 92, which declares that any person having a claim against any foreign insurance company may bring an appropriate suit thereon in the courts of the state, and that process may be served on the insurance commissioner, or on any duly appointed agent of the company within the state, apply only to foreign insurance companies which have complied with sections 79, 80, 84, and have obtained a license

to do business in the state. *Greenleaf v. National Ass'n of Ry. Postal Clerks* (U. S.) 130 Fed. 209, 211.

FOREIGN PORT.

See "Passenger from a Foreign Port."

FORFEITURE.

The words "escheat" and "forfeiture" have a distinct and definite legal meaning, and can never be construed to mean "sale" and "purchase." *Woodrough v. Douglas County* (Neb.) 98 N. W. 1092, 1094.

FORGERY.

To constitute "forgery," under the English or common-law definition, the instrument must be such that, if genuine, it would be apparently of some legal efficacy. *Huckaby v. State* (Tex.) 78 S. W. 942, 944.

"Legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon a legal crime, upon criminal breaches of perfect legal operation." *Pearson v. Commonwealth* (Ky.) 78 S. W. 1128, 1129 (quoting *People v. Shall* [N. Y.] 9 Cow. 778).

FORMER SPOUSE.

A woman, whose husband had secured a divorce from her, was not granted by such decree a right to marry; but she did so while such divorced husband was living, he also having married again. Held, that such divorced husband was the "former spouse" of the woman, within the meaning of a statute making it a felony for one to marry while having a former spouse living. *Barfield v. Barfield*, 35 South. 884, 885, 139 Ala. 290.

FORTHWITH.

The requirements of Code Civ. Proc. § 3152, that the papers shall "forthwith" be sent to the justice to whom the transfer is made, and the plaintiff shall "forthwith" appear before him, indicate a purpose to have the order made at a time when, in the orderly course of the proceedings, the parties, or the plaintiff, at least, would be supposed to be before the justice, so that both parties would have notice that it was made, and so that, on the receipt of the order by the justice to whom the action is transferred, it will be in a condition to be at once tried or further postponed as such latter justice shall determine. *De Zur v. Provost*, 90 N. Y. Supp. 1016, 1018, 99 App. Div. 14.

FOUND.

An indictment is "found" when 12 grand jurors competent to vote upon such finding shall concur in finding such indictment. *Shivers v. Territory*, 74 Pac. 899, 901, 13 Okl. 466.

FOUND WITH THE WILL.

Where a will makes reference to a sealed letter "found with the will," any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody at any time after the will was executed and "found with the will," would each fully and accurately answer the reference. *Appeal of Bryan*, 58 Atl. 748, 749, 77 Conn. 240.

FOUNDED UPON A CONTRACT.

A claim for damages for breach of contract is one "founded upon a contract," within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], and is provable in bankruptcy. In re *Frederick L. Grant Shoe Co.* (U. S.) 130 Fed. 881, 882.

FRANCHISE.

See "Corporate Franchise."

A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment. *Rhinehart v. Redfield*, 87 N. Y. Supp. 789, 792, 93 App. Div. 410 (citing *Woods v. Lawrence Co.*, 66 U. S. [1 Black] 386, 409, 17 L. Ed. 122).

A franchise is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power; a privilege or immunity of a public nature, which cannot legally be exercised without legislative grant. *State v. Twin Village Water Co.*, 56 Atl. 763, 768, 98 Me. 214.

The franchise of being a corporation is a "franchise," within the meaning of Const. art. 13, § 1, providing for the taxation of all nonexempt property, and defining property as including moneys, credits, franchises, and all other matters and things capable of private ownership. *Bank of California v. City and County of San Francisco*, 75 Pac. 832, 833, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130.

The word "franchise," as used with reference to the rights derived by Laws Ill. 1859, pp. 530, 532, as amended by acts of 1861 and 1865 incorporating the Chicago City

Railways, and granting necessary rights in the streets selected and thereafter to be selected, means the grant from the city of authority to occupy the streets. *Govin v. City of Chicago* (U. S.) 132 Fed. 848, 857.

A license to keep a dramshop is not a franchise, which can be tested or vacated by quo warranto. *Hargett v. Bell*, 46 S. E. 749, 750, 184 N. C. 394.

FRAUD.

Fraud has been defined to be any kind of an artifice by which another is deceived. All surprise, trick, cunning, dissembling, and other unfair way by which another is cheated, is fraud. Collusion in a court of equity is fraud. In short, fraud is infinite. The suppression of the truth is equivalent to the utterance of a falsehood, and both are fraud. *Holt v. King*, 47 S. E. 362, 365, 54 W. Va. 441.

FRAUDULENT AFFIDAVIT.

Where the statements made in an affidavit in support of a pension claim are true, it is not a "false or fraudulent affidavit," the making of which constitutes a crime, under Rev. St. § 4746 [U. S. Comp. St. 1901, p. 3279], merely because it was not in fact sworn to on the date shown in the notary's certificate. *United States v. Wood* (U. S.) 127 Fed. 171, 173.

FRAUDULENT CONCEALMENT.

Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other. *Arkins v. Arkins* (Colo.) 77 Pac. 256, 257.

"There may be such relations between the parties that silence or the nondisclosure of a material fact will be a 'fraudulent concealment.' If a person standing in a special relation of trust and confidence to another has information concerning property and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided. Mere silence under such circumstances becomes fraudulent concealment." *Pitman v. Holmes* (Tex.) 78 S. W. 961, 963 (quoting *Perry on Trusts*, § 178).

Of cause of action.

A mere statement that a holder had no knowledge of the existence of the cause of action does not amount to a statement that the person liable has "fraudulently concealed the cause of action," within *Hurd's Rev. St. 1901*, c. 83, § 22, providing that, if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced any time within five years

after the person entitled to bring the same discovers he has such cause of action, and therefore such statement is not sufficient to prevent the application of the statute of limitations. *Parmelee v. Price*, 70 N. E. 725, 730, 208 Ill. 544 (citing *Conner v. Goodman*, 104 Ill. 365).

FREE FROM CONTRIBUTORY NEGLIGENCE.

The expression "the employé injured being free from contributory negligence" is the equivalent of the provision of Burns' Ann. St. 1901, § 7083, requiring an allegation that the employé was at the time of the injury complained of in the exercise of due care and diligence. *Pittsburgh, C. & St. L. R. Co. v. Collins* (Ind.) 71 N. E. 661, 662 (citing *Indianapolis Union Ry. Co. v. Houlihan*, 157 Ind. 494, 498, 60 N. E. 943, 54 L. R. A. 787; *Pittsburgh, C. & St. L. Ry. Co. v. Lightheiser*, 71 N. E. 218).

FREEHOLDER.

See "Resident Freeholder."

A freeholder is "one who holds lands in fee or for life, or for some indeterminate period." It is also defined as "an estate of inheritance or for life in real property." In order to be a freeholder, a person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. A wife living with her husband on land, the title to which is in the latter, and which is occupied by them jointly as a family homestead, is not by reason thereof a "freeholder," within the meaning of *Cobbey's Ann. St. § 7175*, providing that village authorities may grant license to sell intoxicating liquors on petition signed by a designated number of resident freeholders; and the same is true as to a husband living with his wife on land occupied by them jointly as a homestead, the legal title to which is in her. *Campbell v. Moran* (Neb.) 99 N. W. 498, 499 (quoting *Winfield's Adjudged Words and Phrases*; 8 Am. & Eng. Encyc. of Law, 898).

FREIGHTS.

The word "freights," as used in section 5 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), which provides that it shall be unlawful for any common carrier to enter into any contract, agreement, or combination with any other carrier for the pooling of freights of different or competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, means the commodities carried, and not the compensation paid for such carriage. *Interstate Com-*

merce Commission v. Southern Pac. Co. (U. S.) 132 Fed. 829, 838.

FRIVOLOUS DEFENSE.

A frivolous defense is one which at first glance can be seen to be merely pretensive, setting up some ground which cannot be sustained by argument. *Dominion Nat. Bank v. Olympia Cotton Mills* (U. S.) 128 Fed. 181, 182.

FROM.

The word "from," as used in an information under Comp. Laws, § 11,551, prohibiting larceny by stealing in any building on fire, which charged defendant with stealing goods from a building on fire, means "in"; the word "from" being often used interchangeably with "in." *People v. Klammer* (Mich.) 100 N. W. 600, 11 Detroit Leg. N. 306.

FROM TIME TO TIME.

A recognizance, binding an appellant in a criminal case to appear before the trial court "from time to time of the same," is not in compliance with a statute under which the recognizance should bind defendant to appear "from term to term." *Fulton v. State* (Tex.) 78 S. W. 227.

FRUCTUS NATURALES.

Those crops which grow from perennia roots, and which do not require the natural labor of the owner to bring them into existence, are called "fructus naturales," and pass to the heir at law or devisee as a part of the real estate. *Simanek v. Nemets* (Wis.) 97 N. W. 508, 510.

FULL FAITH AND CREDIT.

Full faith and credit are not denied an Illinois judgment by Code Civ. Proc. N. Y. § 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state. *Anglo-American Provision Co. v. Davis Provision Co.*, 24 Sup. Ct. 92, 191 U. S. 373, 48 L. Ed. 225.

FULL LEGISLATIVE POWERS.

In a statute conferring upon a board of school commissioners "full legislative powers," the expression quoted covers the entire field of legislation upon this subject, including the officers and agents to be employed, the mode and manner of their election or appointment, the tenure of their respective

offices, their duties and compensation, and for what causes and by whom they may be suspended or removed from office. These and any other matters requiring legislation are necessarily embraced. It means ample, complete, perfect powers, not wanting in any essential quality. *Mobile School Com'rs v. Putnam*, 44 Ala. 506, 537.

FULL SATISFACTION.

"Full satisfaction" of the minds and consciences of the jury of the guilt of a defendant is no compliance with the rule which requires the jury to be convinced of guilt "beyond all reasonable doubt." *Jones v. State (Miss.)* 36 South. 243.

FUNDS.

See "Available Funds."

In Acts 1885-86, p. 142, c. 1233, § 9, providing that churches and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, shall be exempt from taxation, the word "funds" is used in the sense of "capital." *City of Louisville v. Werne (Ky.)* 80 S. W. 224, 225.

FURNISHING LIQUOR.

Giving away intoxicating liquor is within the inhibition of Acts 1902, p. 92, No. 90, forbidding "furnishing liquor," but not expressly forbidding giving. *State v. Tague (Vt.)* 56 Atl. 535.

FURNITURE.

See "Household Furniture."

FURTHER DEVELOPMENT.

"Further development," in a contract providing that if, in making certain developments, more water was made to flow than plaintiff was entitled to, then plaintiff was to have the option of purchasing such excess of water, less the amount actually paid by it in making such further development, referred to the development further or beyond what was necessary to make up the deficiency. *Chapea Water Co. v. Chapman (Cal.)* 77 Pac. 990, 992.

GALL CURE.

The term "gall cure" is one descriptive of a medicine, and, standing alone, could not be monopolized as a trade-mark, and, when used as such in connection with a picture, is not infringed by the use of the words as a part of the name of another remedy in connection with another and distinctive picture.

Bickmore Gall Cure Co. v. Karns Mfg. Co. (U. S.) 126 Fed. 573, 574.

GALLOON.

See, also "Narrow."

"The dictionaries generally concur in defining 'galloon' as a 'narrow, tapelike fabric used for binding hats, shoes, etc.'" Certain woven articles from 1 to 2½ inches wide, chiefly used as hat bands for trimming men's hats, are not "galloons," within the meaning of that word as it is used in Tariff Act Aug. 28, 1894, c. 349, § 1, par. 263, 28 Stat. 529. *United States v. Walter H. Gruef & Co. (U. S.)* 127 Fed. 688, 689, 62 C. C. A. 414.

GAMBLING.

"Keeping a gambling house and gambling are distinct offenses. A person guilty of keeping a gambling house may not be guilty of gambling and one may be guilty of gambling without having any connection with the house. The essence of the former offense is the keeping of the place for the purpose of gambling, or the permission of gambling in a place under the care or control of the accused, as appears from section 4962 of the Code, defining it," by declaring that if any person keep a house, shop, or place resorted to for the purpose of gambling, etc., the offender shall be fined, etc., and proof of participation in the play is not essential to a conviction, but under section 4964 of the Code, providing that, if any person play at any game for any sum of money or other property of any value, etc., he shall be guilty of misdemeanor; but, in order to convict, he must be shown to have joined in the game or have participated in the betting or wagering of money or other property. *State v. White*, 98 N. W. 1027, 1028, 123 Iowa, 425.

GAME.

See "Banking Game."

The act of pool selling or betting by buyers on pools is not a "game," within Ky. St. 1903, § 1978, prescribing a penalty for those suffering any game in which any property or money is bet, won, or lost in any house or in premises in their occupation *City of Louisville v. Wehmoff (Ky.)* 79 S. W. 201; *Same v. Alvey, Id.*; *Same v. Pirle, Id.*; *Same v. Smith, Id.*

The words "game or gambling device," as used in Rev. St. 1899, § 3424, providing that any person who shall lose any money or property at any "game or gambling device" may recover it by civil action, do not include a fictitious sale and purchase, though sections 2121, 2223, 2337-2342, declare ac-

tious sales and purchases to be gambling, and render all parties thereto particeps criminis. See *v. Runzi*, 79 S. W. 992, 993, 105 Mo. App. 435.

GAME OF CHANCE.

Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times, especially in the case of tyros, their result is determined by some unforeseen accident, usually called "luck." The test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game. *People v. Lavin*, 71 N. E. 753, 755, 179 N. Y. 164, 66 L. R. A. 601.

GAMING CONTRACT.

A contract between a broker and his customer, whereby there is to be no other liability on either side than a settlement of differences, and under which the broker, as well as the customer, equally stand to gain or lose by the rise or fall of prices, and the parties have no other right or interest against each other under the entire contract than that resulting from the differences, is a "gaming contract." *Thompson v. Williamson* (N. J.) 58 Atl. 602, 605.

GAMING DEVICE.

Lottery is a "gaming device," and the keeping of a house for the purpose of selling lottery tickets is within the spirit and intentment of a charter delegating power to prevent and suppress gaming and gambling houses or places where any game in which chance predominates is played for anything of value. *City of Portland v. Yick*, 75 Pac. 706, 709, 44 Or. 439.

GAMING TABLE.

The characteristics of the gaming table are: First, it is a game; second, there is a keeper, dealer, or exhibitor; third, it must be exhibited for the purpose of obtaining bettors. *Mayo v. State* (Tex.) 82 S. W. 515, 516.

GENERAL AVERAGE.

"General average as per foreign custom" would be a declaration not wholly lived up to, if foreign custom made the assured pay on one basis, but the memorandum clause allowed him to collect on another. *International Nav. Co. v. Sea Ins. Co.* (U. S.) 129 Fed. 13, 15, 63 C. C. A. 663.

GENERAL DAMAGES.

General damages are those which the law presumes must naturally, proximately and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted; and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. *Hanson v. Krehbiel* (Kan.) 75 Pac. 1041, 1042, 64 L. R. A. 790.

GENERAL ELECTION.

In view of Const. art. 7, § 7, and *Mills' Ann. St.* § 1578, referring to annual elections as "general elections," the election of 1903 was a "general election," within Const. art. 14, § 9, providing that, in case of a vacancy in the office of assessor or coroner, the board of county commissioners shall fill such vacancy by appointment, the appointee to hold office till the next "general election." *Mannix v. Selbach*, 74 Pac. 460, 461, 31 Colo. 502.

GENERAL LAW.

A law which operates only upon a class of individuals is none the less a "general law," if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be founded on some natural or intrinsic or constitutional distinction (*Pasadena v. Stimson*, 91 Cal. 238, 251, 27 Pac. 604, 607), but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class. The classification must not be arbitrary, for the mere purpose of classification, but must be founded upon some natural or intrinsic or constitutional distinction, which will suggest a reason which might rationally be held to justify the diversity in the legislation. *Deyoe v. Superior Court of Mendocino County*, 74 Pac. 28, 29, 140 Cal. 476, 98 Am. St. Rep. 73 (citing *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905).

A law is general which operates alike upon all the inhabitants, or all the cities, or all the villages, or other subjects of a class

of subjects. A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by law. *State ex rel. Corriston v. Rogers* (Minn.) 100 N. W. 659, 660 (quoting *State v. Cooley*, 56 Minn. 540, 58 N. W. 150).

"The term 'general,' when used in antithesis to 'special,' means relating to a class, instead of to persons only of that class." *City of Baltimore v. Allegany County Com'rs* (Md.) 57 Atl. 632, 636 (quoting *Cooley*, *Const. Lim.* 165, note).

"The difference between a general and a special statute is that a general law applies to all of the class, while a special statute applies to one or to a part of a class only." *City of Little Rock v. Town of North Little Rock* (Ark.) 79 S. W. 785, 787 (citing *Railway v. Hanniford*, 49 Ark. 291, 5 S. W. 294; *Wheeler v. Philadelphia*, 77 Pa. 348; *Am. & Eng. Ency. Law*, 148).

A law which excepts a part of a given class is not general and uniform. *State v. City of Red Lodge* (Mont.) 76 Pac. 758, 760.

GENERAL LEGACY.

A general legacy is a gift of personal property by a last will and testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind. *In re Fisher*, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277).

"A legacy of shares of stock given generally, and without any indication that testator intended to bequeath particular stock held by him at the date of the will or existing as a part of his estate, is a general legacy, and, if the shares bequeathed are not in testator's possession at the time of his death, the gift is considered to be a direction to the executors to purchase the securities for the legatee with his general estate. *Blair v. Scribner*, 57 Atl. 318, 324, 65 N. J. Eq. 498 (citing *Norris v. Thompson's Ex'rs*, 16 N. J. Eq. [1 C. E. Green] 218; 2 Williams, *Ex'rs* [R. & T. Ed.] *1026; 3 Pom. Eq. Juris. § 1132; 2 White & T. Lead. Cas. Eq. [4th Am. Ed.] 610).

GENERAL LEGATEE.

"A general legatee is one who has a bequest of a specified quantity, payable out of the personal assets generally." *In re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

GENERAL PURPOSE.

Under constitutional provisions and statutes providing that no tax shall be levied by a city without designating in the levy the

purpose for which it is to be applied, that no tax levied for one purpose shall be applied to another, and providing that, in an ordinance fixing the tax rate for any year, the levy shall be subdivided for the following purposes: For schools, for sinking fund, for police purposes, for sprinkling streets, for general purposes, etc.—and leaving to the discretion of the city the levies to be made each year for the enumerated purposes, an ordinance subdividing a levy among a number of such enumerated purposes, but making no mention of street sprinkling, does not embrace a levy for that purpose under the head of "General Purposes," and no part of the levy can be used for street sprinkling. *City of Louisville v. Button* (Ky.) 82 S. W. 293, 294.

GIFT.

See "Absolute Gift."
Gift to a class, see "Class."

"There can be no gift without an intention to give and a delivery, either actual or constructive, of the thing given. There must be both a purpose to give, and the execution of this purpose. The purpose must be expressed either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift." *Collins v. Maude*, 77 Pac. 945, 947, 144 Cal. 289 (citing *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267).

GIFT CAUSA MORTIS.

It is essential to the validity of a "gift causa mortis" that there must be an actual and complete delivery of the property made in execution of the gift, and for the express purpose of consummating it. *Bruce v. Squires* (Kan.) 74 Pac. 1102, 1108.

A loan, by a person who did not expect to live long, of a sum of money to a firm, which executed a receipt containing an agreement to turn the money over to a certain person in case of the lender's death, was not a gift causa mortis because not delivered to the beneficiary, or any one for him, and not to go to him until the death of the lender. *Ragan v. Hill* (Ark.) 80 S. W. 150.

Where one who was ill stated that she was "going to die," and handed another a number of bankbooks, saying "Bury me out of this, and whatever is left is yours," there was a gift causa mortis. *Mahon v. Dime Sav. Bank of Brooklyn*, 87 N. Y. Supp. 253, 259, 92 App. Div. 508.

GIFT ENTERPRISE.

The law lexicographers define a "gift enterprise" as a scheme for the division and

distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. *Black's Law Dict.*; *Bouv. Law Dict.*; *Anderson's Law Dict.* So in *Lohman v. State*, 81 Ind. 17, it was said, in approving the above definition, that the words "gift enterprise," as thus understood, had attained such notoriety that the courts would take judicial notice of what is meant when they appear in legislative enactments. Manufacturers and dealers in trading stamps sold to merchants, to be given to cash customers, and absolutely redeemable in goods offered by the trading-stamp concern, without restrictions except as to the number redeemable at any one time, are not engaged in a gift enterprise within the meaning of a provision of a city charter authorizing the city to levy a license tax on each gift enterprise. *City of Winston v. Beeson*, 47 S. E. 457, 459, 135 N. C. 271, 65 L. R. A. 167.

To constitute a gift enterprise, the element of chance must enter into the scheme. A trading-stamp business, consisting of the selling of checks or stamps to merchants, who give the same to their customers on purchases of goods, the number of stamps given being determined by the amount of the purchase, the stamps on presentation at the trading-stamp store entitling the holders to select any article from an assortment of articles, each article being plainly marked with its value in stamps, such value not being greater than the market value of the articles, is not a "gift enterprise" within the meaning of a statute denouncing gift enterprises, etc. *State v. Shugart*, 35 South. 28, 29, 138 Ala. 86, 100 Am. St. Rep. 17.

GIFT INTER VIVOS.

To constitute a valid gift inter vivos of personal property, the gift must be voluntary, gratuitous, and absolute, and take effect at once, and ordinarily must be accompanied by a delivery of the thing to the donee, or to some one for his use and benefit. The delivery of a gift, however, is not always required. Hence, where a deed recited that part of the consideration was a note, with interest payable annually for the use of a certain person during her life, there was a valid gift of the interest, though the note was not delivered to the donee. *Malone's Committee v. Lebus* (Ky.) 77 S. W. 180, 181.

It is essential to the validity of a gift inter vivos that there must be an actual and complete delivery of the property made in execution of the gift, and for the express purpose of consummating it. *Bruce v. Squires* (Kan.) 74 Pac. 1102, 1103.

GIN AND WATER.

In considering an indictment charging the mixing of cantharides with gin and wa-

ter, which was objected to on the ground of ambiguity, the court said: "The court, jury, and accused must have known that gin and water is a drink. That is the usual acceptance and meaning of those words, and in that sense they must be taken." *Madden v. State*, 1 Kan. 340, 350.

GINGER ROOT UNGROUND.

A by-product in the process of extracting the essence of ginger root, which results from cracking the crude root in a machine and running it through a still, and consists of the residue of the process pressed into cakes, is not within the provision in paragraph 667, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], for "ginger root unground." Cracking the root, so that it is reduced to small particles and pulverized, is a process of grinding. *Lewis German & Co. v. United States* (U. S.) 128 Fed. 467.

GIVE.

Giving away liquor as furnishing liquor, see "Furnishing Liquor."

GIVEN.

Where the judge, after having read a requested instruction to the jury which had been marked "given," stated that he wished to modify it, and immediately concluded not to give the same, and orally so stated to the jury, whereupon he marked it "refused," the instruction being plainly erroneous, and defendant's right to review the same having been preserved by the court's marking the same "refused," defendant was not prejudiced by the court's oral statement that he wished to modify the instruction which was objectionable, under Prac. Act, § 53, providing that the court shall not modify instructions given otherwise than in writing. *Chicago & E. I. R. Co. v. Zapp*, 70 N. E. 623, 624, 209 Ill. 339.

GLASSWARE.

See "Blown Glassware."

GLUCOSE.

The term "glucose" is obnoxious to many, if not a majority, of the public, and is misunderstood by them. They do not know that in this country glucose is now made entirely from corn, and that the terms "glucose" and "corn syrup" are commercially synonymous. This fact is known to the manufacturers, and perhaps to the dealers. A prejudice exists against the term "glucose," because that material can be manufactured from many substances, including sawdust. In Europe it is made mainly of

potatoes. By many it is associated with a glue factory. In this country "corn syrup" and "glucose" are not only commercially synonymous terms, but it is stated by counsel for respondent that they are permitted to be so used in all the other states. We have not verified this statement, but, as it is not challenged, we assume it to be correct. *People v. Harris* (Mich.) 97 N. W. 402, 403.

GLUE.

So-called "bone size," used for filling and softening corduroys, is not "glue" within Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. *G. W. Sheldon & Co. v. United States* (U. S.) 127 Fed. 494.

GO TO.

Where a testator in his will directs that certain property after the death or remarriage of his widow "shall go to and belong to" other relatives, the words "go to and belong to" are not equivalent to "pay and divide." On the marriage or death of the widow the property "goes" to—that is, moves, passes, proceeds, and belongs to; that is, comes under the physical power of, and is at the disposal of—those persons to whom the legal title was transferred at his death. Thus the language used correctly describes the progress of the tangible property from the possession of the testator to that of the beneficiary, and has nothing of the meaning of "paying and dividing." In *re Hitchens' Estate*, 89 N. Y. Supp. 472, 476, 43 Misc. Rep. 485.

GOOD AND EFFECTUAL DEED.

The words "good and effectual," as applied to a tax deed, must be understood to mean that the deed shall pass the title to the vendee, if the sale was made in obedience to the directions of the law, and was authorized by it; not that the vendee shall be released from the onus of proving every prerequisite to the regularity of the sale. *Lyon v. Hunt*, 11 Ala. 295, 315, 316, 46 Am. Dec. 216.

GOOD CAUSE SHOWN.

A "good cause shown," in Laws 1894, p. 413, c. 235, § 5, providing that a joint-stock association shall not be dissolved, except, among other things, for good cause shown, refers to a condition of affairs where the business of the association could no longer be carried on, either because of the inherent failure of the enterprise, or because of considerable loss of the assets, and consequent danger of continuing the business, or because of the existence of other reasons which threaten to eventually wipe out the assets

or divert the business from the original purposes for which it was formed. *Colton v. Raymond*, 85 N. Y. Supp. 210, 213, 214, 41 Misc. Rep. 580.

GOOD CONDITION.

Statements contained in receipts and bills of lading to the effect that the goods mentioned therein were received in "good order" or "good condition" are in the nature of mere admissions, mere written declarations, not conclusive or nonexplainable as against the party making them, much less as against one who did not. *Bath v. Houston & T. C. Ry. Co. (Tex.)* 78 S. W. 993, 995.

GOOD FAITH.

See "Purchaser in Good Faith."

"Good faith" is defined to be honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. *Cochran v. Fox Chase Bank*, 58 Atl. 117, 118, 209 Pa. 34.

The good faith which will protect a defendant in an action of trover for the conversion of timber cut and removed by him from plaintiff's land is not incompatible with some degree of negligence. Almost any trespass upon the rights of another which is not willful arises in whole or in part from the defendant's ignorance of something which he might have discovered had he exercised a certain degree of care. Where injury is caused by negligence, as distinguished from willfulness, wantonness, or recklessness, it seems that the defendant is chargeable only with the actual damage in the ordinary sense of that term. *Dartmouth College Trustees v. International Paper Co. (U. S.)* 132 Fed. 92, 98.

GOOD GOVERNMENT.

In the ordinance of 1787 giving Territorial Legislatures power to make laws for the good government of the territory, etc., the term "good government" embraces within its scope the whole range of legislation necessary to secure the comfort, prosperity, and happiness of a people. Under that power the Legislature may provide for taking private property for public uses. *Swan v. Williams*, 2 Mich. 427, 431.

GOOD HEALTH.

In life insurance cases it has been held that good health does not ordinarily mean freedom from infirmity, and that good health or sound health means a state of health free from disease or ailment that affects the general soundness and healthfulness of the system seriously. It is a relative term, and does not mean absolute freedom from physical

infirmity, but only such a condition of body and mind as that one may discharge the ordinary duties of life without serious strain upon the vital powers. Hence, in a suit by a female against a railroad company for damages for personal injuries, where it is alleged that plaintiff was, prior to the injuries, in good health, a recovery may be had, notwithstanding it appears from the evidence that at the time of the injuries the plaintiff was laboring under an infirmity of which she was ignorant, and which did not interfere with the discharge by her of the ordinary duties of life. *Atlantic & B. R. Co. v. Douglas*, 46 S. E. 867, 868, 119 Ga. 658.

An applicant for life insurance, who from a time prior to his application until his death, some years after delivery of the policy, suffered from nephritis, or Bright's disease, which was the direct, though remote, cause of his death, was not "in good health" when the policy was delivered, within the meaning of a provision therein that it should not take effect until delivered while the applicant was in good health, nor until the first premium was paid while he was also in good health. *Austin v. Mutual Reserve Fund Life Ass'n* (U. S.) 132 Fed. 555, 559.

A statement, in an application for additional insurance, that the applicant was in "good health," was not a misrepresentation, though she was at the time pregnant. *American Order of Protection v. Stanley* (Neb.) 97 N. W. 467, 469.

GOOD ORDER.

Statements contained in receipts and bills of lading, to the effect that the goods mentioned therein were received in "good order" or "good condition," are in the nature of mere admissions, mere written declarations, not conclusive or nonexplainable as against the party making them, much less as against one who did not. *Bath v. Houston & T. O. Ry. Co.* (Tex.) 78 S. W. 993, 995.

GOOD ORE.

See "Extra Good Ore."

GOOD WILL.

"Good will" varies with the custom of the general trade and the character or methods of the particular business. An early definition by Lord Eldon is "the probability that the old customers will resort to the old place." This involved the ancient idea that good will inhered in the premises where the business was conducted. This is too limited for modern kinds or methods of business. The habit of people to purchase from a certain dealer or manufacturer, which is the foundation for any expectation that purchases will continue, may depend on many

things besides place. Confidence in the quality of the goods, in the facilities of the establishment to fill orders promptly, or in the personal integrity or skill of a dealer or manufacturer, familiarity of the public with a designating name for the product, and probably many other circumstances, might be mentioned as illustrative. The good will is a sort of beaten pathway from the seller to the buyer, usually established and made easy of passage by years of effort and expense in advertising, solicitation, and recommendation by traveling agents, exhibition tests, or displays of goods, often by acquaintance with local dealers who enjoy confidence of their own neighbors, and the like. *Rowell v. Rowell* (Wis.) 99 N. W. 473, 478.

"A good will is the probability that the old customers will resort to the old place." With reference to a commercial partnership business requiring no special personal skill or professional knowledge, this good will may be described "to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Plaintiff and defendant dissolved a partnership existing between them on July 23d, reciting in the contract of dissolution the sale by defendant to plaintiff of his entire interest in the business, together with the good will thereof. On August 1st following, they entered into another agreement, reciting the sale by defendant to plaintiff of abstract books, iron safe, and letterpress for a certain sum, and stipulated as a further consideration that plaintiff should give defendant the free use of the abstract books, and should keep them in defendant's office, and defendant should not compile abstracts or engage in the abstract business. The parties, not being partners at the time of the subsequent agreement, and the sale not being one of good will, the restraint on defendant from engaging in the abstract business was in violation of Rev. Civ. Code, § 1277, making contracts restraining any one from exercising a lawful vocation, otherwise than as provided in sections 1278 and 1279, void. *Prescott v. Bidwell* (S. D.) 99 N. W. 93, 94 (quoting Bishop on "Contracts," p. 520; Story on "Partnerships," § 99).

GOODS.

See "Confusion of Goods"; "Dress Goods."

The word "goods" has a generic meaning, in which it is synonymous with the word

"property"; and it has a specific meaning, as in the phrase "a stock of goods," where it means articles of trade—goods, wares, and merchandise. It is used in its specific sense in section 847 of the Revised Statutes, providing that "every person who shall willfully and maliciously set fire to or burn, or attempt to set fire to or burn, any bridge, shed, railroad, plank road, railroad car, carriage or other vehicle, or any goods, wares, or merchandise, shall, on conviction, be imprisoned." *State v. Fontenot*, 86 South. 630, 631, 112 La. 628.

GOODS IN STORE.

The term "goods in store," in a chattel mortgage, does not include an iron safe kept for use, and not for sale; it has reference only to merchandise and commodities kept on hand for purposes of sale. *Curtis v. Phillips*, 5 Mich. 112, 113.

GOVERNMENT.

See "City Government"; "Good Government"; "Republican Form of Government."

GRADE.

Any change in grade, see "Any."

The term "grade" in Gen. St. 1902, § 2051, making the municipality liable for special damages resulting from a change in a street grade, is used not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists; and any elevation or depression of this surface by municipal authorities resulting from an attempt to establish a grade is a change of grade which, if damages result, will support an action. *Pickles v. City of Ansonia*, 56 Atl. 552, 553, 76 Conn. 278.

GRADUATING.

By "graduating the license" is meant to regulate its amount according to the amount of the gross sales of the licensee, or on some other basis of proportion. Thus, under the general license law, the wholesale merchant pays \$3,500 if his gross sales amount to seven millions or more, and \$50 if they amount to a quarter of a million or less; and the retail merchant's license varies in the same way, from \$3,500 to \$5, according to the amount of his sales. *State v. Rittenberg*, 86 South. 330, 112 La. 224.

GRANT.

See "Imperfect Grant."

An instrument which does not purport to convey any present interest in an existing

patent, or one for which an application is pending, is not a "grant" within Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387]. *National Cash Register Co. v. New Columbus Watch Co.* (U. S.) 129 Fed. 114, 63 C. C. A. 616.

A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. *Trustees of Town of Brookhaven v. Smith*, 90 N. Y. Supp. 646, 649.

By statute the words "grant or convey" in a deed carry with them an implied warranty that the estate conveyed is at the time of the execution of the deed free from incumbrances, unless restrained by express terms contained therein. *Rotan v. Hays* (Tex.) 77 S. W. 654, 655.

GRANTEE.

Where a conveyance by A. and wife to B. and C., her husband, recited that it was to them and the heirs of their body, for the express purpose of a home for them for life, and for the welfare and comfort of their children, provided that, if B. and C. separated, the interest of C. in the land should cease, and provided that the grantees, with the written consent of the grantors, or the survivor of them, might sell the land and reinvest the proceeds in other lands, to be owned and held by them and their heirs in the manner provided in the deed, and provided that, if the grantees died, the land should revert to the grantors or the survivor, the grantor's widow may convey the property without requiring B. and C. and children to join in the deed, C. having separated from B., the grantees being B. and C. *Louisville & A. R. Co. v. Horn* (Ky.) 82 S. W. 567, 568.

GRASS SEED.

Canary seed, which is botanically a grass seed, but is used principally as a bird seed, and which is not known commercially as grass seed, is not within the meaning of the words "grass seeds," as used in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 656, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687], relating to grass seeds not specially provided for. *Nordlinger v. United States* (U. S.) 127 Fed. 683, 684, 62 C. C. A. 409.

GRAZE.

Where sheep are being driven from one range to another, the occasional eating of grass as they go, or while stopped for a needed rest, is not "grazing" them, within Rev. St. 1887, § 1210, making it unlawful to herd sheep or permit them to graze within two miles of the dwelling house of the owner or owners of possessory claims. *Phipps v. Grover* (Idaho) 75 Pac. 64, 65.

GREAT BODILY INJURY.

See "Assault with Intent to Commit Great Bodily Injury."

GREAT INCONVENIENCE.

The mere question between the right to challenge three jurors and the right to challenge two juries and a half is not within the meaning of the expression "great inconvenience," as used in the statement that, where a proposed construction of a statute would occasion great inconvenience, that construction is to be avoided if another and more reasonable interpretation is present in the statute. *Betts v. United States* (U. S.) 132 Fed. 228, 236.

GROOVE.

A "groove" is defined as "a furrow, channel, or long hollow." *Gordon, Strobel & Lureau v. Carnegie Steel Co.* (U. S.) 126 Fed. 538, 540.

GROSS DAMAGES.

In a complaint for the flowage of plaintiff's land by defendant's milldam under the mill acts "gross damages" are simply the equivalent of "annual damages," which are to be ascertained by the same mode and upon the same facts. *Ingram v. Maine Water Co.*, 57 Atl. 893, 894, 98 Me. 566.

GROSS NEGLIGENCE.

In order to constitute gross negligence, there must be charged and shown either a willful intent to injure, or that reckless and wanton disregard of another's rights and safety, and that willingness to inflict injury, which the law deems equivalent to an intent to injure; and where plaintiff, in an action for wrongful death, alleges that it was caused by defendant's wanton and willful misconduct, he cannot recover on proof of mere negligence. *Wilson v. Chippewa Valley Electric R. Co.*, 98 N. W. 536, 538, 120 Wis. 636, 66 L. R. A. 912.

In a suit in which an issue of gross negligence was involved, the trial court, in defining the term, instructed the jury that "gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life, under circumstances of equal or similar danger to the plaintiff on the occasion under consideration." The appellate court in passing on this instruction, and the contention of the appellant that "gross negligence" should be defined as the want of slight care, said that it might be doubted if there was an appreciable practical

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difference between the two definitions, and that whatever the hazard of the particular employment might be, whether upon a railroad or elsewhere, the degree of care is required to correspond with the danger of the situation, and a definition given by the trial court, or its equivalent, should be applied in all cases where gross negligence was an element of the suit. *Chesapeake & O. Ry. Co. v. Board* (Ky.) 77 S. W. 189.

GROSS PREMIUM PLAN.

The "gross premium plan" employed by a building association in taking the premium and determining the amount is where an amount or certain percentage determined on is deducted from the par value of the stock at the time of the loan, and the difference or balance is handed over to the borrower. The amount so deducted is often determined by receiving bids from various members who are desirous of anticipating the value of their stock by borrowing from the association some of its funds on hand. *Fidelity Sav. Ass'n v. Bank of Commerce* (Wyo.) 75 Pac. 448, 456.

GROSS PREMIUMS.

In Tax Law, § 187, Laws 1896, p. 859, c. 908, as amended by Laws 1897, p. 630, c. 494, as amended by Laws 1901, p. 297, c. 118, imposing a franchise tax on the gross amount of premiums received during the preceding calendar year by domestic insurance companies, the term "gross premiums" includes, in addition to all other premiums, such premiums as are collected from policies subsequently canceled and from reinsurance. *People v. Miller*, 85 N. Y. Supp. 468, 471, 88 App. Div. 218.

Gross premiums received by domestic insurance companies for business done in the state for the purpose of taxation, under Laws 1896, p. 859, c. 908, § 187, as amended by Laws 1901, p. 297, c. 118, § 1, imposing an annual state tax for the privilege of carrying on the business, and providing that the term "gross premiums" shall include such premiums as are collected from policies subsequently canceled and from reinsurance, do not include premiums unearned and paid in advance, but refunded on a cancellation of a policy. *People v. Miller*, 70 N. E. 10, 177 N. Y. 515.

GROSS RECEIPTS.

Unearned premiums returned to the insured on the cancellation of the policy of insurance do not constitute any part of the "gross receipts" of the company by which the policy was issued, and need not be included in its return of gross receipts, under the provisions of Sess. Laws 1903, c. 73, § 58. *State v. Fleming* (Neb.) 97 N. W. 1063, 1069.

GROUND RENT.

A ground rent, being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands, within the meaning of section 4158, Rev. St. 1892, relating to descent and distribution. *McCammon v. Cooper*, 69 N. E. 658, 69 Ohio St. 366.

GUARANTY.

See "Continuing Guaranty"; "Quality Guaranteed."

"A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of any person who is himself in the first instance liable to such payment or performance." *Cowan v. Roberts*, 46 S. E. 979, 980, 134 N. C. 415, 65 L. R. A. 729.

GUARDIAN.

The guardian and next friend in conducting a civil action are a "species of attorney, whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. *Williams v. Cleaveland*, 58 Atl. 850, 853, 76 Conn. 426.

GUARDIAN AD LITEM.

"There is no substantial difference between a guardian ad litem and a prochein ami. The former denomination is usually applied when the representation is for an infant defendant, and the latter where it is for an infant plaintiff." *Vaile v. Sprague*, 78 S. W. 609, 610, 179 Mo. 393.

GUEST.

The universal rule seems to be that one cannot be the "guest" of a hotel unless he procure some accommodation. He must procure a meal, room, drink, feed for his horse, or at least offer to buy something of the innkeeper before he becomes a guest. *Tulane Hotel Co. v. Holohan* (Tenn.) 79 S. W. 113.

GUILTY.

See "Plea of Guilty."

GUN.

As deadly weapon, see "Deadly Weapon."

HABEAS CORPUS.

As civil proceeding, see "Civil Action—Case—Suit—etc."

Habeas corpus is for the benefit of those unlawfully restrained of their liberties, and

this means physical, and not moral, restraint. In re *Dykes*, 74 Pac. 506, 507, 13 Okl. 339.

The writ of habeas corpus is not in the nature of, nor is it to be used as a substitute for, proceedings in error. A finding or decision of the inferior court, no matter how erroneous, if it does not affect its jurisdiction, is not subject to attack in this collateral proceeding. The office of the writ is to determine the legality of the particular imprisonment, and the facts to be considered in determining that question are jurisdictional facts. *Younger v. Hehn* (Wyo.) 75 Pac. 443, 444.

HABITATION.

In the law of process and attachment "residence" and "habitation" are generally regarded as synonymous. A "resident" and an "inhabitant" mean the same thing. A person resident is defined to be "one dwelling or having his abode in any place"; an inhabitant, "one that resides in a place." *Atkinson v. Washington & Jefferson College* (W. Va.) 46 S. E. 253, 259, 54 W. Va. 32 (citing *Drake on Attachment*).

HALF.

The words "east half and west half" in a description in a deed naturally import an equal division; but they may lose that effect when it appears that at the time the deed was made some fixed boundary or monument divided the premises somewhere near the center, so that the words referred more properly to one of such parts than to a mathematical division which had never been made. *People v. Hall*, 88 N. Y. Supp. 276, 279, 43 Misc. Rep. 117.

HALF SECTION LINE.

A road was ordered by the authorities of a county along a "half section line." In a contest over the location of such line between the owners of premises on opposite sides of the road, in which contest the county was not interested, it was held that the line of a division fence jointly built between the holdings of the contending parties, to which each party had occupied and maintained possession for more than 10 years, was rightly adopted by the trial court as the "half section line," within the meaning of the proceedings locating such road. *Nance County v. Russell* (Neb.) 97 N. W. 320, 321.

HARMLESS.

See "Hold Harmless."

HAVE CHARGE OF.

A treasurer of a corporation, merely empowered by the by-laws to "have charge of

and be responsible for" the securities of the corporation, has no authority to change the registration and sell certain of its bonds without special authority. *Jennie Clarkson Home for Children v. Chesapeake & O. R. Co.*, 87 N. Y. Supp. 848, 853, 92 App. Div. 491.

HAZARDOUS NEGLIGENCE.

Where one poured kerosene oil from a can on wood and kindling in a stove in which she knew there were live coals, and there was an explosion of the can, resulting in her being seriously burned, she was charged, as a matter of law, of being guilty of "hazardous negligence" precluding a recovery for the injury from the manufacturer of the oil on the ground that it was below the legal standard of safety. *Riggs v. Standard Oil Co.* (U. S.) 130 Fed. 199, 204.

HEAD OF A BUREAU.

The person in charge of the branch office of the bureau for the collection of revenue from the sale and use of water in the borough of Brooklyn was not the "head of a bureau," within New York Charter, § 1543, providing that the heads of departments shall have power to remove certain officers, but that no head of a bureau shall be removed until he has been allowed an opportunity of making an explanation. *People v. Oakley*, 87 N. Y. Supp. 856, 859, 93 App. Div. 535.

HEAD OF A FAMILY.

A head of a family is one who contracts, supervises, and manages the affairs about the house, not necessarily a father or a husband. A person furnishing a home for himself, his mother, two minor brothers, and an invalid sister, and furnishing the groceries and money for their support, is the "head of a family," within the statute fixing the amount of wages which shall be exempt. *Jarboe v. Jarboe* (Mo.) 79 S. W. 1162, 1163 (quoting *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165, 43 S. W. 633).

HEALING ACT.

A healing act is one that cures some defect in a proceeding which the Legislature could have authorized in the first instance. *Lockhart v. City of Troy*, 48 Ala. 579, 584.

HEALTH.

See "Good Health"; "Sound Health."

HEALTH OFFICER.

As employé, see "Employé."

HEARING.

Any hearing, see "Any."

HEIRS.

See "Bodily Heirs"; "Lawful Heirs." Distributees synonymous, see "Distributee."

Unless it is necessary to effectuate the manifest intention of a testator, the word "heirs" is a word of limitation. *Jabine v. Sawyer* (Ky.) 78 S. W. 140, 141.

Where a will provided that, if a life tenant should die before 25 years, a certain portion of his income should go to his mother, and "the rest to be divided between the heirs living and the heirs of any deceased," the word "heirs," as first employed in the first sentence, means the children of testatrix, and, as secondly employed, the children or descendants of such of her children as may be dead. *Dulaney v. Dulaney* (Ky.) 79 S. W. 195, 197.

The word "heirs," as used in a will providing that, if a daughter to whom all the real estate of testatrix was devised should die before her husband without having disposed of the property by will or leaving bodily heirs, the husband should take the real estate, with power to do with it as he desired, and providing that if the daughter should die, leaving heirs, before her father, he should enjoy the income during his life, and at his death it should return to the daughter's heirs, means children, and is to be construed as a word of limitation. *Cralle v. Jackson* (Ky.) 81 S. W. 669, 670.

The word "heirs," as used in a deed from a husband to his wife for life, with remainder to his heirs at her death, or before marriage as his widow, means children. *Shirey v. Clark* (Ark.) 81 S. W. 1057, 1058.

Where a testator directs that if his son shall have any lawful issue at his death the estate shall vest in his heirs forever, the word "heirs" means the same as lawful issue, and is not used in its legal sense. *Harclerod v. Bass* (Miss.) 36 South. 537, 538.

As used in a will giving land to testator's two sons, their heirs and assigns, forever, the word "heirs" is not used as "heirs of the body," and the sons took a fee. *Gannon v. Albright*, 81 S. W. 1162, 1163, 183 Mo. 238.

The word "heirs" or "descendants," used in the creation of a separate estate of a married woman, will not, at her death, exclude the marital rights of the husband, except as to the children. *Wood v. Reamer* (Ky.) 82 S. W. 572, 574.

In 2 Ballinger's Ann. Codes & St. § 4828, providing that, when the death of a person is caused by the wrongful act or neglect of

another, his heirs or personal representatives may maintain an action for damages against the person causing the death, etc., the term "heirs" means the widow and children of the deceased, and does not include parents and collateral heirs. *Copeland v. City of Seattle*, 74 Pac. 582, 583, 33 Wash. 415, 65 L. R. A. 338.

The words "heirs" and "personal representatives," as used in 2 Ballinger's Ann. Codes & St. § 4828, providing that, when the death of a person is caused by any injury received from the wrongful act of another, his heirs or personal representatives may maintain an action, include only the widow and children of the deceased person, and do not authorize an action by the mother for the wrongful death of her unmarried adult son, on whom she was dependent. *Manning v. Tacoma Ry. & Power Co.*, 75 Pac. 994, 34 Wash. 406.

It is only as to the adopting parent that the adopted child is made heir or next of kin by the statute (Comp. Laws 1897, § 8780) providing that an adopted child shall become the heir at law of the person adopting it, and the adopted child, therefore, is not heir by right of representation of the kindred of the person who adopted it. *Van Derlyn v. Mack* (Mich.) 100 N. W. 278, 280, 66 L. R. A. 437 (quoting *Helms v. Elliott*, 14 S. W. 930, 89 Tenn. 446, 10 L. R. A. 535).

HEIRS OF THE BODY.

Bodily heirs synonymous, see "Bodily Heirs."

HERD.

Driving sheep from one range to another is not "herding" them, within Rev. St. 1887, § 1210, making it unlawful for any person to herd sheep on the land of others. *Phipps v. Grover* (Idaho) 75 Pac. 64, 65.

HEREDITAMENT.

"Tenements and hereditaments" include every species of realty, as well corporeal as incorporeal. In *re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

HIGH CARE.

"High care," used in an instruction requiring the jury to believe that plaintiff used that high care which a person of ordinary prudence would have used, conveys the idea that a higher degree of care than ordinary care was imposed by law on him in that respect, if, indeed, it did not actually have that effect. *St. John v. Gulf, C. & S. F. Ry. Co.* (Tex.) 80 S. W. 235, 237.

HIGH-TENSION SYSTEM.

The high-tension system is a method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires, to be taken off at different points called "substations." At these substations the current is reconverted into the large volume again, with a pressure adjusted to the requirements of the trolley wire. The method of transmission of the current may be likened somewhat to transmitting water through pipes. *Harrison v. Detroit, Y., A. A. & J. Ry.* (Mich.) 100 N. W. 451, 452.

HIGHWAY.

See "Passable Highway."

The term "highway," as used in Code, § 919, providing that any part of a plat may be vacated, provided it does not abridge or destroy any right of any proprietor therein, and declaring that nothing contained in the statute shall authorize the closing or obstruction of the highways, means a traveled street, as distinguished from the mere space laid out between lots and blocks, which may sometimes become such. It cannot be construed to mean a country road, for the plat contemplated is that filed within corporate limits, where a road is always a street. All streets are highways, but all highways are not streets. *Chrisman v. Omaha & C. B. Ry. & Bridge Co.* (Iowa) 100 N. W. 63, 65.

When land is taken for highway purposes it does not become a "highway," within the meaning of the statute relating to the change of grade in the highway, until it has been made into one by working it to some grade and otherwise completing it for travel. *Gorham v. City of New Haven*, 58 Atl. 1, 2, 76 Conn. 700; *Munson v. Same*, Id.

"The term 'highway' is generic, comprehending in its broadest sense every public way, from an alley to a railroad or a navigable river." The Legislature, in *Burns' Ann. St.* 1901, § 7233d, prohibiting the sale of intoxicating liquors by virtue of a license in any room, unless it is arranged with a window or glass door, so that the whole of it may be in view from the street or highway, did not use the word "highway" in an unrestricted sense, and a paved alley 16 feet wide passing through the middle of a block is not a highway. *State v. Harrison*, 70 N. E. 877, 878, 162 Ind. 542.

Laws 1899, p. 958, § 469, authorized a canal company to lease, sell, or discontinue its canal. The canal company conveyed the entire canal and its appurtenances to a steamboat company, with all the franchises

of the grantor in connection with the ownership and operation of the canal. The steamboat company operated the canal for about three years, charging the tolls authorized by law, when it conveyed the east 12 miles of the canal to a manufacturing company, reserving to itself and its successor and a certain person named the right at all times when the canal was operated to use it for boats, light or loaded, without charges. The entire canal except such 12 miles was abandoned, but the grantee continued to use the 12 miles for itself and such persons as it saw fit to permit. Such 12 miles were a public highway, and must be regarded, for the purpose of transportation, a public highway, to be operated under the restrictions placed on the original canal company by the act under which it was organized. *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 70 N. E. 451, 453, 178 N. Y. 167; *Same v. Consolidated Rosendale Cement Co.*, Id.

HINDRANCE.

See "Unavoidable Hindrance."

HIRE.

See "Let for Hire"; "Using for Hire."

The compensation received by a man who owned a team, wagons, and a plow, with which he worked by the day for different employers as he could obtain work, earning usually from nine to fifteen dollars per week, and working alone when he could not find work for his team, must fall within the meaning of either "wages" or "hire," as used in Bankr. Act July 1, 1898, c. 541, § 1, cl. 27, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], defining a "wage earner" to be one who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year. *In re Yoder* (U. S.) 127 Fed. 894, 895.

HOLD HARMLESS.

A receipt to an administrator, containing an agreement to "hold him harmless" in case the estate which he represents does not pay enough on settlement to cover the amount received, is held equivalent to an agreement to return the amount in case the claim should be rejected. *Gorman v. Nairne*, 12 Ala. 338, 339.

HOLIDAY.

See "Legal Holiday."

HOME PORT.

Under the United States statutes requiring the name of the "home port" of a vessel to be painted on her stern, and defining

the word "port" to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside, a corporation having its principal place of business in Chicago, and offices in Paducah, sufficiently complies with such statutory requirements by painting on the stern of a vessel belonging to it the words "of Paducah, Kentucky." *Commonwealth v. Ayer & Lord Tie Co. (Ky.)* 77 S. W. 686, 688.

HOMESTEAD.

See "Urban Homestead."

The homestead right or privilege granted by statute, before it has ripened into a life estate by the death of the spouse holding the legal title, is a quality of exemption and freedom of the property embraced in the homestead from execution and forced sale, incumbrance, or alienation without the consent of both husband and wife. The right of homestead is a personal privilege, which may be waived or lost unless asserted in due time on all proper occasions. The statute providing for the selection and exemption of a homestead withdraws the land thus selected from forced sale, and prevents alienation without the consent of both spouses. But the statute treats the subject as one of exemption, rather than creation of any new estate in the property in the spouse not holding the legal title. *Campbell v. Moran* (Neb.) 99 N. W. 498, 499.

A "homestead" is defined as follows: "A homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land, not exceeding two lots within any incorporated city or village, shall be exempt from execution or forced sales." Comp. St. 1901, c. 36. The first limitation imposed is that the homestead shall not exceed \$2,000 in value; the next that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. *Tyson v. Tyson* (Neb.) 98 N. W. 1076, 1078.

Under the act exempting a dwelling house in which the claimant lives, and its appurtenances, and the land on which it is situated, not exceeding 160 acres, a homestead may be composed of contiguous parts of different governmental subdivisions, and, where the buildings are situated upon only one of such subdivisions, that only does not necessarily constitute the homestead. *Tindall v. Peterson* (Neb.) 98 N. W. 688, 689.

Under Civ. Code, § 1237, providing that the homestead consists of the dwelling house in which the claimant resides and the land on which it is situated, the homestead does not include such other land as has resting thereon, as a part thereof, a building or buildings devoted to other purposes than those of a family home. *In re Levy's Estate*, 75 Pac. 301, 303, 141 Cal. 646, 99 Am. St. Rep. 92.

A homestead, if one exists, should be preserved, and there can be no sale of any portion of the building, if the result thereof will be to unreasonably interfere with the use and occupation of such homestead. Each case presented must be determined in great part on the particular facts involved therein. Where a two-story building is subject to convenient use as a residence by the owner, she should not be deprived of her homestead right of any part because she is using for her ordinary business the front windows and a portion of the room on the lower floor. *Edmonds v. Davis*, 98 N. W. 375, 376, 122 Iowa, 561.

Property is not deprived of its character as a homestead, under a statute exempting to every housekeeper or head of a family a dwelling house and appurtenances, and the land used in connection therewith, not exceeding a certain specified amount in value, by reason of the fact that the house was constructed into two separate living apartments, one of which was rented. *Adams v. Adams*, 82 S. W. 66, 67, 183 Mo. 396.

A leasehold interest which may be sold on execution may constitute a homestead. *White v. Danforth*, 98 N. W. 136, 137, 122 Iowa, 403.

HOMICIDE.

Homicide is the killing of any human creature, and is of three kinds—justifiable, excusable, and felonious. *State v. Brinte* (Del.) 58 Atl. 258, 262.

HOOD.

A "hood" used in connection with a rip saw is a tin or sheet-iron cap partly covering the saw, and preventing the board from flying up, while the saw is cutting it, and striking the operative. *Dean v. St. Louis Woodenware Works* (Mo.) 80 S. W. 292, 294.

HORSE.

As chattel, see "Chattel."

HOTEL.

As building, see "Building."

A house having 24 bedrooms and a dining room containing the required amount of

space, and with adequate kitchen facilities, and harboring between 80 and 40 people, was a "hotel," within Laws 1897, p. 234, c. 312, § 31, cl. "k," authorizing a holder of a liquor tax certificate, who is a keeper of a hotel, to sell liquor on Sunday to his guests with their meals. *In re Oullinan*, 87 N. Y. Supp. 660, 661, 93 App. Div. 427.

HOUSE.

See "Apartment House"; "Dwelling House"; "Eating House"; "School-house"; "Tenement House."

HOUSE OF WORSHIP.

The erection of a vestry or parish house is not the erection of a "house of worship," within the meaning of a will giving a legacy on condition of an additional sum being raised for the erection of a new house of worship. If a house of public worship was erected containing a vestry within its walls, it would not be contrary to the provisions of the will; but if a fund was raised for the erection of a meetinghouse and vestry which might be separate structures, with no provisions showing what part of the fund was to be used for the meetinghouse and what part for the vestry, the fund as a whole would not be for the erection of a house of worship. *Trustees of the Ministerial Fund of the First Parish in Cambridge v. First Parish in Cambridge*, 71 N. E. 74, 75, 186 Mass. 85.

HOUSEHOLD FURNITURE.

A bequest of "household furniture" includes silverware, but does not include mere garments and articles of clothing. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

IDEA.

The word "idea" is frequently used as a substitute for the word "intention," especially by careless talkers. *Lewis v. Paull*, 42 Ala. 136, 144.

IF.

Where synonymous, see "Where."

IF ABLE.

The phrase "if able," in Rev. St. c. 18, § 51, providing that, when any person is affected with any disease or sickness dangerous to the public health, the local board of health may remove him to a separate house and there care for him at his charge, if able, relates to the pecuniary ability of the party at the time the expenses were incurred. *Inhabitants of Greenville v. Beauto*, 58 Atl. 1026, 99 Me. 214.

IF IT APPEARS.

The phrase "if it appears," as used in Code Civ. Proc. § 2623, providing that if it appears to the surrogate that the will was duly executed, and that the testator at the time of executing it was in all respects competent and not under restraint, it must be admitted to probate, is equivalent to a requirement that the fact of competency must be established by sufficient evidence. In re Goodwin's Will, 88 N. Y. Supp. 734, 95 App. Div. 183.

IF POSSIBLE.

The qualifying phrase "if possible," in Gen. St. §§ 471, 472, declaring it unlawful for any president, director, etc., or other officer of any banking institution to receive deposits, with knowledge that the bank is insolvent, and making it the duty of every such officer, "if possible," to know the condition of the bank, has application to the discovery of wrong conditions by reasonable examination, and does not serve to excuse the want of all examination by a competent director. In short, the requirement of the statute is that the examination must be made, and must be of such a character as would result in a knowledge of the condition of the bank if such knowledge could possibly, within the range of reasonable frequency and thoroughness, be obtained. *Forbes v. Mohr* (Kan.) 76 Pac. 827, 829.

ILLEGALITY.

Illegality is predicable of radical defects only, and signifies that which is contrary to the principles of the law, as distinguished from mere rules of procedure. It denotes complete defects in the proceedings. *State v. Norton*, 48 S. E. 464, 465, 69 S. C. 454 (quoting 17 Am. & Eng. Enc. Law, 482).

IMMATERIAL ALLEGATION.

Concerning the rule which governs what may be termed "immaterial allegations," and distinguishes them from mere surplusage, it is said that: "The statement of immaterial or irrelevant matter or allegations is not only censured, as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary. If a party take unto himself to state in pleading a particular estate, where it was only required of him that he should show a general or even a less estate, title, or interest, the ad-

versary may traverse the allegation, and, if it be untrue, the party will fail." 1 Ohit. Pl. p. 325, § 252. The meaning of "immaterial" is that the thing pleaded is unnecessary to plaintiff's action; that he could have succeeded without reference thereto; but, when he sees fit to set forth such matter, then it becomes material. It is an immaterial thing made material by the act and choice of the pleader. *Dunlap v. Kelly*, 78 S. W. 664-666, 105 Mo. App. 1.

IMMEDIATE.

In an accident policy agreeing to pay a certain indemnity for the immediate continuance and total loss of time necessarily resulting from injuries, the word "immediate" will be construed as applying to causation, and not to time. *Pacific Mut. Life Ins. Co. v. Branham* (Ind.) 70 N. E. 174, 176.

IMMEDIATE DELIVERY.

"Immediate delivery," as to coal, has a trade meaning among coal shippers, and means during the current month in which the offer is made and accepted. *Feeley v. Boyd*, 76 Pac. 1029, 143 Cal. 282, 65 L. R. A. 943.

IMMEDIATE NOTICE.

The term "immediate," as used in a policy requiring immediate notice to be given to the insurer of an accident, means within a reasonable time with regard to the attending circumstances. *Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York*, 78 S. W. 320, 322, 104 Mo. App. 157.

IMMEDIATELY.

As soon as practicable synonymous, see "As Soon as Practicable."

IMMIGRANT.

See "Alien Immigrant."

IMPEACH.

The rule is that jurors cannot impeach their own verdict, but this does not prevent a party showing by affidavits of jurors that the insertion in the answer in a special verdict was by mistake, and that the jury agreed on the opposite answer. Such evidence did not impeach the verdict of the jury, for that is not the written paper filed, but is the agreement which the jury reached, and the former, like most records or writings, is but the expression of evidence of some mental conception. Hence it may well be said that a showing that such writing is not correct is not impeachment of the verdict itself. *Wolfgram v. Town of Schoepke* (Wis.) 100 N. W. 1054, 1056.

The credibility of a witness is for the determination of the jury, and it was not error to instruct that a witness may be believed though impeached for general bad character, if the jury believe the witness has sworn to the truth, the use of the word "impeached" being the equivalent of "attacked" or "assailed." *Ector v. State*, 48 S. E. 315, 316, 120 Ga. 543.

IMPERFECT GRANT.

An imperfect grant is one which requires a further exercise of the granting power to pass the fee in the lands; is one "which does not convey full and absolute dominion, not only as against private persons, but as against the government, and which may be affirmed or disavowed by the political or granting authority." *Territory v. Delinquent Tax List of Bernalillo County (N. M.)* 76 Pac. 316, 317.

IMPERFECT OWNERSHIP.

Ownership is imperfect when it terminates at a certain time or on a condition. *Ruddock Cypress Co. v. Peyret*, 36 South. 105, 107, 111 La. 1019.

Ownership is "imperfect" when it is terminable at will, or on a condition or at a certain time. Where a claim against a city was assigned to a person in payment of a debt due him, and on further condition and consideration that he should devote the balance to be collected pro tanto to the payment of the debts due to the assignor's other creditors in whose favor, to that extent, such person bound himself by written contracts, as to the remaining interest in the claim his ownership was imperfect, in that it was subject to the condition that such remaining interest should, on the payment of the claim by the city, be surrendered to the holders of the equitable title in satisfaction of the debts due them. *Sintes v. Commerford*, 36 South. 656, 659, 112 La. 706.

IMPLICATION.

See "Amendment by Implication"; "Necessary Implication."

IMPLIED DEDICATION.

See "Dedication."

IMPLIED MALICE.

Implied or constructive malice is an inference or conclusion of law from the facts found by the jury, and, among these, the actual intention of the prisoner becomes an important and material fact; for, though he may not have intended to take away life or

to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act from which the law raises the presumption of malice. *State v. Brinte (Del.)* 53 Atl. 258, 262.

"Legal or implied malice (as distinguished from ill will or 'malice' in the vernacular sense of the word) is defined to be the intentional doing of a wrong act without just cause or excuse." An instruction which states that malice does not mean mere spite, hatred, or dislike, but that condition of mind which makes a person disregard the rights of others by doing an act without just cause or provocation, is erroneous. *Ickenroth v. St. Louis Transit Co.*, 77 S. W. 162, 166, 102 Mo. App. 597.

IMPLIED WAIVER.

An implied waiver, of a forfeiture for instance, is where one party has pursued such a course of conduct, with reference to the other party who has incurred the forfeiture, as to evidence an intention to waive the same, or where the conduct pursued is inconsistent with any other honest intention than an intention to waive the forfeiture, and the one who has incurred the forfeiture has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble and expense thereby. *Astrich v. German-American Ins. Co. (U. S.)* 131 Fed. 13, 20.

IMPOSSIBILITY.

See "Physical Impossibility."

IMPRESSION.

The word "impression" is equivalent to the word "mistake" in an instruction, in an action for reformation of a deed for mutual mistake, stating that plaintiffs were entitled to a verdict if the parties were at the time of the execution of the deed under the "impression" that the deed described other property. *Metcalf v. Lowenstein (Tex.)* 81 S. W. 362, 364.

IMPRISONMENT.

See "False Imprisonment."

IMPROVEMENT.

See "Local Improvement."

The word "improvements," in an agreement for the sale of mining claims which stipulated that if the purchaser failed to perform his agreement the improvements should become the property of the seller as rent for the occupation of the premises by the purchaser and as damages sustained by reason

[Appendix.]

of a breach of the contract, includes removable betterments placed on the land by the purchaser, and which he might, in the absence of an agreement to the contrary, take away. *Smith v. Detroit & D. Gold Min. Co.* (S. D.) 97 N. W. 17, 19.

The word "improvements" in Gen. St. 1894, § 5853, declaring that the word "improvements," as used in the act relating to actions concerning improvements on realty, shall be construed to include all kinds of buildings, fences, ditching, drains, grubbing, clearing, breaking, and all other necessary or useful labor or permanent value to the land, does not include ordinary repairs, but all improvements which are of permanent value to the land are within its scope. The test is whether the alleged improvements are of permanent value to the land. *Northern Inv. Co. v. Bargquist* (Minn.) 100 N. W. 636, 638.

The phrase "improvement or improvements" in San Francisco Charter, art. 16, § 29, requiring that when the supervisors shall determine that the public interest requires the construction of any permanent improvement or improvements, etc., includes the construction of sewers. *Law v. City and County of San Francisco* (Cal.) 77 Pac. 1014, 1017.

IMPUTED KNOWLEDGE.

The doctrine of "imputed knowledge" as to actual existing conditions necessarily rests upon the duty of the master to furnish his employé with a safe place in which to work, and is inapplicable where there is no such duty. It is ordinarily the duty of the master, as the court instructed the jury, to furnish his employé a suitable and safe place in which to work, and suitable appliances wherewith to perform the work; and, where such duty exists, the master is held to the exercise of care in making the place and appliances safe, and cannot be heard to say that he did not know of defects and dangers that he might have ascertained by the exercise of reasonable care. *Roche v. Llewellyn Ironworks Co.*, 74 Pac. 147, 149, 150, 140 Cal. 563.

IN.

The words "in one year," in a will directing that, on the death of one of the beneficiaries, the executors in one year therefrom shall divide the portion of the principal held in trust for him among his heirs equally, means within one year, and thereby the testator desired to express his intention that the time when the different remaindermen would come into actual possession and use of their estates should not be postponed beyond one year from the date of the death of a life tenant, and in no sense can they be taken to work any enlargement of the time of pay-

ment. *Nichols v. Nichols*, 86 N. Y. Supp. 719, 722, 42 Misc. Rep. 381.

IN ADDITION TO.

Rev. St. 1898, § 4490, provides that on escape from prison the guilty person shall be punished by imprisonment, not to exceed 10 years, in addition to his former sentence; and section 4494 declares that, in case of a prisoner breaking jail, he shall be punished by imprisonment for one year in addition to the unexpired term of the former sentence. The words in section 4490, "in addition to his former sentence," and in section 4494, "in addition to the unexpired term," were used to indicate that the punishment for the second offense is not deemed to abridge the execution of the judgment theretofore pronounced. The theory of the law is that where a judgment has once been rendered bearing solely on the person, as in the case of a sentence to confinement at hard labor for punishment of crime, it can only be satisfied by death of the party, his confinement at hard labor for the length of time mentioned in the sentence, less any good time earned according to law, by a reversal of the judgment, or by pardon. The sections do not preclude the recapture and confinement of a person escaping from custody to serve the unexpired term of his original sentence without judicial proceedings, the time of his voluntary absence not being counted in his favor. *In re McCauley* (Wis.) 100 N. W. 1031, 1032.

IN ANY PLACE.

See "Any."

IN BULK.

The term "in bulk" has long been understood in commercial circles as contradistinguished from "package" or "parcel," as where wheat, lard, and the like are sold in bulk. The common and approved usage of language, the technical meaning given by the business world, and the legal definition of the expression "in bulk" are opposed to the idea of a number of packages, parcels, or barrels containing merchandise being regarded as being in bulk. *Standard Oil Co. v. Commonwealth* (Ky.) 82 S. W. 1020, 1022.

Where a storekeeper, after selling at auction part of his stock of goods, sold at a private sale all but a few dollars worth of the balance, such sale was a "sale in bulk," defined by Laws 1901, p. 224, c. 109, § 4, to be a sale of a stock of goods out of the usual course of business. *Fitz-Henry v. Munter*, 74 Pac. 1003, 1004, 33 Wash. 629.

IN CUSTODY.

See "Custody."

IN DISGUISE.

The term "persons in disguise" does not include persons in ambush or concealed in bushes, where a person so concealed lies in wait to attack by surprise. *Dale County v. Gunter*, 46 Ala. 118, 143.

IN FORCE.

See "Be in Force."

IN KIND.

See "Partition in Kind."

IN POSSESSION.

See "Mortgagee in Possession."

IN REM.

See "Quasi in Rem."

A suit strictly in rem is where the property itself, conceived of as having done the wrong or as having been the instrument of its commission, is being proceeded against. In such a suit personal service within the jurisdiction, or appearance, is not necessary. The decree can, however, extend only to the property in controversy. Public citation to the world is all that is necessary, and the decree binds everybody. *Hill v. Henry* (N. J.) 57 Atl. 554, 555.

Proceedings to vacate streets are proceedings in rem. *Detroit Real Estate Inv. Co. v. Frazer* (Mich.) 100 N. W. 271.

A suit in partition is a proceeding in rem, and the jurisdiction of the court is confined to the property described in the complaint. *Sandiford v. Town of Hempstead*, 90 N. Y. Supp. 76, 79, 97 App. Div. 163.

A statute providing that a vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names, partakes of all the essential features of an admiralty proceeding in rem, in which exclusive jurisdiction is given to the District Courts of the United States. The exclusive admiralty jurisdiction of the federal courts extends to the enforcement by proceedings in rem of a lien for repairs furnished to a vessel engaged in navigating the Erie Canal, though such vessel was employed wholly in commerce between ports in the same state. *The Robert W. Parsons*, 24 Sup. Ct. 8, 14, 191 U. S. 17, 48 L. Ed. 73.

IN THE STATE.

See "Institution in the State."

IN STORE.

See "Goods in Store."

IN TRUST.

Where testatrix's will devised lands to trustees "in trust for my grandchild, D.," such provision was not equivalent to vesting the title in the grandchild. In *re Dixon's Estate*, 77 Pac. 412, 143 Cal. 511.

INABILITY.

The term "inability," as used in a statute that, in case of the failure, inability, or refusal of the mayor to act, the president pro tem. shall perform the duties and receive the compensation of the mayor, embraces disqualification or disability on account of interest in the subject-matter of the action. *Riggins v. Richards* (Tex.) 77 S. W. 946, 948.

INCAPABLE.

See "Total Incapacity."

Gen. St. § 549, providing that the probate court shall appoint an administrator c. t. a. in the place of an executor who is "incapable" to accept the trust, does not empower the court to reject an executor named in the will on the ground that he is lacking in honesty, integrity, and business experience, the purpose of the section being only to authorize the appointment of an administrator when the person named as executor is disqualified by law. *Appeal of Smith*, 24 Atl. 273, 274, 61 Conn. 420, 16 L. R. A. 538.

INCEPTION.

The "inception of a cause" in a court, in a constitutional sense and in every other sense, is the first step or proceeding necessary to be taken in order that the subsequent proceedings may follow. The lodging of the papers in the criminal district court, no matter in what shape those papers may be, provided they are sufficient to seize the court of the subject-matter, is the inception of the case. *State v. Bollero*, 36 South. 754, 755, 112 La. 850.

A note made payable to the maker's order, and successively indorsed by him and by a firm for whose accommodation it was made, and by defendant, and after a few days was discounted for the firm by plaintiff, had no "inception" until it was discounted, because suit could not have been maintained on it prior to that time. *Simpson v. Hefter*, 87 N. Y. Supp. 243, 244, 42 Misc. Rep. 482.

INCEST.

An information that one had sexual intercourse with his daughter sufficiently states the crime of "incest," defined in Pen. Code, § 285, as the commission of fornication or adultery by persons within the degrees of consanguinity within which marriages are

prohibited. *People v. Stratton*, 75 Pac. 166, 141 Cal. 604.

INCHOATE INSTRUMENT.

Instruments that the law requires to be registered are said to be "inchoate" prior to registration, in that they are then good only between the parties and their privies and persons having notice of them. *Wilkins v. McCorkle* (Tenn.) 80 S. W. 834, 837.

INCIDENT.

Under Pol. Code, § 2631, providing that by taking and accepting land for a highway the public acquire only the right of way and "the incidents necessary to enjoying and maintaining it," the county has no right to bore wells in the highway and use the subterranean water for sprinkling it. *Wright v. Austin*, 76 Pac. 1023, 143 Cal. 236, 65 L. R. A. 949.

INCLOSURE.

See "Substantial Inclosure."

INCLUDE.

The name "Independent Democratic Party" includes that of "Democratic Party," within Election Law, Laws 1896, p. 925, c. 909, § 57, providing that the name which shall be designated as the political name in a certificate of independent nomination shall not "include" the name of any organized political party. In re Carr, 88 N. Y. Supp. 107, 94 App. Div. 493.

INCOME.

A salary paid to a judgment debtor for his personal services is "income" out of which he may be required, under Act March 22, 1901, P. L. 1901, p. 373, § 3, to make payments on account of an unsatisfied judgment. *White v. Koehler* (N. J.) 57 Atl. 124.

INCOMPETENT.

See "Mentally Incompetent."

INCONSISTENT WITH.

The words "inconsistent with," as used in an instruction that, if a witness had been shown to have made before the grand jury statements which were inconsistent with and contradictory to the statements made on the trial, it would be for the jury to say whether or not his credibility had been destroyed, being used in connection with the words "contradictory to" by the conjunction "and," are evidently used in the sense of opposed to or "contradictory with," and were not in-

tended to convey the idea that mere inconsistency would be a sufficient reason for rejecting the testimony. *O'Dell v. State*, 47 S. E. 577, 120 Ga. 152.

INCONVENIENCE.

See "Great Inconvenience."

An inconvenience which controls the construction of a statute must be an inconvenience of such a kind as to force the right to find a reasonable interpretation in lieu of one which is unreasonable. That a number of indictments against the same defendant, charging him with using the mails to defraud, are by order of the court tried together by the same jury, does not affect the right under Rev. St. U. S. § 819 [U. S. Comp. St. 1901, p. 629], to three peremptory challenges for each indictment, for such an inconvenience as will arise from such a construction of the statute is of such an inferior class that to attempt to determine whether Congress had it in mind is necessarily a matter of pure speculation. *Betts v. United States* (U. S.) 132 Fed. 228, 237.

INCORPOREAL THING.

Incorporeal things are such as are not manifest to the senses, and which are conceived only by the understanding, such as the rights of inheritance, servitudes, and obligations. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

INCREASE.

The term "increase" is the synonym of "augment" or "aggravate." *Mathew v. Washash R. Co.* (Mo.) 78 S. W. 271, 272.

INCUMBRANCER.

An incumbrancer is one who has a legal claim against an estate. A judgment is an incumbrance, and the holder thereof is an incumbrancer. *De Voe v. Rundle*, 74 Pac. 836, 837, 33 Wash. 604.

INDECENT LIBERTIES.

An indictment for the crime of taking indecent liberties with or on the person of a female child under the age of consent is not defective because it does not state the particular acts which constitute the alleged indecent liberties. The term "indecent liberties," when used with reference to a woman, old or young, is self-defining; and it would be as unnecessary and as indecent to allege the defendant's particular acts as it would be, if he were charged with rape, or carnally knowing or abusing a female child under the age of consent, to set forth the evidence in

the indictment. The term, when used with reference to a female child under the age of consent, is the legal equivalent of an assault or attempt on her person. *State v. Kunz*, 97 N. W. 131, 132, 90 Minn. 526 (citing *State v. West*, 89 Minn. 321, 40 N. W. 249).

INDEMNIFY.

To "indemnify" means, according to Cent. Dict., to "secure against loss, to save harmless, to make good, to reimburse." A sheriff accepted a bond to indemnify him against liability for damages sustained by a levy on personal property. The sheriff could not recover on a bond for attorney's fees, incurred in defending an action for conversion of the property levied on, until such fee had been actually paid by him. *Cousins v. Paxton & Gallagher Co.*, 98 N. W. 277, 278, 122 Iowa, 465.

INDEPENDENT CONTRACTOR.

A man who owned a team, wagons, and a plow, with which he worked by the day for different employers as he could obtain work, earning usually from \$9 to \$15 per week, and working alone when he could not find work for his team, was not an "independent contractor," but a "wage-earner," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4, cl. "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and was not subject to be adjudged an involuntary bankrupt. In *re Yoder* (U. S.) 127 Fed. 894, 895.

INDIANS BY DESCENT.

The term "Indians by descent," as used in Indian treaties, includes full-blooded Indians as well as those of mixed blood. *Campau v. Dewey*, 9 Mich. 381, 435.

INDIRECT EVIDENCE.

Indirect evidence consists of inferences and presumptions. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect, and a presumption is a deduction which the law expressly directs to be made from particular facts. *Lake County v. Nellon*, 74 Pac. 212, 214, 44 Or. 14.

INDIRECT PURCHASE.

Under the statute prohibiting an administrator from purchasing, directly or indirectly, the property of the estate, procuring another to purchase for him is an "indirect purchase," and is precisely what the statute prohibits. *Hoffman v. Harrington*, 28 Mich. 90, 95.

INDIVIDUAL.

The word "individual," as used in General Order in Bankruptcy No. 6, 89 Fed. v. 32 C. C. A. ix, prescribing the procedure in case two or more petitions shall be filed against the same individual in different districts, and in case of two or more cases against a partnership in different districts, is used in the sense and is descriptive of a single person incapable of division, and includes a corporation. In *re United Button Co.* (U. S.) 132 Fed. 378, 381.

INDORSE — INDORSEMENT — INDORSER.

See "Accommodation Indorser."

The words "indorse" and "indorser" have a popular as well as a technical meaning; hence from the circumstance that they, and they alone, were used in a conversation in which a person was asked and consented to put his name on the back of a note for the purpose of increasing its commercial value, it does not necessarily follow that the person signed as indorser merely, and not as surety. *Redden v. Lambert*, 36 South. 663, 669, 112 La. 740.

The use of the word "indorser" or "indorsement," in a conversation between the parties anterior to the signing of the instrument, is not decisive of the obligation of the party who signed across the back, for both words are used popularly to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term. *Oexner v. Loehr* (Mo.) 80 S. W. 690, 691.

A third person signing a note on the face thereof, and placing the word "indorser" after his name, is not an indorser known to the law merchant, and is therefore not entitled to demand or protest or notice of non-payment. His liability is either that of a maker or guarantor. *Herrick v. Edwards*, 81 S. W. 466, 467, 106 Mo. App. 633.

An indictment is "indorsed" when the words "A true bill" are written on the indictment and signed by the foreman, and the names of the witnesses examined before the grand jury are written thereon. *Shivers v. Territory*, 74 Pac. 899, 901, 13 Okl. 466.

INDUBITABLE PROOF.

"Indubitable proof," in a rule that the standard of proof in suits to reform written instruments is clear, precise, and indubitable, is evidence that is not only found to be credible, but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. *Highlands v. Philadelphia & R. R. Co.*, 58 Atl. 560, 562, 209 Pa. 286.

INFAMOUS PUNISHMENT.

"For more than a century imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America." An order of a police magistrate directing that a person shall serve a term in the chain gang was a sentence to infamous punishment, where the members of the chain gang wore the typical striped clothing of the penitentiary convict, with iron manacles riveted on their legs which could only be removed by the use of the cold chisel, the irons on each leg connected by chains, and their progress to and from work was public, and from dawn to dark, with brief intermissions, they tolled on the public roads and before the public eye. *Jamison v. Wimbish* (U. S.) 130 Fed. 351, 355 (quoting *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89).

INFERENCE.

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect. *Lake County v. Neillon*, 74 Pac. 212, 214, 44 Or. 14.

"Inference is a deduction or conclusion from facts or propositions known to be true. When the facts themselves are directly attested, the jury may deduce or infer or presume from them the truth or falsity of the main proposition." An inference of fact can be found by a jury only from other facts proven. A jury, instead of basing their verdict upon a fact proved, based it upon a probability. A probability is not a proven fact, and hence the inference drawn from it cannot be properly based upon it. *Seavey v. Laughlin*, 57 Atl. 796, 797, 98 Me. 517 (quoting *Gates v. Hughes*, 44 Wis. 336).

INFERIOR COURT OF RECORD.

As *Hurd's Rev. St. 1899*, c. 37, § 240, limits the jurisdiction of city courts to the cities in which the courts are established, such courts are "inferior courts of record" within chapter 53, § 5, providing that judges of inferior courts of record in towns and cities shall receive, in lieu of all other fees, perquisites, and benefits, in cities and towns having a population of more than 5,000 inhabitants, \$1,500, to be paid out of the city treasury. *Wolf v. Hope*, 70 N. E. 1082, 1087, 210 Ill. 50.

INFLAMMABLE LIQUID.

Kerosene is not an "Inflammable liquid" within the meaning of a policy of insurance. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 29.

INFLUENCE.

See "Undue Influence."

The word "influence," in the term "undue influence," as affecting the validity of a will, does not refer to any and every line of conduct capable of disposing in one's favor a free and self-directing mind, but to a control acquired over another which virtually destroys his free agency. *Caughey v. Bridenbaugh*, 57 Atl. 821, 823, 208 Pa. 414.

INFORMATION.

See "Denial of Knowledge or Information."

INHABITANT.

An "inhabitant" and "resident" mean the same thing. *Pearson v. West* (Tex.) 77 S. W. 944, 945.

In the law of process and attachment, "residence" and "habitation" are generally regarded as synonymous. A "resident" and an "inhabitant" mean the same thing. A person resident is defined to be "one dwelling or having his abode in any place"; an inhabitant, "one that resides in a place." *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (citing *Drake on Attachment*).

INHABITANT OF.

As used in a statute providing that the time during which a defendant in a criminal case is "not an inhabitant of or usually resident within" the state is not to be counted in his favor, the words "inhabitant of" and "usually resident within" are synonymous. In determining the construction of these words, the court said: "We are cited to various decisions upon statutes affecting taxation and the administration of estates, in which the words 'inhabitants' and 'residents' are differentiated from 'domicile' and from each other, but none of these cases present the two words in such context as they appear in the section under construction. It may be that 'inhabitant' is often a more comprehensive term than 'resident,' but, taken together as they appear in the clause under consideration, with the modifier 'usually' before the word 'resident,' it seems to us that the term 'usually resident,' following the word 'inhabitant' in such close, immediate connection, was intended to illustrate the meaning of 'inhabitant,' and that, whatever different shades of distinction may be drawn when the words are used independently of each other in other statutes here they are synonymous. When to the noun 'resident' the adjective 'usual' is prefixed, in the sense of 'customary' or 'common,' the term becomes more clearly the synonym of 'inhabitant' as

that word is defined by the courts." *State v. Snyder*, 82 S. W. 12, 22-24, 182 Mo. 462.

INHUMAN TREATMENT.

See "Cruel and Inhuman Treatment."

INJUNCTION.

Injunction is a conservatory writ, which it is within the sound legal discretion of the judge before whom a cause is pending to issue whenever it is necessary to prevent one of the parties, during the continuance of the suit, from doing some act injurious to the other party. *State ex rel. Pelletier v. Somerville*, 36 South. 864, 866, 112 La. 1091.

"Originally injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but nonexistent, injury. A concrete case is presented whenever a right of the plaintiff is threatened by the defendant and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity." *Schubach v. McDonald* (Mo.) 78 S. W. 1020, 1024, 1027, 65 L. R. A. 136.

INJURY.

See "Wanton Injury"; "Willful and Malicious Injury."

INJURY TO THE PERSON.

See, also, "Personal Injury."

The phrase "injury to the person," as used in Gen. Laws 1896, c. 260, § 10, providing that no person who shall be committed on execution in any action for malicious injury to the person, health, or reputation of another shall be deemed within the meaning of section 1 of the act, authorizing persons imprisoned for debt to apply to be admitted to take the poor debtor's oath, includes an action for alienation of the affection of a wife, the gist of the action being depriving him of companionship and a wounding of his feelings. *Taylor v. Bliss* (R. I.) 57 Atl. 939, 940.

INLAND WATERS.

The phrase "inland waters," as used in a policy of marine insurance on a houseboat, expressly limiting the risk to loss or disaster occurring while the boat is within inland waters, does not include the waters of the Atlantic Ocean off Coney Island. *Fulton v. President, etc., of Insurance Co. of North America* (U. S.) 127 Fed. 413, 414.

INQUIRE AND REPORT.

The words "inquire and report" have long been used in England and in this country as a formula for a reference to a master in chancery to obtain and report information to the court. *Austin v. Ahearne*, 61 N. Y. 6, 12.

INQUIRE INTO THE CIRCUMSTANCES.

The phrase "inquire into the circumstances," as used in Code Civ. Proc. § 2471a, providing that, if the demand of any public officer for the books and papers pertaining to the office is refused, he may make complaint to any justice of the Supreme Court of the district, or to the county judge, and declaring that at the time of the return of the order to show cause, or at any time to which the matter may be adjourned, on proof of the due service of the order, a justice or judge to whom the application is made shall proceed to inquire into the circumstances, means that when an issue of fact is raised by the affidavit interposed in objection to the application it is the duty of the court to take evidence relative to that issue, and to decide it in one way or the other; for to "inquire into the circumstances" imports a judicial investigation of the question of fact. In re Gill, 88 N. Y. Supp. 466, 467, 95 App. Div. 174.

INSANE—INSANITY.

See "Temporary Insanity."

A person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of his or her act in making a contract. *Barlow v. Strange*, 48 S. E. 344, 345, 120 Ga. 1015 (citing *Frizzell v. Reed*, 77 Ga. 724).

In many statutes, of which that of Michigan and Wisconsin are instances, the term "insanity," considered in its technical sense, is separated from its equivalent as regards the ability of the sufferer to care for himself or his property, leaving no ground to claim that mental unsoundness—meaning insanity, strictly so called—is essential to the appointment of a guardian. In re Streiff, 97 N. W. 189, 191, 119 Wis. 563, 100 Am. St. Rep. 903.

"Insanity" may be either total or partial in its character. It may be either permanent or temporary in duration. Where insanity of a permanent character is once established by the evidence, it is presumed to continue until the contrary is proven satisfactorily; but if the insanity be of a temporary character no such presumption arises. To exempt a person from responsibility for crime the insanity must be of such a charac-

ter as either to deprive him of the capacity to distinguish between right and wrong in respect to the particular act committed, or to deprive him of sufficient will power to choose whether he would do the act or refrain from it. So long as a person has capacity to distinguish between right and wrong in the particular act, and has will power to do it or not to do it, he will be held criminally responsible, even though the mind is subject to hallucinations, melancholy, exhilaration, or is otherwise affected from the use of cocaine, intoxicants, or any other cause. *State v. Jack* (Del.) 58 Atl. 833, 834.

INSANE DELUSION.

"An insane delusion does not mean a mistaken conclusion from a given state of facts, nor a mistaken belief as to the existence of facts. An erroneous conclusion of a sane person may arise from incorrect reasoning, or from a deduction from information which he supposed to be correct." A misconception as to a particular matter is not an insane delusion when it does not spring up spontaneously from a disordered intellect. *Bohler v. Hicks*, 48 S. E. 306, 308, 120 Ga. 800.

INSOLVENCY—INSOLVENT.

The term "insolvency," as used in bankruptcy and insolvency laws, means the inability of a person to pay his debts as they mature in the ordinary course of business; but as used in a general sense, it means a substantial excess of a person's liabilities over the fair cash value of his property. *Grunsfeld Bros. v. Brownell* (N. M.) 76 Pac. 310, 311.

The bankruptcy act of July 1, 1898, c. 541, § 1, cl. 15 (30 Stat. 545 [U. S. Comp. St. 1901, p. 3419]), declares that a person shall be deemed insolvent whenever the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts. The fact alone that the indebtedness of a retail merchant to a wholesale house is past due when a payment is made thereon does not give the creditor reasonable cause to believe the debtor to be insolvent. In *re Goodhile* (U. S.) 130 Fed. 471, 473.

A person is deemed to be "insolvent," within the meaning of the bankruptcy act, when the aggregate of his present property "shall not, at a fair valuation, be sufficient in amount to pay his debts." *John S. Brittain Dry Goods Co. v. Bertenshaw* (Kan.) 75 Pac. 1027.

An insolvent, within the meaning of Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], is one the aggregate of whose property, etc., shall not, at a fair valuation, be sufficient in amount

to pay his debts. *Cullinane v. State Bank of Waverly*, 98 N. W. 887, 888, 123 Iowa, 340.

The general understanding is that an insolvent debtor is one whose property is insufficient to pay all his debts, or out of which his debts may be collected. *Kingsley v. City of Merrill* (Wis.) 99 N. W. 1044, 1047.

Where the record shows that a building and loan association was insolvent and in the hands of a receiver, a debt due to it must be treated as that due an "insolvent concern," on a question as to whether the debt of the corporation should be treated as that of a going concern or of an insolvent one. *Carman v. Carrico* (Ky.) 80 S. W. 216, 218.

INSTALLMENT PREMIUM PLAN.

The method employed by a building association in taking the premium and determining the amount is called the "installment premium plan," where the borrower agrees to pay periodically a sum or percentage in addition to the interest and the dues on his stock. *Fidelity Sav. Ass'n v. Bank of Commerce* (Wyo.) 75 Pac. 448, 450.

INSTITUTION.

See "Charitable Institution"; "State Institution."

INSTITUTION IN THE STATE.

The words "institutions in this state," as used in Rev. St. § 2731-1, imposing a collateral inheritance tax, but declaring that the provisions of the act shall not apply to property transmitted to "institutions in this state for purposes of purely public charity or other exclusively public purposes," do not include boards and societies, and auxiliaries thereto, which are incorporated and organized under the laws of other states for purposes of purely public charity or other exclusively public purposes. *Humphreys v. State*, 70 N. E. 957, 959, 70 Ohio St. 67, 65 L. R. A. 776.

INSTITUTION OF EDUCATION.

A gymnastic association where regular gymnastic exercises are taught and a teacher in physical culture is constantly employed is an "institution of education" within Const. § 170, exempting such institutions from taxation. *German Gymnastic Ass'n of Louisville v. City of Louisville* (Ky.) 80 S. W. 201, 65 L. R. A. 120.

A pharmacy college whose charter provided that, should the corporation be dissolved, its funds and property, after payment of debts, should be paid into the state treasury for the benefit of the common school fund, which is without stockholders, and

whose entire income, which is derived from nominal membership fees, an initiation fee, small tuition fees, and the rental of a portion of its building, is applied to the purposes of the institution, is an "institution of education" within a constitutional provision exempting from taxation institutions of education not used for gain. *Louisville College of Pharmacy v. City of Louisville (Ky.)* 82 S. W. 610, 611.

INSTRUMENT.

See "Inchoate Instrument"; "Negotiable Instrument"; "Perfect Instrument."

INSUFFICIENT.

In a statute providing that when sureties are or become insufficient new bond may be required, "insufficient" is a comprehensive term, embracing every cause or ground the court may regard as amounting to that. It includes removal of surety from the state. *State v. Hull*, 53 Miss. 626, 644.

An objection that the certificate of protest related to matter between other parties than those to the suit on the note, and was therefore incompetent, is not within the contention that the certificate was insufficient; and, where defendant objected to the admission in evidence of the protest of a note on the specific objection that it was not competent, he could not on appeal raise the question that the protest could only be proved by a certified copy of the record kept by notaries. *Elwen v. Wilbor*, 70 N. E. 575, 579, 208 Ill. 492.

INSURABLE INTEREST.

An insurable interest is such an interest in property arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured, otherwise the contract is a mere wager by which the party taking the policy is directly

interested in the early death of the assured. *Brett v. Warnick*, 75 Pac. 1061, 1064, 44 Or. 511 (citing *Warner v. Davis*, 104 U. S. 775, 28 L. Ed. 924).

"As to what relationship must exist between the parties to create in one of them an insurable interest in the life of the other is a question upon which the authorities are not so definite, but it seems to be settled that, when such interest is dependent alone upon consanguinity, the parties must be related as closely as the second degree, and such interest will only be presumed in favor of the husband, wife, father, mother, child, brother, or sister of the insured. Such interest, however, may exist in one not so related by blood or affinity to the insured, when the facts show that he has a reasonable expectation of pecuniary benefit or advantage from the continued life of the insured." *Wilton v. New York Life Ins. Co. (Tex.)* 78 S. W. 403, 404.

INSURANCE.

See "Accident Insurance"; "Life Insurance"; "Other Insurance"; "Total Insurance."

INSURANCE AGENT.

As public officer, see "Public Officer."

INSURANCE COMPANY.

See "Foreign Insurance Company."

INSURANCE POLICY.

As chose in action, see "Chose in Action."

INTEGRITY.

The word "integrity," as used in Code, § 1369, providing that no person shall be entitled to serve as administrator who has been adjudged incompetent to execute the duties of a trust because of want of understanding or integrity, means soundness of moral principle and character, as shown by a person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for "probity," "honesty," and "uprightness" in business relations with others. In *re Gordon's Estate*, 75 Pac. 672, 674, 142 Cal. 125.

INTENT.

Intent, in its legal sense, is quite distinct from motive. It is defined as the purpose to use a particular means to effect a certain result. Motive is the reason which leads the mind to desire that result. *Baker v. State (Wis.)* 97 N. W. 566, 570.

If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does the act, he is chargeable, in law, with the intent to injure or defraud. It is not necessary that his object or purpose was primarily to injure or defraud. It may have been to benefit himself. *United States v. Breese* (U. S.) 131 Fed. 915, 922.

INTENT TO COMMIT GREAT BODILY INJURY.

See "Assault with Intent to Commit Great Bodily Injury."

INTENT TO COMMIT RAPE.

See "Assault with Intent to Commit Rape."

INTENT TO KILL.

See "Shooting with Intent to Kill."

"Intent to kill" means just what the ordinary signification of the words suggest, whether it be described by the words "actual intent," "design," or "premeditated design" makes no difference. When we leave entirely out of view those subtleties often indulged in, in discoursing on the meaning of "premeditated design," and giving words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated or thought of, because without mental action the purpose could not be formed. So, when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design or premeditated design. That the word "premeditated," as used in the statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term "premeditated design" where used inclusively in murder in the first degree, as to "design" where that word alone is used exclusively in murder in the third, and manslaughter in the first, second, and third, degrees. *Cupps v. State* (Wis.) 98 N. W. 546, 549.

INTENT TO MURDER.

See "Assault with Intent to Murder."

INTERCOURSE.

"Intercourse" means "a commingling; intimate connections or dealings between persons or nations, as in common affairs and

civilities, in correspondence or trade; communication; commerce; especially interchange of thought and feeling; association; communion." Webster's Dict. In a prosecution for rape under Pen. Code, § 261, par. 1, a conviction cannot be had on proof alone that defendant had intercourse with the prosecutrix. *People v. Howard*, 76 Pac. 1116, 1117, 143 Cal. 316.

INTEREST.

See "Change of Interest"; "Community of Interest"; "Direct Interest"; "Insurable Interest"; "Money at Interest"; "Real Party in Interest"; "Pre-Emption Interest."

As used in a policy providing that it shall be void, if any change, other than by the death of insured, takes place in the interest, title, or possession of the subject of insurance, etc., the word "interest" has the same meaning as in the phrase "right, title, and interest." It means a legal interest, a proprietary or insurable interest, not a mere sentimental interest. *Stenzel v. Pennsylvania Fire Ins. Co.*, 35 South. 271, 272, 110 La. 1019, 98 Am. St. Rep. 481.

"An interest in land is the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable." A contingent remainderman has such a present and existing interest as is susceptible of release to the life tenant in possession. *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 123 Iowa, 413.

Tax liens held by the state are not interests in and claims upon the land on which they are a lien, within the meaning of Laws 1903, c. 234, § 6, p. 341, relating to the registration of land titles. *National Bond & Security Co. v. Daskam*, 97 N. W. 458, 91 Minn. 81.

An agreement to pay counsel a sum equal to 33⅓ per cent. of the amount which may be allowed on a claim was not within Rev. St. U. S. § 3477 [U. S. Comp. St. 1901, p. 2320], providing that all transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, shall be absolutely null and void unless made after the claim is allowed. *Knut v. Nutt*, 35 South. 686, 688, 83 Miss. 365.

INTERESTED.

An inquiry by the Post Office Department for the purpose of determining whether a corporation has been guilty of a fraudulent use of the mails, and whether a fraud order shall be issued against it, is a proceeding in which the United States is "interested" within Rev. St. U. S. § 1782 [U. S. Comp. St.

1901, p. 1212], prohibiting a United States senator from receiving compensation for services rendered by him to any person or any bureau of the United States in relation to a matter in which the United States is interested. *United States v. Burton* (U. S.) 181 Fed. 552, 557.

The mother of an illegitimate child is not a "party interested in the event" of an action brought by the child against the executor of his putative father on a contract whereby the father agreed to settle a sum of money on the child in consideration of support by the mother until a certain date, within Code Civ. Proc. § 829, rendering such persons incompetent as witnesses to transactions with decedents in actions against executors or administrators. *Rousseau v. Rouss*, 86 N. Y. Supp. 497, 501, 91 App. Div. 230.

Under a statute entitling a husband, where there are no children, to one-half of the estate absolute, a husband is a "person interested" in the estate, within the meaning of another statute authorizing a "person interested" to file an affidavit preliminary to proceedings for the discovery of assets. *Ex parte Gfeller*, 77 S. W. 552, 556, 178 Mo. 248.

INTERLOCUTORY JUDGMENT.

See, also, "Final Judgment."

Interlocutory judgments are such as are given in the middle of a cause upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory. *Leonard v. Sibley* (Vt.) 56 Atl. 1015.

A judgment is interlocutory under Code Civ. Proc. § 1200, defining a judgment as either interlocutory or final where it is entered against the defendant after demurrer to reply to a separate defense has been overruled, dismissing the separate defense, and providing that plaintiff recover a certain sum as costs and disbursements on the trial of the demurrer and issue of law. *Maeder v. Wexler*, 87 N. Y. Supp. 402, 403, 43 Misc. Rep. 19.

INTERNALLY.

An allegation of a petition that plaintiff was injured "internally" was sufficient to admit proof of injury to her womb or any of her internal organs. *Houston Electric Co. v. McDade* (Tex.) 79 S. W. 100.

INTERSTATE CHARACTER.

See "Business of an Interstate Character."

INTIMATE ACQUAINTANCE.

Where persons have known a testatrix for upwards of 20 years, and were on terms of social intimacy with her, and had seen and conversed with her immediately before and after the execution of the will, they were "intimate acquaintances" within Code Civ. Proc. § 1870, permitting the opinion of an intimate acquaintance respecting the mental sanity of a person. In *re McKenna's Estate*, 77 Pac. 461, 462, 143 Cal. 580.

INTOXICATING LIQUOR.

"Intoxicating liquor" is defined to be "any liquor intended for use as a beverage, or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may be practically drunk as an intoxicant." In a prosecution for violating the local option law, a requested charge to acquit defendant if the beverage sold was not intoxicating liquor if drunk in reasonable quantities was incorrect, what is a reasonable quantity being left undefined, and the expression "reasonable quantities" not being equivalent to such quantities as may practically be drunk. *Murry v. State* (Tex.) 79 S. W. 568, 569 (quoting *Decker v. State*, 39 Tex. Cr. R. 20, 44 S. W. 845).

It cannot be said, as a matter of law, that liquor which contains 3 per cent. or more of alcohol is "intoxicating." *State v. Piche*, 56 Atl. 1052, 1053, 98 Me. 348.

INTRALIMINAL

"Intraliminal," with reference to property rights conferred by a lode location, embraces all within its boundaries, down to the center of the earth. *Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co.*, 75 Pac. 1070, 1073, 64 L. R. A. 925.

INVESTIGATION.

Any investigation, see "Any."

INVITED ERROR.

A requested instruction cannot be regarded on appeal as having "invited error," where it appears that it was refused on the ground that it had already been given in the main charge. *Western Union Tel. Co. v. Bowen* (Tex.) 81 S. W. 27, 28.

INVOLUNTARY MANSLAUGHTER.

The crime of voluntary and involuntary manslaughter is defined by Burns' Rev. St. 1901, § 1981, as whoever unlawfully kills any

human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act is guilty of manslaughter. That a pistol, by the accidental discharge of which deceased was killed while defendant was playing with him, was carried by defendant in violation of law, does not make him guilty of involuntary manslaughter. *Potter v. State*, 70 N. E. 129, 130, 162 Ind. 213, 64 L. R. A. 942.

INVOLUNTARY TRUSTEE.

One who gains a thing by fraud is, unless he has some other and better right thereto, an "involuntary trustee" of the thing gained for the benefit of a person who would otherwise have had it. *Muller v. Palmer*, 77 Pac. 954, 955, 957, 144 Cal. 305.

INVOLVE.

An action to collect delinquent real estate taxes does not involve title to real estate, so as to confer appellate jurisdiction on the Supreme Court, under Const. art. 6, § 12. The suit necessarily assumes that the title to the land is in the defendants. The purpose of the suit is not to divest title out of defendants, but to enforce the lien of the taxes on the land, and to sell the land to satisfy the judgment. The plaintiff does not claim any title to the land. He seeks only to charge it with a lien. The enforcement of the judgment by a sale under the execution may have the effect to pass the title to some one other than the defendants, but that does not make the case one which involves title to real estate, any more than any judgment in personam, enforced by execution, would involve title. *State ex rel. Reed v. Elliott*, 79 S. W. 696, 698, 180 Mo. 658.

Title to land is not "involved," so as to give the Court of Appeals appellate jurisdiction, where the judgment for the recovery of money recites that on plaintiff's motion the lien created by the levy on real estate under the attachment sued out in the action is waived. *Rhodes v. Frankford Chair Co. (Ky.)* 79 S. W. 768.

INVOLVING THE MERITS.

See "Merits."

IRREGULARITY.

The court, in *Treasurers v. Bourdeaux's Representatives*, 3 McCord, 142, says: "In *Tidd's Practice*, 434, it is said: 'An "irregularity" may be defined to be the want of adherence to some prescribed rule or mode of proceeding, and consists either in omitting to do something that is necessary for the due

and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.'" *State v. Norton*, 48 S. E. 464, 465, 69 S. C. 454.

IS.

As used in a constitutional provision that where an old county is reduced for the purpose of forming a new one the seat of justice in the old county shall not be removed without the concurrence of two-thirds of both branches of the Legislature, and two-thirds of the qualified voters of the county, etc., but that the provision requiring a two-thirds majority shall not apply to certain counties, the word "is" is used in the sense of "shall" or "may be." *Lindsay v. Allen (Tenn.)* 82 S. W. 171, 173.

ISSUE.

The word "issue" is defined in the *Century Dictionary* as to send out, deliver for use, deliver authoritatively. A county warrant is not issued until it is actually delivered into the hands of the person authorized to receive it. *American Bridge Co. v. Wheeler*, 76 Pac. 534, 535, 35 Wash. 40.

A certificate is not "issued," within the meaning of a proviso in the constitution of a beneficial society to the effect that a member shall be liable for dues, etc., for the month in which his benefit certificate is "issued or dated by the supreme secretary," until it has been delivered to and accepted by the member. *Logsdon v. Supreme Lodge of Fraternal Union of America*, 76 Pac. 292, 34 Wash. 666.

The word "issued" in an application for insurance, reciting that the policy shall not take effect until it was signed by the secretary of the company and issued, was used as indicative of the completed signing and execution of the instrument, making it ready for delivery. *Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 825, 44 Or. 447.

ISSUE (Noun).

See "Die Without Issue."

The use of the word "issue," in Code, § 1386, prescribing the rules of inheritance, does not limit the right of inheritance to the natural children only, as the word "issue" is there used in the same sense as the words "child" and "children." In *re Winchester's Estate*, 74 Pac. 10, 140 Cal. 468 (citing *re Newman's Estate*, 75 Cal. 219, 16 Pac. 887, 7 Am. St. Rep. 146).

The word "issue" in a will has been invariably held to mean the same prima facie as "heirs of the body." *Graham v. Abbott*, 57 Atl. 178, 179, 208 Pa. 68 (citing *Wistar v. Scott*, 105 Pa. 200, 51 Am. Rep. 197).

The phrase "their living issue" in a contract of life insurance, directing the payment of the amount of the policy at the death of the insured to his brothers and sisters or their living issue, according to the right of representation, means and refers to living lineal descendants of deceased brothers and sisters. *Hemenway v. Draper*, 97 N. W. 874, 91 Minn. 235.

ITEM.

An "item" means an article, an entry; anything which can form part of a detail; the particulars of an account. *United States v. Young* (U. S.) 128 Fed. 111, 114.

ITINERANCY.

Itinerancy, in the doctrines of the Methodist Church, means that no preacher having charge of a congregation shall remain at any one place longer than a brief period, ranging at different times from three months to three years. *People v. Steele*, 2 Barb. (N. Y.) 397, 407.

ITS.

Where a railroad company was in possession of tracks and of the yard in which they were laid, and was engaged in switching cars on such tracks, the use of the possessive word "its," in an allegation that the company had or permitted a telegraph pole to be on the south side of its main switch track in its switch yard, does not necessarily indicate ownership in fee, as the possessive word "its" may as well designate a right by arrangement to use the track and switch yard as an absolute ownership thereof. *Illinois Terminal R. Co. v. Thompson*, 71 N. E. 328, 331, 210 Ill. 226.

J. P.

The letters "J. P.," following the name of a person affixed to the jurat of an affidavit, are sufficient to designate the official character of such person as a justice of the peace, and if the name is of one who is commissioned justice of the peace of the state it is immaterial that it does not appear from the face of the affidavit where the same was executed; until the contrary appears from the affidavit or otherwise the presumption would be that it was executed in the state and at such a place where such an officer would be authorized to administer such an oath. *Abrams v. State* (Ga.) 48 S. E. 965; *Osburn v. State*, Id.

JAIL.

A building used as a jail, and in which a prisoner is confined for a violation of law,

is within the protection of a statute punishing jail deliveries, though it is not situated in an incorporated town, and is not the property of the county. *Irvington v. State* (Tex.) 78 S. W. 928, 929.

JAR.

Bottle-like containers of glass, used in chemical operations, and known as "Koch flasks," and certain so-called "Wolf flasks," shaped like bottles, but having two or three necks apiece, are "bottles or jars," within Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]. *Elmer & Amend v. United States* (U. S.) 126 Fed. 439.

JEOPARDY.

The general rule is that the prisoner has been put in "jeopardy" when he has been put upon trial before a court of competent jurisdiction, upon an indictment or information sufficient to sustain a conviction, and the jury has been impaneled and sworn to try the case, and the jury is discharged without sufficient cause, and without the defendant's consent; and such discharge of the jury, although improper, results in an acquittal of the defendant. *Schrieber v. Clapp*, 74 Pac. 316, 317, 13 Okl. 215.

Where defendants break into a house at night with intent to steal money, which they abstract from the householder's pocket, and on his awakening shoot him, the burglary and the shooting do not constitute a single transaction, out of which two offenses cannot be carved, so as to render a conviction of the shooting a bar to a prosecution for the burglary. *Mann v. Commonwealth* (Ky.) 80 S. W. 438, 439.

JEWEL—JEWELRY.

A watch and fob are embraced in the terms "jewels" and "ornaments," as used in Acts 1879, p. 185, c. 145, relating to the liability of the proprietor of a hotel for the keeping of any jewels and ornaments belonging to a guest. Mr. Webster defines the word "jewel" as an ornament of dress, usually made of a precious metal, having enamel or precious stones as a part of its design; but we are of the opinion that it was used by the Legislature in the common meaning attributed to it as an ornament, or useful article of value, and embraces a watch used for a timekeeper or chronometer, and in which precious stones may or may not form a part. The fob is evidently an article kept and worn both for use and ornament. *Rains v. Maxwell House Co.* (Tenn.) 79 S. W. 114, 117, 64 L. R. A. 470.

Women's silver hand bags or purses, used for holding money, articles of wearing

apparel, etc., are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for articles commonly known as "jewelry," but are dutiable as articles of silver, under paragraph 193 of said act, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]. *Tiffany v. United States* (U. S.) 131 Fed. 398.

JOINT CAUSE OF ACTION.

Joint causes of action include causes of action against joint wrongdoers as well as causes of action against joint parties to a contract. *Williamson v. Howell*, 17 Ala. 830, 832.

JOINT TENANCY.

To create a "joint tenancy" there must exist unity of interest, unity of title, unity of time, and unity of possession. Where tenants in common of land made a deed directly to one of the tenants and a third person as joint tenants, it created a joint tenancy, so that the surveyor of the grantees took all the land. *Colson v. Baker*, 87 N. Y. Supp. 238, 239, 42 Misc. Rep. 407.

JOINTLY.

The word "jointly," in a finding that plaintiff, jointly with others, should have a perpetual right to use the waters of a ditch for irrigating purposes, means only that his right to such use is in no degree exclusive or superior to the rights of others interested therein, but that he, with the others interested, have the right together as a common right. *Blankenship v. Whaley*, 76 Pac. 235, 237, 142 Cal. 568.

JOINTURE.

See "Equitable Jointure."

JUDGE.

As public officer, see "Public Officer."

As used in an act relating to the taking of testimony in criminal cases which provides that when any witness is present who shall desire to have his or her evidence taken on any prosecution he shall apply to the judge of the court in which such prosecution is pending to have his or her testimony taken in writing, and thereupon the judge shall order said testimony to be taken in writing before him, etc., the word "judge" means the trial judge. *State v. Jackson*, 35 South. 593, 598, 111 La. 843.

The appeal to "the judge of the district court of the district," authorized by Act Sept. 18, 1888, c. 1015 (25 Stat. 479 [U. S. Comp.

St. 1901, p. 1317] § 13, where a Chinese person has been convicted before a United States commissioner of being unlawfully in the United States, is in effect an appeal to the district court, and not to the district judge as an individual; and the commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court. *In re United States*, 24 Sup. Ct. 629, 630, 194 U. S. 194, 48 L. Ed. 931.

The commission provided for by Acts 1893, p. 386, c. 231, § 13, providing that if a municipal corporation, after deciding to establish a municipal lighting plant, refuses to purchase a private plant operated by a corporation incorporated by the General Assembly, it may be compelled to do so, and a commission appointed by the superior court to adjudicate whether the plant should be purchased and what the price and conditions of sale should be, is not a court, nor its members judges, within the meaning of the Constitutional provision prescribing the mode by which judges are to be appointed. The functions of the commission are but quasi judicial. *Norwich Gas & Electric Co. v. City of Norwich*, 57 Atl. 746, 749, 76 Conn. 565 (citing *State v. New Haven & N. Co.*, 43 Conn. 351; *New Milford Water Co. v. Watson*, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57).

Justice of the Peace.

The word "judge," as used in Code Civ. Proc. § 46, disqualifying a judge for certain reasons, includes a justice of the peace. *Truesdell v. Winne*, 90 N. Y. Supp. 155, 44 Misc. Rep. 451.

The word "judge," as used in Code Civ. Proc. § 1778, which provides that in an action against a corporation to recover for nonpayment of a note or other evidence of a debt due on demand at a particular time, unless defendant serves with a copy of his answer or demurrer an order of a judge directing that the issues be tried, plaintiff may take judgment as by a default after 20 days after service of the complaint, does not include a justice of the peace, since Laws 1892, c. 667, § 8, declares that the term "judge" includes every judicial officer authorized, alone or with others, to hold or preside over a court of record. *Center v. Hoosick River Pulp Co.*, 88 N. Y. Supp. 548, 549, 43 Misc. Rep. 247.

JUDGMENT.

See "Dormant Judgment"; "Estoppel by Judgment"; "Final Judgment"; "Interlocutory Judgment"; "Void Judgment."

Claim distinguished, see "Claim."

A judgment is the sentence of the law, pronounced by a court of competent jurisdiction.

tion, as the result of proceedings instituted. It is a judicial act, and, to be valid, must be pronounced by the court at a time and place appointed by law, and in the form it requires. *People v. Hebel* (Colo.) 76 Pac. 550 (citing *Cooper v. American Cent. Ins. Co.*, 3 Colo. 318).

An order of a recorder in the city of New Orleans, in a proceeding under an ordinance relating to juvenile vagrants for the commitment of such a person to the House of the Good Shepherd, is not a "judgment." *State ex rel. Caillouet v. Marmouget*, 35 South. 529, 533, 111 La. 225.

"An order of seizure and sale is not a 'judgment' for all purposes and in the full sense of the term, but it is a decree of a court in aid of the execution of an obligation which, by law, is given the effect of a judgment quoad the particular property to which it refers. It is a judgment in so far that an appeal will lie therefrom for the review of the question of the sufficiency of the evidence upon which it is based." *Huber v. Jennings-Heywood Oil Syndicate*, 35 South. 889, 893, 111 La. 747.

Rev. St. 1889, § 2882, defines a judgment to be the final determination of the rights of the parties in the action. A judgment is essentially different from an order dismissing an appeal from a decision of a county board disallowing a claim against the county, and such a dismissal is an order from which an appeal may be taken under section 3062. *Ellis v. Barron County* (Wis.) 98 N. W. 232, 233.

An order denying motions for findings and judgment on the ground that there has been a settlement of the controversy is an order striking the cause from the calendar, and is not a judgment, though such order recited the facts, and ordered and adjudged that the action was fully settled, as a judgment, as defined by Rev. St. 1898, § 2882, is the final determination of the rights of the parties in the action. *Dr. Shoop Family Medicine Co. v. Schowalter*, 98 N. W. 940, 941, 120 Wis. 663.

An inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county, and their certificate that said person therein named is insane and a proper subject for treatment in the hospital for the insane, is not a judgment of a court or equivalent thereto, nor is such finding and certificate equivalent to a verdict of a jury or a finding of a court that such person is of unsound mind and incapable of managing his own estate, its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment. *Leinss v. Weiss* (Ind.) 71 N. E. 254, 255, 256.

Since the Code of Criminal Procedure requires judgment to be entered in criminal

cases as a matter of course on the return of a verdict, the incompetency of a witness based on his conviction of crime cannot be established by producing only such a judgment. To show such incompetency the record of a conviction showing sentence must be produced. If that which is called the judgment in the criminal procedure of the state were, in its legal effect, the same as a judgment of conviction at common law, such judgment would be proper evidence of incompetency; but at common law the judgment was the final act of the court adjudging the guilt, and included that which is now treated separately as the sentence. It was pronounced after the court had heard what the accused could say in bar of it, and, when it had been rendered, the sanction of both the court and jury was given to the conviction. Under the statutory procedure the judgment adjudges accused to be guilty and fixes the punishment, and is merely the consequence of the verdict, and the court in rendering it finally determines nothing as to the sufficiency of the procedure and evidence to justify the conviction. *Gulf, C. & S. F. R. Co. v. Johnson* (Tex.) 81 S. W. 4, 5.

The word "judgment," in Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent within four months prior to the filing of the petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, refers only to the lien of the judgment, the judgment remaining an assignable claim against the estate. *Davis v. Jewett Bros. & Jewett* (S. D.) 97 N. W. 16.

A judgment of sale for whatever is due is not a judgment against the property for a definite or specific amount. The statute contemplates a judgment against the property, and an order for the sale of the same to satisfy the judgment, and the entry of a "judgment of sale" is rather an order for the enforcement of a judgment than a judgment itself. *Gage v. People*, 69 N. E. 80, 82, 205 Ill. 547.

JUDGMENT BOOK.

In a court it was the practice for the clerk, as each order for judgment was made, to promptly write out the judgment with a typewriter on separate sheets of paper of uniform size, to sign the judgment and affix the seal of the court, to number the sheets consecutively according to the chronological order in which the judgments were written out, and to place and securely keep these sheets in their proper order in a compact parcel in an inclosed box or case in the form of a book, labeled "judgment book," until there should be sufficient of them to make a bound volume, when they were per-

manently bound together, preserving the same order and same paging. The sheets as kept constituted a "judgment book," within Rev. Codes N. D. 1899, §§ 5479, 5487, 5488, which required the clerk of the district court to keep among the records of the court a judgment book in which the judgment in each case is to be entered by the clerk upon the order of the court or judge. *Lynch v. Burt* (U. S.) 132 Fed. 417, 426.

JUDGMENT BY CONFESSION.

A judgment by a justice, reciting that the cause coming on to be heard, plaintiff and defendant present, and the petition of the plaintiff being read by his attorney, defendant confesses judgment for the amount claimed, is a judgment by confession, and not by default. *Wade v. Swope* (Mo.) 81 S. W. 471, 472.

JUDGMENT ROLL.

A statement on a motion for new trial is no part of the "judgment roll," within Code Civ. Proc. § 1196, providing that the pleadings, a copy of the verdict or findings, all bills of exceptions, all orders, matters, and proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment, shall constitute the judgment roll. *Powell v. May*, 74 Pac. 80, 29 Mont. 71.

JUDICIAL ACT.

"The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial, but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists it is not to be deemed merely ministerial." *Burnam v. Terrell* (Tex.) 78 S. W. 500, 501 (quoting Commissioner of General Land Office v. Smith, 5 Tex. 471, 479).

"To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights of property of the citizens in a manner analogous to that in which they are affected in the proceedings of courts acting judicially. * * * Where proceedings are judicial, if no right of appeal is given certiorari will lie, but the fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature." *State ex rel. Grant v. Iverson* (Minn.) 100 N. W. 91, 92 (quoting *State ex rel. Hardy v. Clough*, 64 Minn. 378, 67 N. W. 202).

Inspectors of an election, in determining what ballots shall be counted for or against any candidate or any question voted on, or what ballots shall be rejected, "act judicially." *People ex rel. Haverly v. Hanes*, 90 N. Y. Supp. 61, 62, 44 Misc. Rep. 475.

JUDICIAL CONTEMPT.

A judicial contempt is any willful disregard of the authority of the court, rightfully exercised. *Powell v. The State*, 48 Ala. 154, 156.

JUDICIAL DICTA.

"Made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the judge who utters them." *Commonwealth v. Paine*, 56 Atl. 317, 819, 207 Pa. 45.

JUDICIAL DISCRETION.

By "judicial discretion" is never intended the whim or caprice of the magistrate nor a course of judicial action inconsistent with itself in dealing with cases essentially alike. *Hubbard v. Hubbard* (Vt.) 58 Atl. 969, 970.

JUDICIAL OFFICER.

A justice of the peace, in disposing of any cause, civil or criminal, which has been properly brought before him, holds a court of record, and acts as a "judicial officer." *McVeigh v. Ripley*, 58 Atl. 701, 702, 77 Conn. 136.

JUDICIAL PROCESS.

The filing of a petition in bankruptcy is judicial process, and operates as an attachment or sequestration from that time of the property of the bankrupt for the equal benefit of all of his creditors, and as a restraint to its disposition by him. In re *Smith & Shuck* (U. S.) 132 Fed. 301, 303.

JURISDICTION.

See "Common-Law Jurisdiction"; "Concurrent Jurisdiction"; "Final Jurisdiction"; "Plea to the Jurisdiction."

To obtain jurisdiction of a cause three things are necessary. Black, in his work on Judgments (volume 1, § 242), said: "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be

present; and, third, the point decided must be, in substance and effect, within the issue." In *St. Louis, I. M. & S. Ry. Company v. State*, 55 Ark. 200, 205, 17 S. W. 806, 807, the court said: "'Jurisdiction' is defined to be 'the right to adjudicate concerning the subject-matter in the given case.'" In *Babb v. Bruere*, 23 Mo. App. 604, jurisdiction is defined to be "the power to hear and determine the particular cause." In *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366, it is said there are three essentials to jurisdiction: "First, the court must have cognizance of the class of cases to which the one adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue"—thus approving and adopting the definition of "jurisdiction" given by *Black. Nenzo v. Chicago, R. I. & P. R. Co.*, 80 S. W. 24, 26, 105 Mo. App. 540.

"The power and authority constitutionally conferred upon a court or judge to pronounce the sentence of the law or to award the remedies provided by law upon a state of fact proven or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal in favor of or against persons who present themselves or who are brought before the court in some manner sanctioned by law as proper and sufficient," constitutes jurisdiction. *Ingram v. Fuson* (Ky.) 82 S. W. 606, 607 (quoting *Black, Judgm.* § 215).

"Jurisdiction exists wherever there is a suit, the subject-matter of which is cognizable in a court of chancery, and parties are brought before the court whose rights in relation to such subject-matter the court may adjudicate, and the effect of such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual, because the rights of such parties cannot be determined, that may be good cause for arresting proceedings or dismissing the suit, but it does not deprive the court of the power to proceed." The want of necessary parties does not deprive the court of jurisdiction, but the decree will bind the parties to it until set aside in a direct proceeding. *Tod v. Crisman*, 99 N. W. 686, 689, 123 Iowa, 693.

The term "jurisdiction," as used in Const. art. 7, § 8, declaring that the circuit court shall have jurisdiction in all matters, civil and criminal, within the state, together with appellate jurisdiction from all inferior courts, with power to use all writs necessary to carry into effect its orders, judgments, or decrees, is used in its broad general sense, that of judicial power. "A

court may have jurisdiction of a particular subject-matter, but by settled judicial policy ought not to exercise it. Again, it may, by the settled law, established by its own practice, deemed to be as binding as the written law, have power in a constitutional sense to adjudicate disputed matters of a particular character, acting by recognized unbending principles of procedure, but not jurisdiction to adjudicate such matters in the particular way attempted." The constitutional jurisdiction of the circuit courts is substantially co-extensive with that of the English courts of King's Bench, Common Pleas, and Chancery combined. *Harrigan v. Gilchrist*, 99 N. W. 909, 939, 121 Wis. 127.

The word "jurisdiction," as used in Rev. St. 1887, § 4994, declaring that the writ of prohibition arrests the proceedings when they are without or in excess of the jurisdiction, means the right to hear and determine a matter, and carries with it the idea of exercising judicial or quasi judicial functions. *Stein v. Morrison* (Idaho) 75 Pac. 246, 256.

The words "jurisdiction," as used in the Virginia Act providing for the formation of Kentucky, and declaring that the use and navigation of the Ohio River, so far as the territory of the proposed state, or the territory which shall remain within the limits of Virginia, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of Virginia, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which compose the opposite shores of the said river, is not confined to any one of the three agencies of jurisdiction, legislative, executive, or judicial. *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877.

Jurisdiction is jurisdiction in its popular sense of authority to apply the law to the acts of men. Jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore, in view of the condition contained in the Virginia Compact of 1789, § 11, declaring that the jurisdiction of the proposed state of Kentucky on the Ohio river should be concurrent only with the states which may possess the opposite shores of the river, which condition Congress assented to and adopted when it consented to the Virginia Compact by the act of February 4, 1791, admitting Kentucky to the Union. *Wedding v. Meyler*, 24 Sup. Ct. 322, 324, 192 U. S. 573, 48 L. Ed. 570.

JURY.

See "Trial by Jury."

JURY OF THE VICINAGE.

The term "jury of the vicinage" literally signifies of the neighborhood where a crime

was committed. *Commonwealth v. Jones (Ky.)* 82 S. W. 643, 644.

JUST CAUSE.

"Just cause" means lawful ground. Hence, whether a man has "just cause" to desert his wife, or to refuse to support her, is a question of law to be determined by the court. *State ex rel. Mioton v. Baker*, 86 South. 703, 704, 112 La. 801.

JUSTICE EJECTMENT.

The proceeding commonly known as "justice ejectment," given by statute where one in possession of demised premises under a written or parol lease remains in possession, without right, after the termination of the lease by its own limitation, or after a breach of a stipulation contained therein, is available where the tenancy is created by contract, although it is created for life. *Foss v. Stanton (Vt.)* 57 Atl. 942.

JUSTICE OF THE PEACE.

As judge, see "Judge."

As judicial officer, see "Judicial Officer."

The true conception indicated by the term "justice of the peace," as disclosed by our Constitution and statutes, is that of an officer having both judicial and political functions—judicial, in that he holds a court and decides matters of litigation arising between parties; political, in that he is a member of the quarterly county court, which is the governing agency or legislative body of the county—but that, in performing all of the duties pertaining to these two functions, he is, in the main, dependent upon his civil district, which creates him, which must be his home, which he cannot remove from without forfeiture of his office, and which he represents in the county legislature or county court. *Grainger County v. State (Tenn.)* 80 S. W. 750, 756.

JUSTIFY IT.

The words, "when the finances of the county will justify it," as used in Rev. St. c. 24, § 26, making it the duty of the county board of each county to provide a suitable courthouse, when necessary and the finances of the county will justify it, cannot be construed to mean that the county has no power to make a contract for the repair or construction of a courthouse unless it has cash in its treasury. The fifth paragraph of the section shows that "finances" include all debts and liabilities of every description, and the assets and other means of discharging the same. In passing upon the question, the county board takes into consideration everything in connection with the fiscal affairs of

the county, and if, in good faith, without fraud, it determines that the finances justify the erection of the courthouse, the person with whom the contract is made to build the same is not bound to inquire into the correctness of the determination. The conclusion which the board comes to upon the subject is one which must control. *Coles County v. Goehring*, 70 N. E. 610, 617, 209 Ill. 142.

KEEP.

The word "keep," as used in an agreement where a master agreed with a servant to keep the latter's wages and pay better interest than a bank, does not indicate any trust relation, but indicates that the master is borrowing money. *Tucker v. Linn (N. J.)* 57 Atl. 1017, 1020.

The words "keep" and "maintain" are frequently used as synonymous, and a person may be convicted under an indictment for keeping and maintaining a gaming house, on proof that he was guilty of either keeping or maintaining. *Bryan v. State*, 47 S. E. 574, 120 Ga. 201.

KEEPING A GAMBLING HOUSE.

Gambling distinguished, see "Gambling."

KEPT FOR SALE.

Posts and poles cut by a foreign corporation, peeled and inspected where cut, and kept there to be gradually shipped away, either to a yard to await sale or directly to the consumer, as orders are received at the yard, are "kept for sale" at the place where cut, within the meaning of Rev. St. 1898, § 1040, providing that merchants' goods, wares, and commodities kept for sale shall be assessed in the district where located. *Valentine-Clark Co. v. Shawano County (Wis.)* 97 N. W. 915, 916.

Liquor in possession of a boarding house keeper is "kept for sale," where he keeps it to be disbursed under an agreement that boarders, who pay the regular price, should be entitled to have it to drink with their meals when called for. *State v. Wenzel*, 56 Atl. 918, 72 N. H. 396.

KEROSENE.

As inflammable liquid, see "Inflammable Liquid."

KIN.

See "Next of Kin."

KIND.

See "Like Kind."

KINDRED.

See "Next of Kindred."

KNIFE.

As deadly weapon, see "Deadly Weapon."

KNOWLEDGE.

See "Actual Knowledge"; "Best of the Knowledge and Belief"; "Denial of Knowledge or Information"; "Imputed Knowledge."

KNOWN VEIN.

A "known vein," within the limits of a placer, when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them. *McConaghy v. Doyle* (Colo.) 75 Pac. 419, 420.

LABOR.

See "By Her Own Labor"; "Separate Labor."

As property, see "Property."

LABORER.

A person under a contract of employment contemplating services mainly of work requiring mental skill or business capacity, and involving the exercise of his mental faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, is not a laborer, whose wages are exempt from garnishment. *Tabb v. Mallette*, 47 S. E. 587, 588, 120 Ga. 97.

A Chinese person of a reputable character, who has resided in this country for 19 years, and who is the proprietor of two laundries, which he conducts, is not a laborer, in contemplation of the Chinese exclusion laws, if he labored himself; it being only incidentally. *United States v. Kol Lee* (U. S.) 132 Fed. 136, 137.

LABORER FOR WAGES.

The phrase "laborer for wages," in a statute giving a lien to such on agricultural products, means those who cultivate on shares and receive a portion of the crop in payment for their labor, as well as those who work for money. *Betts v. Ratliff*, 50 Miss. 561, 570.

LACHES.

"Laches" consists in an inexcusable delay in asserting a right. It involves negli-

gence, and arises from a failure in duty. Without such failure there can be no laches. *Allis v. Hall*, 56 Atl. 637, 642, 76 Conn. 322.

The lapse of time which might induce the application of the doctrine of laches is not a determined period, and depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, and that is that not only must there be a seemingly necessary delay on the part of the plaintiff in bringing or prosecuting his action, but that, by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced. *London & San Francisco Bank v. Dexter, Horton & Co.* (U. S.) 128 Fed. 593, 601, 61 C. C. A. 515 (quoting *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; *Wheeling Bridge & Terminal Co. v. Reynnann Brewing Co.* [U. S.] 90 Fed. 189, 32 C. C. A. 571).

"Laches is not, like limitation, a mere matter of time, but rather a question of the inequity of granting the relief." Laches cannot be successfully invoked in aid of a publisher of an infringing article, when it does not appear that the owner of the copyrighted article had knowledge of the infringement, or that he had notice of any fact sufficient to put him on inquiry. *Encyclopædia Britannica Co. v. American Newspaper Ass'n* (U. S.) 130 Fed. 460, 467 (citing *Gallagher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* [U. S.] 89 Fed. 794).

LACK OF MUTUALITY.

See "Mutuality."

LAND.

See "Claim upon Land"; "Drainage of Land"; "Public Land."
Other lands, see "Other."

"Land," in its legal signification, has an indefinite extent upwards, so that by a conveyance of land all buildings, growing timber, and water erected and being thereupon shall likewise pass. *Trustees of Town of Brookhaven v. Smith*, 90 N. Y. Supp. 646, 650.

"The term 'land,' in statutes conferring power to condemn, is to be taken in the legal sense, and includes both the soil and buildings and other structures on it, and any and all interests therein." In assessment of damages in proceedings for condemnation of land, the appraisers should value the land taken with the buildings on it, and it will be presumed that the buildings were included in the award. *Stauffer v. Cincinnati, R. & M. R. Co. (Ind.)* 70 N. E. 543, 544 (quoting *Lewis*,

Em. Dom. [2d Ed.] § 285, and citing *Brocket v. Ohio & P. R. Co.*, 14 Pa. [2 Harris] 241, 53 Am. Dec. 534; *State v. Reed*, 38 N. H. 59; *Mills*, Em. Dom. §§ 49, 223).

The word "lands" is not coextensive with the words "tenements and hereditaments," and does not comprehend incorporeal hereditaments. In re *Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388 (citing 2 Jarm. Wills, 382).

Easement.

Under Laws 1896, p. 796, c. 908, § 2, as amended by Laws 1899, p. 1589, c. 712, providing that the term "land" shall include, not only the land itself, but all buildings and other articles and structures and superstructures erected on or under the same, where a turnpike company did not own the fee in the land, but owned a continuing easement therein for the maintenance of the pike during the life of the company's franchise, such easement, together with the corporation's tangible property, consisting of bridges, culverts, ditches, prepared roadbeds, and structures on the soil, were taxable to it as land. In re *President of Albany & B. Turnpike Road Co.*, 87 N. Y. Supp. 1104, 1105, 94 App. Div. 509.

Mine.

The word "lands," as used in a statute governing descent and distribution, which provides that a surviving spouse shall be entitled to an estate for life in the lands of an intestate leaving issue, remainder to such issue, includes a mine open at the time of the vesting of the life estate, and such mine is, under the statute, inherited as lands by the life tenant. *Lone Acre Oil Co. v. Swayne* (Tex.) 78 S. W. 380, 383.

LANDLORD AND TENANT.

The relation of "landlord and tenant" is that which subsists by virtue of a contract for the possession of lands at will, for a definite period, or for life. *Foss v. Stanton* (Vt.) 57 Atl. 942.

The reservation of rent in some form and allegiance to the title are distinguishing characteristics of a contract by which the relation of landlord and tenant exists. *Andrews v. Erwin* (Ky.) 78 S. W. 902, 903.

LARCENY.

Embezzlement distinguished, see "Embezzlement."

LAST PUBLICATION.

In Comp. Laws N. M. 1897, §§ 2956, 2967, relating to a publication of a notice, and requiring the last publication at least two weeks before the return day, by "last publi-

cation" the last act of making the notice public—the last insertion in a newspaper prescribed—was intended, not the last day of the period for which the publication was directed. *Harrison v. Wallis*, 90 N. Y. Supp. 44, 49, 44 Misc. Rep. 492.

LAST SESSION.

In a statute providing that supervisors might, at their last session before regular election, etc., "last session" means the last regular session appointed by law. It has no reference to special sessions called for some specific purpose. The "session" includes the entire sittings of the board, from the meeting on the first day till the final adjournment. *Tuohy v. Chase*, 30 Cal. 524, 527.

LATENT AMBIGUITY.

"A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise (1) either when it names a person as the object of a gift, or a thing as subject to it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator." *Wheaton v. Pope*, 97 N. W. 1046, 1048, 91 Minn. 299 (quoting *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 29 L. Ed. 860).

LAW.

See "By-Law"; "Common Law"; "Decision Against Law"; "Error of Law"; "General Law"; "Special Law."

"An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no offense. It is in legal contemplation as inoperative as though it had never been passed." *Wright v. Davis*, 48 S. E. 170, 172, 120 Ga. 670 (quoting *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178).

The phrase, "which may by law be brought before him," used in a statute defining the offense of bribery, and making it a material element thereof that the offered bribe shall be on a question which may by law be brought before the person sought to be bribed in his official capacity, means a law in force at the time of the offered bribe. *State v. Butler*, 77 S. W. 560, 572, 178 Mo. 272.

LAW OF THE LAND.

"The phrase 'law of the land,' as used in the Bill of Rights, is not easy of definition. It does not mean any act that the Legislature may have passed, if such act does

not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury and give an adequate remedy to recover therefor. Whatever the term may mean, it does mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one shall have remedy—that is, proper and adequate remedy—thus to be ascertained. To refuse hearing and remedy for an injury after its infliction is a small remove from infliction of penalty before and without hearing.” *Osborn v. Leach*, 47 S. E. 811, 814, 135 N. C. 623, 66 L. R. A. 648 (quoting *Hanson v. Krehbiel* [Kan.] 75 Pac. 1041, 64 L. R. A. 790).

To say that the law of the land or due process of law may mean the very act of the Legislature which deprives the citizen of his rights, privileges, or property leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights, unless the Legislature shall pass a law to effect the wrong; and this would be throwing the restraint away. It follows that a law which by its own inherent force extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution. *King v. Hatfield* (U. S.) 130 Fed. 564, 579 (quoting *Wynehamer v. People*, 13 N. Y. [3 Kern.] 378).

The clause, “law of the land,” in Const. art. 1, § 1, providing that no member of the state shall be disfranchised or deprived of any of his rights or privileges, unless by the law of the land or the judgment of his peers, means a general and public law, equally binding on every member of the community. *Rosin v. Lidgerwood Mfg. Co.*, 86 N. Y. Supp. 49, 51, 89 App. Div. 245.

The expressions “due course of law” and “law of the land” do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury and give an adequate remedy to recover therefor. *Hanson v. Krehbiel* (Kan.) 75 Pac. 1041, 1042, 64 L. R. A. 790.

LAW OF THE ROAD.

The custom of the road, and the law founded on it, to go to the right of the center of the road in order to safely pass, governs the case of vehicles passing on the same side of the roads and streets so wide that there is no necessity for them to turn to the right of the center line in order to pass safely. *Wright v. Fleischman*, 85 N. Y. Supp. 62, 41 Misc. Rep. 533.

LAWFUL.

See “Shall be Lawful.”

LAWFUL CURRENT MONEY.

Where a theft is charged, and the allegation is general that the money taken was lawful current money of the United States, the evidence must show that it was legal tender coin or legal tender currency of the United States, and the nickel is legal tender under the provisions of U. S. Comp. St. 1901, p. 2349. *Black v. State* (Tex.) 79 S. W. 311.

LAWFUL ENTRY.

The expression that the “entry must be lawful” means, not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. *Stouffer v. Harlan* (Kan.) 74 Pac. 610, 613, 64 L. R. A. 320.

LAWFUL HEIRS.

Devise to lawful heirs as devise to class, see “Class.”

The word “lawful,” qualifying the word “heirs,” is not sufficient per se to show an intention not to use the word “heirs” in its ordinary legal sense as a word of inheritance or of limitation. *Wool v. Fleetwood* (N. C.) 48 S. E. 785, 789.

The words “lawful heirs,” as used in a will whereby the testator bequeathed his residuary estate to his lawful heirs, without other or further designation as to who are intended as his beneficiaries, and directed that the same should be equally divided among his lawful heirs, share and share alike, described all the persons who, at the time of the death of the testator, answered the description of lawful heirs and were entitled to share in the residuary estate, regardless of the degree of their relationship to the testator, and resort must be had to the statute in order to determine who were the legal heirs of the testator. *Mooney v. Purpus*, 70 N. E. 894, 895, 70 Ohio St. 57.

LEASE.

A lease is a commutative contract. *Werlein v. Janssen*, 36 South. 216, 218, 112 La. 31.

The contract employed in the creation of the relation of landlord and tenant is called a “lease,” and with reference to this the parties are designated as “lessor” and “lessee.” *Foss v. Stanton* (Vt.) 57 Atl. 942.

A lease is “a species of contract for the possession and profits of lands and tenements, either for life, or for a certain term of years, or during the pleasure of the parties.” A writing by which defendants gave

[Appendix.]

plaintiff the right to enter on and take possession of a strip of their land, and construct thereon a tramway, and occupy it for a stated time, in consideration of a certain amount per year, is a lease. *Asher v. Johnson* (Ky.) 82 S. W. 300, 301 (quoting *Bouvier*).

An instrument reciting that it is agreed that a lease will be given on certain terms, and which was preceded by a letter in which different terms were proposed, and the parties subsequently agreed on still other terms, did not constitute a "lease," though it was accompanied by a payment of rent and the lessee took possession. *Ver Steeg v. Becker-Moore Paint Co.* (Mo.) 80 S. W. 346, 351.

Where a statute provides for the payment of a franchise tax by railroads, express companies, chair and dining car companies, etc., to the state, and also a local tax to the county, city, or taxing district, and another statute provides for the ascertainment of the franchise tax according to that proportion of the capital stock which the length of lines operated, owned, or leased in the state bears to the total mileage operated, owned, or leased, and the proportion of the tax to be paid in any locality is to be computed in the same way, a traffic arrangement by which one railroad obtains the right to use the tracks of another for a certain period of time at a certain rental, in order to obtain ingress to a terminal city, is a "lease," within the meaning of the statute and for the mileage operated under which the railroad is liable to pay a franchise tax. *Jefferson County v. Board of Valuation and Assessment of Kentucky* (Ky.) 78 S. W. 443, 445.

A paper cannot be considered as a "lease," where it is not signed by the lessee, does not identify the premises, or state when the term is to begin or upon what dates the rent is payable. *Kuntz v. Mahrenholz*, 88 N. Y. Supp. 1002, 1003.

An agreement to give a lease is not a "lease," unless followed up by occupation, which is evidence of lessee's agreement to hire. *Goldberg v. Wood*, 90 N. Y. Supp. 427, 428, 45 Misc. Rep. 327.

The word "lease," as used in *Burns' Ann. St. Ind.* 1901, § 5524, providing that any telephone company authorized under the act shall have power to lease or attach to other telephone lines or exchanges by lease or purchase, does not include the power to sell all the property and franchises of a telephone company to another corporation, nor can the power to sell be necessarily implied from the grant of the expressed powers. *Cumberland Telephone & Telegraph Co. v. City of Evansville* (U. S.) 127 Fed. 187, 193.

LEAVE.

See "Loss Through His Leaving."

Going away from a horse, beyond sight, hearing, and reasonably immediate reach, is

"leaving" it, within a city ordinance declaring leaving any horse unhitched within a street a nuisance. *Monroe v. Hartford St. Ry. Co.*, 56 Atl. 498, 500, 76 Conn. 201.

LEAVENED.

Edible wafers, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened," although such agents do not produce fermentation. *F. H. Leggett & Co. v. United States* (U. S.) 131 Fed. 817; *Meyer & Lange v. Same*, Id.

LEFT WITH.

A person being in charge of an office must be understood to have been in charge of the whole of it, and a paper placed before his eyes in a conspicuous place on the office desk therein is, in contemplation of Code Civ. Proc. § 1011, "left with a person having charge" of the office. *People v. Ferris Irr. Dist.*, 76 Pac. 381, 142 Cal. 601.

LEGACY.

See "Demonstrative Legacy"; "General Legacy"; "Specific Legacy."
Bequest distinguished, see "Bequest."

A legacy implies a bounty, and not a payment. In *re Dailey's Estate*, 89 N. Y. Supp. 538, 542, 43 Misc. Rep. 552.

Legacies are parcels of the distributable estate. Their amount may be expressed in precise figures, or they may be determinable upon an established basis of computation. *Blakeslee v. Pardee*, 56 Atl. 503, 505, 76 Conn. 203.

LEGAL AND SUFFICIENT FENCE.

The phrase "legal and sufficient fence," as used in *Rev. St.* 1883, c. 51, §§ 36, 37, requiring a railroad company to erect and maintain along the line of its road a legal and sufficient fence, means a fence sufficient to restrain and exclude any of the ordinary domestic animals from straying on that part of its track which passes through and is contiguous to the inclosure where such animals are pastured or kept; and a fence abutting a railroad, four feet in height and otherwise complying with the statute, and that will restrain horses, cows, and oxen, but will not restrain sheep, is not a legal and sufficient fence. *Cotton v. Wiscasset*, W. & F. R. Co., 57 Atl. 785, 786, 98 Me. 511.

LEGAL COUNTY ROAD.

In *Sess. Laws* 1893, p. 380, making a county liable for injuries from defects in a "legal county road," it is apparent that the Legislature only intended to provide a remedy for injuries received by a traveler on

a county road or highway. *Schroeder v. Multnomah County* (Or.) 76 Pac. 772, 773.

LEGAL HEIRS.

My legal heirs, see "My."

LEGAL HOLIDAY.

The words "legal holidays," as used in Comp. Laws 1897, § 5395, requiring saloons to be closed on all "legal holidays," not only includes legal holidays existing at the time of the adoption of the section, but includes holidays subsequently created by the Legislature, such as Labor Day, made a holiday by the act of 1893. *People v. Kriesel* (Mich.) 98 N. W. 850, 851.

LEGAL INTEREST.

See "Direct Legal Interest."

LEGAL REPRESENTATIVE.

The phrase "legal representatives," in its ordinary acceptation, means executors and administrators, though it may mean next of kin or descendants. *Kelsay v. Eaton* (Or.) 76 Pac. 770, 772.

The phrase "legal representatives" usually means executors or administrators, but it cannot, of course, mean executors and administrators only, in whatever instrument it may appear, and with reference to all the different subject-matters treated of in the multitude of varying instruments, and no matter what the plain purpose of the maker of the instrument using the phrase may be in using it. It may, in various circumstances, mean executors, administrators, heirs, legatees, assignees, and devisees, even while legatees or devisees are strangers; in short, it may mean any person or corporation taking the beneficial interest in property, real or personal. *Allen v. Alliance Trust Co.* (Miss.) 36 South. 285, 286.

Under a will giving legacies to relatives who shall be living or whose legal representatives shall be living at a certain time, the words "legal representatives" mean children or lineal descendants. *Miller v. Metcalf*, 58 Atl. 743, 745, 77 Conn. 176.

The words "legal representatives," as used in a contract for preferential rates between a railroad company and a shipper, which provided that the railroad agreed to transfer logs for such shipper and his assigns at a prescribed rate, and defined the word "assigns" as limited to the shipper's legal representatives in case of death, to his successors in the timber and lumber business in case of his retirement, and to any mill that he might build or purchase, does not include a legatee of the shipper's lumber busi-

ness under his will. *Sullivan v. Louisville & N. R. Co.*, 35 South. 694, 697, 138 Ala. 650.

On the death of a party to an action involving real estate, the heir of the deceased party must be brought in as successor, and hence a contention that the provisions of the Code of Public General Laws, providing that if a party to a suit in equity shall die before final decree, leaving heirs at law or representatives who should be made parties, it shall not be necessary to file an amended bill, do not contemplate that such proceedings should be revived by summoning in the heir, but that they mean, by using the term "legal representative," that the purchaser, and none other, in case of a sale of the land by the fraudulent vendee, should be brought in, is untenable. *Sinclair v. Auxiliary Realty Co.* (Md.) 57 Atl. 664, 668.

LEGAL RIGHT.

The order of deportation of a Chinese person, who has plainly violated the exclusion act, made by a court of the United States, pursuant to the acts of Congress, is not made in an ordinary justiciable case, and does not deal with "legal rights," as that expression is generally understood. It merely involves the unpretended claim to remain in this country of an individual who, against settled American policy and against the positive command of our statutes, has surreptitiously and fraudulently obtruded his unacceptable presence among our people. *United States v. Fah Chung* (U. S.) 132 Fed. 109, 110.

LEGATEE.

See "General Legatee"; "Residuary Legatee"; "Sole Legatee"; "Specific Legatee."

LEGISLATION.

See "Class Legislation."

LEGISLATIVE OFFICER.

Legislative officers are those whose duties relate mainly to the enactment of laws. *State v. Kelly*, 77 S. W. 996, 997, 103 Mo. App. 711 (quoting Bouvier).

LEGISLATIVE POWERS.

See "Full Legislative Powers."

LEGITIMATE PURPOSE.

The term "legitimate purpose," as applied to the acts of a municipal corporation, means such a purpose as is authorized by the municipal charter. *Vaughn v. Village of Green-castle*, 78 S. W. 50, 51, 104 Mo. App. 206.

LESSEE.

As owner, see "Owner."

LET.

See "Agree to Let."

LET FOR HIRE.

As used in an ordinance providing for the payment of a license by owners of vehicles used or let for hire, the term "letting for hire" was intended to apply to cases where persons, the hirers, took temporary possession of the wagon and team. *Swetman v. City of Covington (Ky.)* 82 S. W. 386.

LETTER PATENT.

A license to keep a dramshop is not a "letter patent," which can be tested or vacated by quo warranto. *Hargett v. Bell*, 48 S. E. 749, 750, 134 N. C. 394.

LEVY.

All levies, see "All."

"The strict meaning of the word 'levy' is usually a seizure of the defendant's property." By the word "levy," as used in *Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]*, making void all levies, judgments, attachments, or other liens obtained through legal proceedings within four months prior to the bankruptcy of an insolvent defendant, seems to include any seizure of property in the bankrupt's possession and which he claims to own, and seems to cover a seizure on a writ of replevin in a suit to recover property sold and delivered on credit under a contract which the plaintiff claims a right to rescind for fraud. In *re Weinger, Bergman & Co. (U. S.)* 126 Fed. 875, 877.

The word "levy," as used in constitutional and statutory provisions that the county commissioners shall levy a tax in their respective counties for the support of public schools, and that county boards shall levy an annual tax on all the property in their respective counties, to be collected at the same time and by the same officers as other taxes, excludes from the act of levying any signification of creation. The duty to levy imposed on the board is therefore purely ministerial, and only imports that it should take such action as would result in the tax being placed on the auditor's books. The boards have no power to do anything more or less than require that the tax be entered. *Dickson v. Burckmyer*, 46 S. E. 343, 346, 67 S. C. 526.

In our revenue laws the word "levy" is sometimes used in the sense of "raising" or "imposing," and not in the sense of "collect-

ing" a tax by execution. In different places in these laws the boards of county commissioners are authorized to "levy," or lay, taxes, while the word "collect" is used to define the power of the county treasurers to gather in or receive money for taxes theretofore assessed by county assessors and levied by the boards. *Parsons v. People (Colo.)* 76 Pac. 666, 669.

LEWDNESS.

"Lewdness is lustfulness and lascivious behavior; a synonym of unchastity, sensuality, and debauchery." On a prosecution for keeping a house of ill fame, instructions that a house resorted to for the purpose of prostitution and lewdness was a house visited by persons of both sexes for the purpose of having sexual intercourse, or some other lewd purpose, and that lewdness was the unlawful indulgence of the animal desires, were correct. *State v. Wilson (Iowa)* 99 N. W. 1060, 1061.

LIABLE.

The words "probable," "likely," and "liable" are synonymous when applied to the effects of a personal injury, each dealing with reasonable probability, not with possibility, and what may probably, or is likely or liable to, be the future result of a personal injury, is competent evidence to prove what is reasonably certain in the matter. *Hallum v. Village of Omro (Wis.)* 99 N. W. 1051, 1054.

LIBELOUS PER SE.

A written or printed statement or article published of or concerning another, which is false, and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is "libelous per se." *Woolworth v. Star Co.*, 90 N. Y. Supp. 147, 148, 97 App. Div. 525 (citing *Triggs v. Sun Printing & Publishing Co.*, 179 N. Y. 144, 153, 71 N. E. 739, 742, 66 L. R. A. 612).

An article designed and calculated to exhibit plaintiff as a shallow, ridiculous, and contemptible person, dishonest and undeserving of confidence, is libelous per se. *Morse v. Times-Republican Printing Co. (Iowa)* 100 N. W. 867, 869.

LIBERTY.

The terms "life," "liberty," and "property" are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, and the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including

the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law. *Coffeyville Vitrifed Brick & Tile Co. v. Perry* (Kan.) 76 Pac. 848, 850, 66 L. R. A. 185 (citing *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176).

The word "liberty," as used in Const. art. 2, providing that no person shall be deprived of life, liberty, or property except by due process of law, means not only the right to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation. *State ex rel. Galle v. City of New Orleans* (La.) 36 South. 999, 1001 (citing *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636).

LIBERTY OF CONTRACT.

Liberty of contract does not imply liberty in a corporation or individuals to defy the national will when legally expressed; nor does it involve a right to deprive the public of the advantages of free competition in trade and commerce. The enforcement of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every combination or conspiracy in restraint of interstate or foreign commerce, and forbidding attempts to monopolize such commerce, or any part of it, does not infringe on liberty of contract. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 462, 193 U. S. 197, 48 L. Ed. 679.

LIBERTY OF THE PRESS.

The "liberty of the press," guaranteed by Const. art. 1, § 7, guaranteeing to every person the liberty to speak, write, and publish his sentiments on all subjects, but holding him responsible for the abuse of that right, has never been held to mean that the publisher of a newspaper shall be any less responsible than any other person would be for publishing otherwise the same libelous matter. The contrary rule has been affirmed by the courts of this country and England with great uniformity. *Morse v. Times-Republican Printing Co.* (Iowa) 100 N. W. 867, 873 (citing *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Sheckell v. Jackson*, 64 Mass. [10 Cush.] 25; *Aldrich v. Press Printing Co.*, 9 Minn. 138 [Gil. 123], 83 Am. Dec. 84; *Root v. King* [N. Y.] 7 Cow. 628; *Tilson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Smart v. Blanchard*, 42 N. H. 137; *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Eviston v. Cramer*, 47 Wis. 659, 3 N. W. 392; *Edwards v. San Jose Printing & Pub. Soc.*, 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; *McAllister v. Detroit Free Press*, 76 Mich. 338,

43 N. W. 431, 15 Am. St. Rep. 318; *Upton v. Hume*, 24 Or. 420, 83 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Smith v. Tribune Co.* [U. S.] 22 Fed. Cas. 689; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Davis v. Duncan*, 7 El. & Bl. 231; *Mallory v. Pioneer-Press Co.*, 34 Minn. 521, 26 N. W. 904; *Delaware, etc., Ins. Co. v. Crosdale* [Del.] 6 Houst. 181; *Palmer v. Concord*, 48 N. H. 216, 97 Am. Dec. 605).

LICENSE.

As office, see "Office."

Easement distinguished, see "Easement."

The popular understanding of the word "license" undoubtedly is a permission to do something which, without a license, would not be allowable. *Standard Oil Co. v. Commonwealth* (Ky.) 82 S. W. 1020, 1021.

The word "license," as used in an ordinance requiring every person and corporation erecting and using poles on the public streets of a city to pay as a license therefor a certain sum for each pole, means the sum paid for permission to erect or maintain poles in the streets and alleys of the city, for the purpose of defraying the expenses of regulating and controlling the use of the same under the police power of the city. *City of Ft. Smith v. Hunt* (Ark.) 82 S. W. 163, 165, 66 L. R. A. 238.

A license confers the right to do that which, without the license, would be unlawful. *Board of Com'rs of Jefferson County v. Mayr*, 74 Pac. 458, 31 Colo. 173 (citing *People v. Ralms*, 20 Colo. 489, 39 Pac. 341).

The word "licenses," as used in the Illinois act relating to the Chicago City Railways, and providing that any deeds of transfers of rights, privileges, or franchises between railway corporations, or any two of them, and all contracts, stipulations, licenses, and undertakings made, entered into, or given, and as made or amended by and between the common council of the city and any one or more of the railway corporations respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of the city, etc., refers to the designation by the council of the streets to be occupied by the companies. *Govin v. City of Chicago* (U. S.) 132 Fed. 848, 857.

LICENSEE.

A person is a mere licensee where he was not on the premises by invitation expressed or implied, nor for any business connected with defendant nor in relation to any business for which the freight house in which he was injured was used, but went there of his own volition, uninvited, concerning a matter which was personal to himself in which

the defendant had no interest. *Means v. Southern Cal. R. Co.* (Cal.) 77 Pac. 1001, 1002.

LIEN.

See "Attorney's Lien"; "Builder's Lien"; "Common-Law Lien"; "Equitable Lien"; "Mechanic's Lien"; "Vendor's Lien."

A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge. In the nature of things, no tax or assessment can exist, so as to become a lien or incumbrance upon real estate, until the amount thereof is ascertained and determined. *Gillmor v. Dale*, 75 Pac. 932, 934, 27 Utah, 372.

An attachment on mesne process under the statute creates a lien. This lien does not depend upon possession. It is created by process of law, sometimes by a record of the doings of an officer, as in the case of attachments of real estate and of personal property that cannot easily be removed. Undoubtedly an attachment by trustee process gives a lien on property which will be good against bankruptcy, if more than four months old. *Snyder v. Smith*, 69 N. E. 1089, 1090, 185 Mass. 58.

A personal claim against a bankrupt's estate does not constitute a lien. *Eason v. Garrison & Kelly* (Tex.) 82 S. W. 800, 801.

LIFE.

The terms "life," "liberty," and "property" are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, and the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law. *Coffeyville Vitrified Brick & Tile Co. v. Perry* (Kan.) 76 Pac. 848, 850, 66 L. R. A. 185 (citing *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176).

LIFE INSURANCE.

Life policy as chose in action, see "Chose in Action."

Life insurance is a promise to pay a certain sum upon the death of the insured. *Ellison v. Straw*, 97 N. W. 168, 170, 119 Wis. 502.

LIKE KIND.

The words "like kind," as used in Code, c. 151, § 1, providing that a person who shall 8 Wds. & P.—68

keep or exhibit a gaming table commonly called A. B. C. or E. O. table, or faro bank, or keno table, or "table of like kind," etc., shall be punished, etc., are used in a broad sense, and the act forbids certain kinds of gaming, among which are faro banks and keno tables, and all other games like them. So, on a trial for unlawfully keeping and exhibiting a slot machine, it is not error to instruct the jury that if they shall believe that the slot machine described is a gaming table, and that the machine is so constructed that it offers unequal chances to the player and exhibitor, and that the unequal chances are in favor of the exhibitor, then the slot machine is a gaming table of like kind and character to A. B. C. and E. O. tables, faro bank, and keno table. *State v. Gaughan* (W. Va.) 48 S. E. 210, 212.

LIKELY.

Liabie synonymous, see "Liabie."

While the term "likely" has in it to a certain extent an element of probability, it is not strong enough to make proper evidence facts which are likely to occur. In an action for injuries, a medical expert cannot be asked as to whether an injury such as the plaintiff received would be "likely" to produce the condition related to the witness. *Higgins v. United Traction Co.*, 89 N. Y. Supp. 76, 77, 96 App. Div. 69.

LIMIT.

The words "limit and control," as used in Acts 1902, p. 420, c. 300, entitled "An act to limit and control the expenditure of money upon public highways" by a designated county, are sufficiently broad to cover a provision in the body of the act prohibiting the county commissioners from levying taxes on the assessable property of the county for the purpose of constructing, maintaining, and repairing any highway, bridge, or public road not in whole or in part within the county; and hence the act is not in conflict with Const. art. 3, § 29, providing that every law shall express but one subject, which shall be described in its title. *Commissioners of Queen Anne's County v. Commissioners of Talbot Co.* (Md.) 57 Atl. 1, 3.

LIMITATION.

The word "limitation," as used in a lease for a term of years, reciting that it is subject to the conditional limitations herein stated, and stipulating in the following paragraph that the occupation of the premises by the tenant and his family as a strictly private dwelling apartment is a specific consideration for the granting of the lease, means restriction. *Schwoerer v. Connolly*, 88 N. Y. Supp. 818, 819, 44 Misc. Rep. 222.

LIMITATION OF A REMAINDER.

A "limitation of a remainder," strictly so called, is a clause creating or transferring an estate or interest in lands or tenements which is limited, either directly or indirectly, to take effect in possession or in enjoyment, or in both, subject, only, to any term of years or contingent interest that may intervene immediately after the regular expiration of a particular estate or freehold previously created together with it by the same instrument out of the same subject of property. *Biggerstaff v. Van Pelt*, 69 N. E. 804, 806, 207 Ill. 611 (citing *Smith*, Ex. Int. § 159).

LINE.

See "Half Section Line."

LINE TREES.

"Line trees" are "trees standing directly on the boundary between lands of adjoining owners," and are "usually considered common property, which neither may destroy without the consent of the other." *Harndon v. Stultz* (Iowa) 100 N. W. 329, 330 (citing *Musch v. Burkhardt*, 83 Iowa, 301, 48 N. W. 1025, 12 L. R. A. 484, 32 Am. St. Rep. 305).

LINSEED OIL.

Laws 1897, p. 403, c. 217, provides that no person or corporation shall manufacture or sell any linseed oil, unless the same answers a chemical test for purity recognized in the United States Pharmacopoeia, and declares that the same shall be sold under its true name and in vessels bearing proper stamps, describing it as pure linseed oil raw or pure linseed oil boiled. Laws 1901, c. 332, amends the act, and provides that no person or corporation shall manufacture linseed oil, unless the same answers to a certain described test. The amendment makes no reference to raw or boiled oil. The words "linseed oil," as used in the amendment, includes both raw and boiled oil. *State v. Williams* (Minn.) 100 N. W. 641, 642.

LIQUID.

See "Inflammable Liquid."

LIQUOR.

See "Furnishing Liquor"; "Intoxicating Liquor."

LIS PENDENS.

Lis pendens denotes those principles and rules of law which define and limit the operation of the common-law maxim, "*Pendente lite nihil innovetur*." Pending the suit nothing should be changed, if it has the ef-

fect to bring the subject-matter of the litigation within the control of the court; and to render the parties powerless to place it beyond the power of the final judgment. *Powell v. National Bank of Commerce in Denver* (Colo.) 74 Pac. 536, 538 (citing 21 Am. & Eng. Enc. Law [2d Ed.] 594, 595; *Freem. Judgm.* § 193).

LOCAL ACTION.

By the common law an action for the recovery of damages for injuries to land is "local," and can be brought only where the land is situated; and such is the law in most of the states of the Union. In Minnesota, an action for pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy. It is there deemed to be transitory in its nature, and not local. *Peyton v. Desmond* (U. S.) 129 Fed. 1, 4, 63 O. C. A. 651.

"The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated." A suit to enjoin a defendant from diverting. In California, the waters naturally flowing down a river having its source in that state and flowing into and through the state of Nevada, where complainant's lands are situated, he being the lowest proprietor on the river, is an action transitory in its nature, so that a court in Nevada, having acquired jurisdiction of defendant's person, had jurisdiction to try the same. *Miller & Lux v. Rickey* (U. S.) 127 Fed. 573, 577 (citing *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52).

LOCAL AGENT.

The term "local agent," within Rev. St. 1895, art. 1223, providing for service of writs in suits against foreign corporations on any local agent within the state, means an agent at a given place or within a definite district, and an "agent for the state" is not a local agent within the state. *Western Cottage Piano & Organ Co. v. Anderson* (Tex.) 79 S. W. 516, 517.

LOCAL CONCERN.

The formation of towns and cities, or the change of their boundaries, is not a "local concern," of which the county court has exclusive jurisdiction, under Const. 1874, art. 7, § 28, giving to such courts exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, etc.

and in every other case that may be necessary to the internal improvement and local concerns of the county. The local concerns over which the county court is given exclusive jurisdiction are those which relate specially to county affairs, such as public roads, bridges, ferries, and other matters of the kind mentioned in the section. *City of Little Rock v. Town of North Little Rock* (Ark.) 79 S. W. 785, 788.

LOCAL IMPROVEMENT.

A "local improvement," within the meaning of the law, is an improvement which, by reason of its being confined to a locality, enhances the value of property situated within the particular district, as distinguished from benefits diffused by it throughout the municipality. *City of Butte v. School Dist. No. 1*, 74 Pac. 869, 870, 29 Mont. 336.

LOCAL OPTION ELECTION.

"Local option elections" mean recurring elections, and mean recurring elections for the territory specified in Const. 1876, art. 16, § 20, as amended in 1891, providing for the submission to voters of the question whether the sale of intoxicating liquors shall be prohibited within prescribed limits. *Ex parte Mills* (Tex.) 79 S. W. 555, 556.

LOCATION.

See "Placer Location."

A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. *Wright v. Lyons* (Or.) 77 Pac. 81, 82 (citing *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735).

LODGER.

One who is in the possession of apartments by virtue of a formal lease in writing, by the terms of which the absolute right of use and occupation is given to the lessee for the purpose of a dwelling for himself and family, the lessor having no right to enter except for the purpose of making repairs or alterations, and in which the lessee is designated as "tenant" and the lessor as "landlord," is not a "lodger," within the intent of Laws 1899, p. 834, c. 380, giving a lien to a lodging house keeper on the baggage and other property brought upon the premises by a lodger. *Shearman v. Iroquois Hotel & Apartment Co.*, 85 N. Y. Supp. 365, 42 Misc. Rep. 217.

LOGS OF WOOD.

Sandalwood in pieces of varying sizes, several feet long and several inches thick,

to which nothing has been done beyond removing the bark and sawing the wood into lengths convenient for transportation, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 198, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1646], as "wood, unmanufactured, not specially provided for," but is free of duty, under the provision in paragraph 699 of said act (section 2, Free List, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]), for "logs of wood." *George Lueders & Co. v. United States* (U. S.) 131 Fed. 655.

LONE ENGINE.

A "lone engine" is a locomotive not hauling any cars, except its own tender. *Kielbeck v. Chicago, B. & Q. R. Co.* (Neb.) 97 N. W. 750.

LONG ACCOUNT.

The services of an attorney, rendered in an action or actions under a single or different retainers, which merely involves charges in connection with the various steps in the litigation, cannot be said to constitute a long account. On the contrary, the charge in each action, although the service be permissible of exhaustive itemization, is essentially a single charge respecting each action, and exceptional circumstances must be made to appear in order to remove the case from the operation of such rule. *Prentice v. Huff*, 90 N. Y. Supp. 780, 782.

LOSE A HAND.

The term "lose a hand," in the constitution of a fraternal benefit association, is used in its ordinary and popular sense, and does not mean that there must be a total destruction of the hand, anatomically speaking, but that the loss of the use of it for the purposes to which a hand is adapted would be a loss of it. *Slisson v. Supreme Court of Honor*, 78 S. W. 297, 299, 104 Mo. App. 54.

LOSING.

See "Person Losing."

LOSS.

See "Direct Loss."

LOSS OF CONSORTIUM.

The "loss of consortium" is a deprivation of the full society, affection, and assistance to which a wife is entitled. *Angell v. Reynolds*, 58 Atl. 625, 626, 26 R. I. 160.

LOSS THROUGH HIS LEAVING.

An agreement by a third person to become bound in a specified sum, in case an

employé left his master during a certain season and the master sustained loss through his leaving, did not render the third person liable for a defalcation by the employé; for the words "sustained loss through his leaving" must be read in connection with what immediately precedes, and, when so read, they refer to the direct pecuniary loss that may be suffered as the result of the employé's leaving the employment during the period of his employment. *Freeman v. Waxman*, 88 N. Y. Supp. 129, 130, 43 Misc. Rep. 656.

LOST PROPERTY.

"At common law a distinction was made between lost property and treasure trove. Lost property was such as was found on the surface of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker, until the owner appeared and showed that its losing was accidental, or without an intention to abandon the property. Treasure trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place; the owner being unknown. It originally belonged to the finder, if the owner was not discovered, but Blackstone says it was afterwards adjudged expedient, for the purposes of state, and particularly for the coinage, that it should go to the king; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the king. (1 Bl. Comm. *295.) In this country the law relating to treasure trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure trove obtains in any state has never been decided in America." *Danielson v. Roberts*, 74 Pac. 913, 914, 44 Or. 108, 65 L. R. A. 526.

LOT.

A city charter defined the term "lot," as used in connection with the establishment of assessment districts for street improvements, to mean lots shown by recorded plats of additions or subdivisions, but, if there were no such recorded plat, or if the owner had disregarded the lots as platted, the whole plat should be treated as one lot. The allotment of portions of a tract in the survey of a partition suit, and the recording of such allotments with the commissioner's deed, did not constitute a division of the lots by recorded plat, as contemplated by the charter; the allotment not having been ap-

proved by the board of public improvements, nor recorded in the platbook in the recorder's office. *Collier's Estate v. Western Paying & Supply Co.*, 79 S. W. 947, 953, 180 Mo. 362.

LOTTERY.

See, also, "By Chance."

A financial co-operative scheme, which contemplates the creation of a fund out of enrollment fees and monthly dues, to be returned to the members at the end of a fixed period of membership in the shape of "realizations," the amount of which will depend upon the growth in membership, the plan being certain to involve a loss to every one interested as soon as the number of members ceases to increase, because of the absence of any provision for a reserve fund, is a lottery, or scheme for the distribution of money by lot or chance, within the meaning of the provisions of Rev. St. § 3929 [U. S. Comp. St. 1901, p. 2686], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 466 [U. S. Comp. St. 1901, p. 2686], and of section 4041 [U. S. Comp. St. 1901, p. 2749], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], empowering the Postmaster General to deny the privileges of the mails and the money order and registered letter service to persons engaged in certain prohibited enterprises. *Public Clearing House v. Coyne*, 24 Sup. Ct. 789, 796, 194 U. S. 497, 48 L. Ed. 1092.

Under Pen. Code, §§ 323, 327, defining a lottery as a scheme for the distribution of property by chance among persons who have paid a valuable consideration for the chance, and making advertising a lottery a misdemeanor, a scheme for the distribution of money and cigars among purchasers of certain brands of cigars who will estimate most closely the number of cigars of all brands on which taxes would be collected by the government during a named month is a "lottery," though the distribution does not depend exclusively on chance, and the advertising of the same is a misdemeanor. *People v. Lavin*, 71 N. E. 753, 179 N. Y. 164, 66 L. R. A. 601.

There can be no "lottery," in the absence of the element of chance. A trading-stamp business, consisting of the selling of checks or stamps to merchants, who give the same to their customers on purchases of goods, the number of stamps given being determined by the amount of the purchase, and the stamps, on presentation at the trading stamp store, entitling the holders to select any article from the assortment of articles, each article being plainly marked with its value in stamps, such value not being greater than the market value of the articles, is not a "lottery," within a statute denouncing lot-

teries, etc. *State v. Shugart*, 35 South. 28, 29, 138 Ala. 86, 100 Am. St. Rep. 17.

"A lottery is commonly understood as a scheme for the distribution of prizes by lot or chance, especially a gaming scheme in which one or more tickets bearing particular numbers draw prizes, and the rest of the tickets are blank. A knife rack, consisting of an inclined table, with knives stuck therein, and so arranged that rings could be thrown on them, which rings are sold to customers, who endeavor to ring the knives on the table, they being entitled to any knives rung, or on which the rings caught, is not a lottery. *McRea v. State* (Tex.) 81 S. W. 741.

Where an investment company issues bonds, numbered consecutively in the order in which applications happen to be received by the secretary, and the time of payment of the bonds, and consequently their value, depend on the number they happen to receive, the scheme is a lottery. *Siver v. Guarantee Inv. Co.*, 81 S. W. 1098, 1100, 183 Mo. 41.

"It has been said in some of the books and by several of the courts that, while the word 'lottery' is not a technical term of the law, and to dispose of property of any kind by lottery is not an offense which has a recognized and established legal definition, and that the meaning of the word must be determined with reference to a popular sense of the mischief intended to be redressed by the statute, yet, when thus construed, it indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. The word 'lottery' has been variously defined as a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or other articles; a distribution of prizes won by lot or chance; a kind of game or hazard, wherein several lots of goods or merchandise are deposited in prizes for the benefit of the fortunate; or a sort of gaming contract, by which, for valuable consideration, one may, by favor of the lot, obtain a prize superior to the amount or value of that which he risks. Tested by any one of these approved definitions, a lottery always involves the element of chance, fortune, or hazard. It is gaming, pure and simple." *City of Winston v. Beeson*, 47 S. E. 457, 459, 135 N. C. 271, 65 L. R. A. 167 (citing *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532; *State v. Clarke*, 33 N. H. 329, 334, 66 Am. Dec. 723).

LOWERMOST PORTION.

The words "beginning from the lowermost portion thereof" should be construed as meaning from the lowermost portion of the bed of stream; not from the lowest depths of some hole or sudden depression

therein, but from the lowermost part of the general contour of the channel. *Krause v. Oregon Iron & Steel Co. (Or.)* 77 Pac. 833, 835.

LUMBER.

Slabs are not included in the material designated as "lumber and timber" in the statute giving a lien on the lumber and timber for services in cutting logs. *Engl v. Hardell* (Wis.) 100 N. W. 1046, 1048.

LUNACY.

The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances, a legislative construction being given thereto in harmony with the broad views of courts that they include every phase of unsound mind rendering one incapable of caring for himself or his property. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903.

LYING IN WAIT.

"Lying in wait" means hiding in ambush or concealment. It does not necessarily refer to the attitude of the body, but rather to its location, and the purpose of taking the person attacked unawares. It is the mental poise of the wild beast in quest of prey, and necessarily implies malice, premeditation, deliberation, and the willful intent. If a person, armed with a club, was hiding in the darkness with the purpose of assaulting another when unaware of danger, he was, though standing, technically "lying in wait." *State v. Tyler*, 97 N. W. 983, 985, 122 Iowa, 125.

MACADAMIZE.

Pave distinguished, see "Pave."

MACHINE.

See "Dangerous Machinery."

The term "machine" includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. A steel hammer of 1,500 pounds, resting in the center of the floor, within four large upright posts, with attachments to a power for the purpose of hauling it to the top of the frame and letting it drop, is a machine, within the meaning of *Burns' Ann. St. 1901*, § 7087, relating to the duty of an employer, and requiring that all vats, pans, saws, and machinery of every description shall be properly guarded. *Green v. American Car & Foundry Co. (Ind.)* 71 N. E. 268, 270 (citing *Corning v. Burden*, 56 U. S. [15 How.] 252, 14 L. Ed. 683).

An emery belt, used in a factory to polish metal, is a "machine," within Burns' Ann. St. 1901, § 70871, requiring machinery of every description in factories to be properly guarded. *La Porte Carriage Co. v. Sullender* (Ind.) 71 N. E. 922, 924.

MADE ACQUAINTED.

A certificate of acknowledgment of a married woman that she was "made acquainted" with the contents of the deed is equivalent to a certificate that the contents were made known and explained to her. *Chauvin v. Wagner*, 18 Mo. 531, 544.

MAIN CHANNEL.

The "main channel" of the Mississippi river means the principal navigable and navigated channel, the one customarily followed in steamboat navigation. *Franzini v. Layland* (Wis.) 97 N. W. 499.

MAINS.

By the word "mains," in Laws 1890, c. 566, p. 1148, § 65, providing that any owner or occupant of any premises within 100 feet of any main laid down by any gas light corporation may require it to supply him with gas, were intended those pipes through which the company distributed the gas that was designed to be taken therefrom into the buildings to be lighted. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

MAINTAIN.

Keep synonymous, see "Keep."

The word "maintain" ordinarily means to preserve something which is already in existence; but, considering that, by the use of the words "unless one of them chooses to let his land lie without fencing," Civ. Code, § 1301, declaring that coterminous owners are mutually bound equally to maintain the boundaries and monuments between them and the fences between them, unless one of them chooses to let his land lie without fencing, applies to land not fenced, it is comprehensive enough, in the light of the subject-matter, to include the erection, as well as the maintenance, of the fences. *Hoar v. Hennessy*, 74 Pac. 452, 454, 455, 29 Mont. 253.

MAINTENANCE.

Maintenance is an officious intermeddling in a suit that in no way belongs to one by assisting either party, with money or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife and perverts the re-

medial powers of the law into an engine of oppression. *Lacey v. Davis* (Iowa) 98 N. W. 366, 367 (quoting 6 Cyc. 850).

MAJORITY.

See "Requisite Majority."

Where the language of an act is "a majority of the votes cast," or "a majority of all votes cast," it means a majority of the votes cast on the question submitted; and that, whether the votes are cast at a general or special election. *Territory v. Board of Trustees*, 76 Pac. 165, 167, 13 Okl. 605.

The phrase "majority vote of legal voters," in Sp. Act Feb. 26, 1903, providing that it shall take effect when approved by a majority vote of the legal voters within the district, means, according to Act March 18, 1903, a majority vote of the legal voters voting. *Foy v. Gardiner Water Dist.*, 56 Atl. 201, 202, 98 Me. 82.

MALARIA.

Malaria is "a morbid condition produced by exhalations from decaying vegetable matter in contact with moisture, giving rise to fever and ague and many other symptoms characterized by their tendency to recur at definite and usually uniform intervals." *City of St. Louis v. Galt*, 77 S. W. 876, 879, 179 Mo. 8, 63 L. R. A. 778 (quoting Webster Dict.).

MALICE.

See "Express Malice"; "Implied Malice"; "Universal Malice."

Probable cause distinguished, see "Probable Cause."

Malice denotes a wrongful act done intentionally, without just cause. *Hathaway v. Commonwealth* (Ky.) 82 S. W. 400, 402.

Malice denotes a wrongful act done intentionally, without just cause or excuse. *Connell v. State* (Tex.) 81 S. W. 746, 747.

In order to justify the imputation of "malice," within the rule of punitive damages, the injury must have been conceived in a spirit of mischief and partake of a criminal or wanton nature. *Baxter v. Campbell* (S. D.) 97 N. W. 386, 387.

"Malice, in common acceptance, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally.

If I am arraigned of felony and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not." The law will imply that degree of malice in an act of criminal conversation which is sufficient to bring a judgment for damages therefor within the exception mentioned in Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], declaring that judgments for willful and malicious injuries to the person or property of another shall be exempted from a discharge in bankruptcy. *Tinker v. Colwell*, 24 Sup. Ct. 505, 508, 193 U. S. 473, 48 L. Ed. 754 (quoting *Bromage v. Prosser*, 4 Barn. & C. 247).

In criminal law.

Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. *Bromage v. Prosser*, 10 E. C. L. 321. In law "malice" is a term of art, importing wickedness, and excluding a just cause or excuse. *State v. Doyg*, 2 Rich. Law, 182. There can be no doubt that malice is presumed from an intentional killing, in the absence of facts or circumstances in evidence tending to show want of malice. *State v. McDaniel*, 47 S. E. 384, 387, 68 S. C. 304.

"Malice" is not restricted to spite or malevolence toward the deceased in particular, but in its legal sense it is understood to mean the general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty and fatally bent on mischief. Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be; for the law considers that he who does a cruel act voluntarily does it maliciously. *State v. Brinte* (Del.) 58 Atl. 258, 262.

In the statute declaring it murder in the first degree for any person to purposely and in his deliberate and premeditated malice kill another, "malice" is not confined to ill will toward an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duties and fully bent on mischief, indicates malice, within the meaning of the law. Malice may be either expressed or implied. Express malice may appear from all the evidence and circumstances of the alleged killing. Implied malice may appear where

there is no just cause or excuse of the alleged killing. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

In libel and slander.

Malice, as used in cases of slander and libel, does not necessary imply actual evil intent, but rather the want or absence of any legal excuse for the speaking or publication of the injurious words. Where slanderous words are actionable per se, malice is presumed. *McDonald v. Nugent*, 98 N. W. 506, 508, 122 Iowa, 631.

Where words are spoken which are slanderous per se, malice is presumed; but the malice which is thus presumed is known as legal malice, as distinguished from actual or express malice, or malice in fact. In an action for slander, the absence of actual malice will not defeat the action, and the party injured may recover his actual damages; but where actual malice is charged in a complaint, and more than compensatory damages are claimed for the injury, the actual motive or intent with which the publication was made becomes an important fact from which to determine the amount of damages to be awarded. *Wrege v. Jones* (N. D.) 100 N. W. 705, 707.

"The term 'malice,' as employed in the definition of libel per se, is often misunderstood by the general reader, and is sometimes misapprehended by lawyers. It does not necessarily mean personal hatred or ill will toward the person at whom the libel is directed. Legal malice in the publishing of a libel is not inconsistent with honesty of purpose and good motive. * * * In other words, malice is the want of legal excuse for an act done to the injury of another. Whoever gives currency to libelous matter (not protected as being privileged) must be prepared to prove its truth, if he would avoid liability to the party injured." *Morse v. Times-Republican Printing Co.* (Iowa) 100 N. W. 867, 871.

In malicious prosecution.

"Malice" need not indicate anger or vindictiveness, but it imports bad faith in a malicious prosecution, or the want of sincere belief that the facts and circumstances justify the prosecution. *Griswold v. Griswold*, 77 Pac. 672, 673, 143 Cal. 617.

The fact that an action was commenced and prosecuted without probable cause may be considered by the jury on the question of malice. Actual malicious purpose or personal ill will is not essential to constitute the legal malice which must be shown to support an action for malicious prosecution. The malice required to support the action may be inferred by the jury from the want of probable cause. *Connelly v. White*, 98 N. W. 144, 145, 122 Iowa, 391.

MALICE AFORETHOUGHT.

As applied to murder, "malice aforethought" is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts done or words spoken. *Connell v. State* (Tex.) 81 S. W. 746, 747.

"Malice aforethought," either expressed or implied, is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured. *People v. Balkwell*, 76 Pac. 1017, 1019, 143 Cal. 259.

MALICIOUS.

"The legal meaning of the term 'malicious' is the unintentional doing of a wrongful act without just cause or excuse." *McNamara v. St. Louis Transit Co.*, 81 S. W. 880, 881, 182 Mo. 676, 66 L. R. A. 486.

The word "malicious," as ordinarily employed in criminal statutes, is the equivalent of wrongful, intentional, and without just cause or excuse; but, as used in many statutes directed against the unlawful destruction of property, it is held to have a restricted meaning peculiar to such statutes, implying that the act to which it relates must have resulted from actual ill will or revenge. The special meaning noted had its origin in England in prosecutions under the "Black Act" (St. 9 Geo. I, c. 22), enacted in 1722, so called because it was designed to repress the depredations of marauders calling themselves "blacks." The act provided that, if any person or persons shall unlawfully and maliciously kill or wound any cattle, etc., such persons shall be adjudged guilty of felony. It was held that in prosecutions under this act for injuries to cattle, in order to bring an offender within the law, the malice must be directed against the owner of the cattle, and not merely against the animal itself. In the United States most statutes prescribing a penalty for the malicious destruction of property are sufficiently like those of England to warrant the inference that they were modeled on them, and for this reason they have generally, but not always, been given the same construction. But the effect of Crimes Act, § 112 (Gen. St. 1901, § 2105), providing that every punishment and forfeiture imposed on any person maliciously committing any offense prohibited by the provision of preceding sections shall equally apply and be in force, whether the offense shall be committed from malice conceived against the owner of property in respect to which it shall be committed or otherwise, is to take from the word "malicious" the specific meaning that had been attributed to it in laws against the destruction of property, and restore it to the usual sense in which it is used in criminal statutes. *State v. Boles* (Kan.) 74 Pac. 630.

MALICIOUS INJURY.

See "Willful and Malicious Injury."

MALICIOUSLY.

By the word "maliciously," as used in an indictment for slander by imputing to a woman a want of chastity, is meant that the words must have been so uttered as to imply by defendant an evil intent or legal malice, or without reasonable grounds for believing that the words uttered were true. *Rainwater v. State* (Tex.) 81 S. W. 38, 39.

MANAGEMENT.

Where a ship was at the commencement of a voyage in all respects seaworthy and properly manned and supplied, damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the "management" of the vessel, for which she is exempt from liability by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), providing that, if the owner of any vessel transporting merchandise or property to or from any port in the United States shall exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall be responsible for the damage resulting in the management of the vessel. *The Wildcroft* (U. S.) 130 Fed. 521, 527.

MANDAMUS.

As action, see "Action."

As suit of a civil nature, see "Suit of a Civil Nature."

"The writ of mandamus is an extraordinary remedy, to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits. It lies to compel the performance of a public duty, or one imposed by public authority, and for the nonperformance of which there is no other specific or adequate remedy at law, but not for the enforcement of merely private obligations, such as those arising from contracts." *Lahiff v. St. Joseph's Total Abstinence & Benevolent Society*, 57 Atl. 692, 693, 76 Conn. 648, 65 L. R. A. 92, 100 Am. St. Rep. 1012 (citing *Hartford v. Hartford St. R. Co.*, 74 Conn. 194, 50 Atl. 393; *Bassett v. Atwater*, 65 Conn. 355, 32 Atl. 937, 32 L. R. A. 575; *Tobey v. Hakes*, 54 Conn. 274, 7 Atl. 551, 1 Am. St. Rep. 114; *Parrott v. City of Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439; *American Asylum for Education and Instruction of Deaf and Dumb v. Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112).

Mandamus is one of the extraordinary remedies. The writ may issue in those cases only "to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station," but "it cannot control judicial discretion." *Davis v. Jewett* (Kan.) 77 Pac. 704, 705.

Mandamus may not be invoked to review a judicial or quasi judicial decision. The primary object of the writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, its command is never given to compel the discharge of a duty involving the exercise of judgment or discretion in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. *People v. Matthies*, 87 N. Y. S. 196, 198, 92 App. Div. 16 (citing *People v. Commissioners of Land Office*, 149 N. Y. 26, 43 N. E. 418).

"The province of a writ of mandamus is to afford redress where a party has a right to have anything done and has no other specific means of compelling its performance. The writ is also applicable in certain cases where a duty is imposed by statute for the benefit of an individual." *State v. Charleston Light & Water Co.*, 47 S. E. 979, 983, 68 S. C. 540.

Mandamus is an emergency writ, and its purpose is to furnish a speedy remedy for some apparent wrong. It must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. *State v. District Court, Department No. 1, Lewis and Clarke County*, 74 Pac. 498, 501, 29 Mont. 265.

"The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." *Milster v. City Council of Spartanburg*, 47 S. E. 141, 68 S. C. 243 (quoting High. Extr. Leg. Rem. 4); *State ex rel. Huebler v. Police Com'rs* (Mo.) 82 S. W. 960, 962.

"Originally the writ of mandamus was a prerogative of the English crown, and issued in its name from the court of king's bench, requiring the performance of some specified duty which that court had previously determined, or at least supposed, to be consonant to right and justice. In modern times it issues as a judicial process in actions, often

between private parties, in which a court of competent jurisdiction has previously adjudged or commanded the performance by the defendant therein of some specified duty, which under the law he should perform, and is the means by which such judgment or command is enforced." A Circuit Court of the United States is without jurisdiction, either original or by removal from a state court, of an action for a writ of mandamus, which is not necessary for the exercise by it of a jurisdiction which it has otherwise previously acquired; the writ of mandamus not being a suit of a civil nature at law or in equity, within the meaning of the acts of Congress creating the Circuit Courts of the United States and defining their jurisdiction. *Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co.* (U. S.) 132 Fed. 289, 291.

Mandamus is a legal proceeding, and a mandamus issued, after judgment against a county, to compel the levy of a tax to pay the same, is in the nature of an execution to enforce satisfaction. *Carter County v. Schmalstig* (U. S.) 127 Fed. 126, 127, 62 C. C. A. 78 (citing *Riggs v. Johnson County*, 73 U. S. [6 Wall.] 166, 18 L. Ed. 768; *Heine v. Levee Com'rs*, 89 U. S. [19 Wall.] 655, 22 L. Ed. 223.)

MANDATE.

The word "mandate," in Civ. Code, art. 2985, relating to personal mandate, whereby one person appoints another his special agent, or whereby one person gives power to another to transact for him and in his name one or several affairs, does not refer to the business of agency carried on under a charter adopted under the act of 1888. *State ex rel. Le Blanc & Railey v. Michel* (La.) 36 South. 869, 870.

MANSLAUGHTER.

See "Involuntary Manslaughter."

Manslaughter is the unlawful killing of a human being without malice, either express or implied. *State v. Emory* (Del.) 58 Atl. 1036, 1038.

Manslaughter is defined to be the unlawful killing of another without malice, either express or implied, and without premeditation. *State v. Brinte* (Del.) 58 Atl. 253, 262.

Murder distinguished.

Manslaughter is distinguished from murder by the absence of malice as a contingent element. If, under the influence of some violent emotion, a sudden intent was formed, which on adequate provocation overwhelmed the reason of the appellant, then the killing was not murder, but manslaughter only. *State v. Clark* (Kan.) 77 Pac. 287, 288.

MANUFACTURE.

To manufacture is to modify or to change natural substances, so that they become articles of value or use. *Baltimore & O. S. W. R. Co. v. Cavanaugh* (Ind.) 71 N. E. 239, 241.

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. The broad interpretation which the courts have always given the word "manufacture" must include the construction of buildings and bridges. In *re Niagara Contracting Co.* (U. S.) 127 Fed. 782, 783.

MANUFACTURE OF OIL.

The refining process which constitutes what is called the "manufacture of oil," relating to cocoanut oil of commerce, merely removes from it the impurities due to the manner in which the kernel is handled and dried and to its partial decay. *United States v. Oriental American Co.* (U. S.) 129 Fed. 249, 251.

MANUFACTURE OF PAPER.

Paper bags with incidental printing thereon are "manufactures of paper," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. *Kraut v. United States* (U. S.) 130 Fed. 392.

MANUFACTURING CORPORATION.

Manufacturing corporation within bankruptcy act, see "Engaged Principally in Manufacturing, Etc."

The Pioneer Pasteurizing Company, authorized by its articles of incorporation to engage in the business of buying, manufacturing, and dealing in milk, cream, butter, cheese, and other dairy products, and pasteurizing and treating said milk, and packing, storing, handling, and selling said products so pasteurized and treated, is not exclusively a manufacturing or mechanical corporation, within Const. art. 10, § 38, and its stockholders are therefore liable for its debts.—*Meen v. Pioneer Pasteurizing Co.*, 97 N. W. 140, 141, 90 Minn. 501.

MANUFACTURING ESTABLISHMENT.

A sawmill at which lumber is sawed for sale on the market is a "manufacturing establishment," within Ky. St. 1903, §§ 2487, 2488, giving laborers in manufacturing establishments a lien for wages superior to that of mortgages. *Graham v. Magann, Fawke Lumber Co.* (Ky.) 80 S. W. 799, 800 (citing *Bogard v. Tyler's Adm'r*, 55 S. W. 709, 21 Ky. Law Rep. 1452).

The furnishing of electric light and power and distributing it is not manufacturing, within Pub. St. 1901, c. 55, § 11, providing that towns may, by vote, exempt for certain time from taxation any "manufacturing establishment" proposed to be erected or put in operation. *Williams v. Park* (N. H.) 56 Atl. 463, 464, 72 N. H. 305, 64 L. R. A. 33.

Act March 2, 1899 (Acts 1899, p. 234; Burns' Ann. St. 1901, § 70871; Horner's Ann. St. 1901, § 5169k), declaring that the words "manufacturing and mercantile establishments mean any mill, factory, place of trade, or other establishment where goods are manufactured, or offered for sale, is not confined in its operation to places where goods are manufactured for or offered to the public market, and a machine shop maintained by a railway company for its own repairs and the making of materials for its own use is within the statute. *Baltimore & O. S. W. R. Co. v. Cavanaugh* (Ind.) 71 N. E. 239, 241.

MANUFACTURING PURPOSE.

The production and control of electric power by mechanical means, and its adaptation for use upon a trolley system, is a "manufacturing purpose," within the meaning of section 8 of the mechanic's lien law (P. L. 1898, p. 533). *Bates Mach. Co. v. Trenton & N. B. R. Co.* (N. J.) 58 Atl. 935, 936; *Phoenix Iron Works Co. v. Same, Id.*; *Henderson & Bro. v. Same, Id.*

MANUFACTURING PURSUITS.

See "Engaged Principally in Manufacturing, Etc."

MARINE INSURANCE BUSINESS.

The business of issuing ordinary fire insurance policies upon boats navigating the Great Lakes and the high seas is "marine insurance business," within Laws 1895, p. 392, c. 175, relating to the organization of marine insurance companies. *Dwinnell v. Minneapolis Fire & Marine Mut. Ina. Co.*, 97 N. W. 110, 111, 90 Minn. 383.

MARITIME CONTRACT.

A contract for repairs to be furnished to a canal boat engaged in navigating the Erie Canal and Hudson river is a maritime contract, and proceedings to enforce a lien for the repairs furnished are within the exclusive admiralty jurisdiction of the federal courts, though such repairs were made in dry dock. *Perry v. Haines*, 24 Sup. Ct. 8, 10, 191 U. S. 17, 48 L. Ed. 73.

A contract relating to wharfage, as understood in the laws and usages of maritime affairs, is clearly a maritime contract. *The James T. Furber* (U. S.) 129 Fed. 808, 810.

MARKET VALUE.

See "Actual Market Value"; "Cash Market Value."

The "market value" of merchandise imported from France, as defined in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], does not include the amount of certain internal revenue imposts of that country known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are not collected if the merchandise is exported. *United States v. R. F. Downing & Co.* (U. S.) 131 Fed. 653.

MARKETABLE TITLE.

The books define a marketable title, as one that is not only good, but indubitable. *Ormsby v. Graham*, 98 N. W. 724, 727, 123 Iowa, 202 (citing *Swayne v. Lyon*, 67 Pa. [17 P. F. Smith] 436; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Tomlin v. McChord's Representatives*, 28 Ky. [5 J. J. Marsh.] 135).

MARRIAGE.

See "Agreement to Marry."

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations, and social obligation and duties, with which government is necessarily required to deal. In *re De Laveaga's Estate*, 75 Pac. 790, 795, 142 Cal. 158 (citing *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244).

Marriage is a civil contract, the consent of the parties to it being all that is required by natural public law. It is true that in most, if not all, of the states of the Union, there are statutes regulating the manner of forming the marriage contract, providing for the performance of ceremonies, and naming those persons who can perform the ceremonies or celebrate the rites of matrimony; but it is held in a number of the states that, in the absence of positive statutes declaring all marriages void that are not performed as directed by law, any marriage made according to the common law would be a valid marriage. Such marriage may be proved by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation. *Edelstein v. Brown* (Tex.) 80 S. W. 1027.

"Marriage is not a civil contract, except in so far as the relation is based on the agreement of the parties. It is true the stat-

ute (section 7289, Burns' Ann. St. 1901) declares marriage to be a civil contract, but the statute itself takes it out of the clause of simple contracts by providing that it may be entered into by persons under age." *Elkenbury v. Burns* (Ind.) 70 N. E. 837, 838.

MARRIAGEABLE WOMAN.

A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. *Baker v. Baker*, 13 Cal. 87, 103.

MASTER.

The master is the one who has the direction and control of the servant, and the test is whether in the particular service the servant continues liable to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired. *Grace & Hyde Co. v. Probst*, 70 N. E. 12, 14, 208 Ill. 147 (citing *Consolidated Fireworks Co. v. Kochl*, 190 Ill. 145, 60 N. E. 87).

MATERIAL.

Other material, see "Other."

MATERIAL ALTERATION.

Whatever changes the legal effect of an instrument is a material alteration. "The test is, not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract—whether it will have the same legal effect and operation after the alteration as before." *White v. Harris*, 48 S. E. 41, 43, 69 S. C. 65 (quoting Am. & Eng. Enc. Law [2d Ed.] 224).

MATERIAL DEGREE.

One of the meanings of the term material is "in an important degree" (Webster, Dict.), and this is the meaning which would properly be attached to it as used in an instruction that a passenger on a street car could not recover if she contributed to her injury in a material degree, and hence the instruction was erroneous, because importing that there might be a degree of negligence on the part of plaintiff, contributing to the injury, which would not defeat a recovery. *Root v. Des Moines Ry. Co.* (Iowa) 98 N. W. 291, 293, 122 Iowa, 469.

The words "material degree," in an instruction, in an action for injuries, to the effect that if the plaintiff was injured as the direct result of defendant's negligence, and was "in no manner or to any material degree negligent himself, or in no manner or to any extent contributed to his own injury," he was entitled to recover, related to the

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amount of care required, and not to the extent of contribution to the injury by reason of failure to exercise such care, and hence the instruction was not erroneous. *Camp v. Chicago Great Western Ry. Co.* (Iowa) 99 N. W. 735, 738.

MATERIAL MISREPRESENTATION.

A misrepresentation, as the basis of rescission, must be material; but it can be material only when it is of such a character that, if it had not been made, the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract; but it must be of such nature, weight, and force that the court can say, "Without it the contract would not have been made." *Oppenheimer v. Clunie*, 75 Pac. 899, 901, 142 Cal. 313 (citing *Colton v. Stanford*, 82 Cal. 351, 399, 23 Pac. 16, 28, 16 Am. St. Rep. 137).

MATERIAL RIGHT.

The right of a defendant to challenge peremptorily is a material right. *Betts v. United States*, 132 Fed. 228, 229, 235.

MATERIALMAN.

Where complainant contracted with defendant, the owner of certain premises, to furnish mining machinery, appliances, and materials, and install the same in a mill to be erected at defendant's mines and constructed by defendant, without any other contractor, he was an original contractor, and not a "materialman," within Cutting's Comp. Laws Neb., § 3885, and therefore was entitled to 60 days within which to file his claim for a lien. *Salt Lake Hardware Co. v. Chainman Mining & Electric Co.* (U. S.) 128 Fed. 509, 510.

MATTER.

See "Printed Matter."

Other matter, see "Other."

Code Civ. Proc. § 46, forbidding a judge to sit or take part in the decision of a "cause or matter" in which he has been an attorney or counsel, refers only to actions or special proceedings in which a judge might take part; the word "cause" meaning a cause of action, and the word "matter" referring to some judicial proceeding which, under the Code, is included in special proceedings for the enforcement of civil rights. *Keeffe v. Third Nat. Bank of Syracuse*, 69 N. E. 593, 177 N. Y. 305.

MATTER IN DISPUTE.

The phrase "matter in dispute," as used in the Code of the District of Columbia (Act

March 3, 1901, c. 854, § 233, 31 Stat. 1227), providing that any final judgment of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, on writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000, means money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value; and, assuming that the term "matter in dispute" may embrace a right to have a claim against a foreign government presented through the political department of the United States, and that the value of such a right may be gauged by the possible pecuniary injury which may be sustained if no such action is taken, it is evident that a claim for damages from the German Empire in redress of an alleged wrongful imprisonment in that country is one having a merely conjectural value. Hence the value of the matter in dispute in a proceeding to compel by mandamus the Secretary of State to seek to obtain \$500,000 damages from the German Empire in redress of petitioner's alleged wrongful imprisonment while on a visit to that country does not exceed the sum of \$5,000. *United States v. Hay*, 24 Sup. Ct. 681, 682, 194 U. S. 373, 48 L. Ed. 1025.

MATTER OF ADMINISTRATION.

The power to compel an administrator to fulfill a contract of conveyance of real estate of his intestate is a "matter of administration," within the Constitution, defining the jurisdiction of the probate court. *Servis v. Beatty*, 32 Miss. 52, 87.

MATTER OF LEGAL AVOIDANCE.

The term "matters of legal avoidance," as used in the statement that a recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate a forfeiture, refers to such matters as are entirely consistent with the truth of the facts stated in the record and furnish a legal excuse for the failure of the defendant to appear according to the condition of his recognizance. The sureties, for example, show, in answer to the *scire facias*, the death of the principal before the time for his appearance had arrived, or that he had been arrested under other process issued at the instance of the state, or that he had become insane. All pleas of this kind are not only consistent with the truth of what is averred in the record, but they are predicated on the assumption of such truth. *State v. Morgan* (N. C.) 48 S. E. 604, 606.

MAY.

The word "may" in statutes usually indicates that the act to which it refers is discretionary, rather than mandatory, and will be so construed, unless the context indicates a different meaning. *Halfacre v. State* (Tenn.) 79 S. W. 132, 133.

Whenever third persons or the public have an interest in having done that which is prescribed by the Legislature, then the act is mandatory, even though words permissive, as "may," are used, instead of words mandatory, as "shall." *Lapsley v. Merchants' Bank of Jefferson City*, 78 S. W. 1095, 1096, 105 Mo. App. 98.

The word "may," as used in Rev. St. 1898, § 2864, providing that all or any of the issues in an action may be referred, is not used with reference to public rights or interests, or where the public or a third person have a claim de jure that the power shall be exercised. So it is not an instance where by the rules of statutory construction a permissive word shall be given the mandatory significance of "must" or "shall." When a permissive word is not so used in the statute, it must be taken in its literal sense. The privilege of the statute in question is designed for the convenience of both the court and parties. Hence the statute authorizes a reference in the discretion of the court, and does not entitle a party to a reference as a matter of right. *Hart v. Godkin* (Wis.) 100 N. W. 1057, 1058.

Pub. St. 1882, c. 189, § 20, provides that a party desiring to have a private way laid out shall file a petition with the county commissioners. Section 25 provides that, when the premises are situated entirely in one town, the petition may be made to the selectmen, or mayor and aldermen, thereof. The word "may," in the last section, does not mean "must." *Eldredge v. Norfolk County Com'rs*, 70 N. E. 36, 37, 185 Mass. 186.

Code, § 5337, providing that at any time before judgment the court "may" permit a plea of guilty to be withdrawn and other plea or pleas substituted, is mandatory. *State v. Hortman*, 97 N. W. 981, 982, 122 Iowa, 104.

The word "may," used in Code Civ. Proc. § 732, providing that any person aggrieved by waste may bring an action therefor, is not a mandatory term, except when it is construed to mean "must"; and it is never thus construed where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation. *Isom v. Rex Crude Oil Co.*, 74 Pac. 294, 140 Cal. 678.

In Pol. Code, § 3804, requiring that any taxes paid more than once, or erroneously or illegally collected, may by order of the board of supervisors be refunded by the county

treasurer, the word "may" means "shall." *Stewart Law & Collection Co. v. Alameda County*, 76 Pac. 481, 482, 142 Cal. 660.

The word "may," as used in Gen. St. 1894, § 5186, which provides that, where defendant is a nonresident and plaintiff proceeds by attaching his property, the action may be brought in any county where defendant has property liable to attachment, is not mandatory, and cannot be construed as meaning "must." *Clements v. Utley*, 98 N. W. 188, 189, 91 Minn. 352.

The word "may" is not to be construed as "must" or "shall," but merely as permissive and discretionary with the city, in an ordinance providing that the grade of alleys, not otherwise fixed, at the points of intersection with streets whose grades are established by the ordinance, shall be the same as said streets, and continuous from one street to the next, but between any two adjacent streets along the line of the alley vertical curves of grade "may" be used, when necessary to facilitate drainage or afford better access to property along the line of said alley, etc., for in interpreting statutes and ordinances the word "may" should not be construed to mean "must" or "shall," for the purpose of creating or determining the character of private rights. *Kelley v. City of Cedar Falls*, 99 N. W. 556, 557, 123 Iowa, 660.

The word "may" is used in a permissive, not a mandatory, sense in *Mills' Ann. St.* § 3162, providing that the relocater of an abandoned lode claim may sink the original shaft deeper than it was at the time of abandonment. *Carlin v. Freeman* (Colo.) 75 Pac. 26, 27.

MEAL.

If a single sandwich satisfies the desires of a person, it constitutes a "meal," and the keeper of a hotel has the right to serve liquors to him with such meal, under Laws 1897, p. 234, c. 312, § 81, cl. "k," providing that the keeper of a hotel, being the holder of a liquor tax certificate, may sell liquor on Sunday to his guests with their meals. In re *Cullinan*, 87 N. Y. Supp. 660, 662, 93 App. Div. 427.

MEANS.

See "Mechanical Means."
Any means, see "Any."
Other means, see "Other."

MEASURE.

Under a statute giving mayors of certain cities power to veto any measure passed by the board of aldermen, a mayor has no power to veto the election of a police justice by the board of aldermen, since such an elec-

tion is not a measure. *Rich v. McLaurin*, 35 South. 337, 83 Miss. 95.

MECHANICAL CORPORATION.

The Pioneer Pasteurizing Company, authorized by its articles of incorporation to engage in the business of buying, manufacturing, and dealing in milk, cream, butter, cheese, and other dairy products, and pasteurizing and treating said milk, and packing, storing, handling, and selling said products so pasteurized and treated, is not exclusively a manufacturing or mechanical corporation, within Const. art. 10, § 38, and its stockholders are therefore liable for its debts. *Meen v. Pioneer Pasteurizing Co.*, 97 N. W. 140, 141, 90 Minn. 501.

MECHANICAL MEANS.

The phrase "by mechanical or other means," as used in the statute making it a misdemeanor for any person not licensed to record or register, by mechanical or other means, bets or wagers on trials of speed, etc., embraces something outside the mechanical class, and covers the registration of such bets by means of the initials or private marks of the parties written on cards. *State v. Villines (Mo.)* 81 S. W. 212, 213.

MECHANIC'S LIEN.

A mechanic's lien is at most only a tentative charge against the property it purports to bind, and is liable to be defeated for lack of technical sufficiency, as well as by showing that the indebtedness or some considerable part thereof is not owing. *Beebe v. Redward*, 77 Pac. 1052, 1055, 35 Wash. 615.

"A mechanic's lien on chattels, as on real estate, is simply a security for the payment of a debt. Without indebtedness to the mechanic there can be no lien. * * * The lien is commensurate with the amount due." *Tenney v. Anderson Water, Light & Power Co.*, 48 S. E. 457, 458, 69 S. C. 430 (quoting Phillips, *Mech. Liens*, § 493).

A mechanic's lien is purely a statutory creation, and can only be maintained by a substantial observance or compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of lien is indispensable. *Russell v. Hayner*, 130 Fed. 90, 92 (citing Phillips, *Mech. Liens* [3d Ed.] § 9).

MEDICINAL PREPARATION.

The expression "medicinal preparations," as used in Tariff Act March 3, 1883, c. 121, Schedule A, 22 Stat. 494, means such articles

as are of use, or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affection of the human frame. *Dodge & Olcott v. United States (U. S.)* 130 Fed. 624, 625; *Lueders v. Same, Id.*

MEMBER.

See "Active Member."

Of Congress.

"When we speak of a member of Congress, we refer to one who is a component part of the Senate or House of Representatives; one who is in office—not out of office; one who is sharing the responsibilities and privileges of membership." The words "member of Congress," as used in the first provision of Rev. St. § 1781 [U. S. Comp. St. 1901, p. 1212], making it a criminal offense for a member of Congress, or any officer or agent of the government, to agree to receive or receive a bribe for procuring or aiding to procure for another any contract, office, or place from the government, do not include a person elected to the office of Senator of the United States until he has been accepted as member by the Senate of the United States and has assumed the duties of the office. *United States v. Dietrich (U. S.)* 126 Fed. 676, 678, 681.

Of police force.

The chief of police of a city is a "member of the police force" of the city, and amenable to an order established by the board of police examiners, created by the charter of the city, providing that no member of the police force should be permitted to be a delegate to any caucus or take part in any political canvass. *Brownell v. Russell (Vt.)* 57 Atl. 103, 104.

MEMBERSHIP.

See "Certain Ascertained Membership."

MEMORANDUM.

A mere indorsement of the name of the owner of property on the check given by a prospective purchaser for earnest money is not a note or memorandum in writing, as required by the statute of frauds (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 1997). *Koenig v. Dohm*, 70 N. E. 1061, 1064, 209 Ill. 468.

MEMORY.

See "Sound Mind and Memory."

MENTALLY INCOMPETENT.

The term "mentally incompetent to have the charge and management of his property," within the statute relating to the appoint-

ment of guardians, means mental incapability to do so. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903 (citing In *re Leonard's Estate*, 95 Mich. 295, 54 N. W. 1082).

MERCANTILE PURSUITS.

See "Engaged Principally in Manufacturing, Etc."

MERCHANDISE.

The word "merchandise," defined in Rev. St. § 2768 [U. S. Comp. St. 1901, p. 1861], as including goods, wares, and chattels of every description capable of being imported, is sufficiently broad to include placer gold. *Six Parcels of Placer Gold v. United States* (Ariz.) 76 Pac. 473, 475.

MERCHANT.

The term "merchant" is defined by Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business, in order to constitute them merchants within the meaning of the definition. *Tom Hong v. United States*, 24 Sup. Ct. 517, 519, 193 U. S. 517, 48 L. Ed. 772.

"Merchant" is defined by Webster, Dict. as "one who traffics on a large scale, especially with foreign countries; a trafficker; a trader; * * * one who keeps a store or shop for the sale of goods; a shopkeeper." A merchant has also been defined as "one whose business is to buy and sell merchandise; one who buys to sell again, who does both, not incidentally or occasionally, but habitually, as a business." An itinerant optician, who merely prescribes and collects for spectacles, and has his orders filled and charged to him by a supply house, is not a merchant. *City of Waukon v. Fisk* (Iowa) 100 N. W. 475, 476 (quoting *Jewel v. Trustees of Sumner Tp.*, 113 Iowa, 47, 49, 84 N. W. 973).

A "merchant" is one engaged in the business of buying commercial commodities and selling them again for the sake of profit. He is one who traffics or carries on trade, especially on a large scale; one who buys goods

to sell again, and any one who is engaged in the purchase or sale of goods; a trafficker; a trader. Under Code, § 700, giving to cities and towns the power to define by ordinance who shall be considered transient merchants, and to regulate, license, and tax their sales, a city may impose a license fee on one engaged in taking orders for goods on his own account, and subsequently having the orders filled by a wholesale house, and the goods shipped to him for delivery; he paying the wholesale price and collecting the retail price from his customers. *City of Cedar Falls v. Gentzler*, 99 N. W. 561, 562, 123 Iowa, 670.

MERITS.

An order granting a change of venue in a civil action involves the merits, and is appealable, under Rev. Codes 1899, § 5626, providing that an order is appealable when it involves the merits of an action or some part thereof. *Robertson Lumber Co. v. Jones* (N. D.) 99 N. W. 1082 (citing *White v. Chicago, M. & St. P. Ry. Co.*, 5 Dak. 508, 41 N. W. 730).

METAL.

See "Composition Metal."

METALS UNWROUGHT.

Certain alloys of iron and mineral substances known as ferrochrome, ferrotungsten, ferromolybdenum, and ferrovanadium, are dutiable as "metals unwrought," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], but are dutiable at the rate applicable to ferromanganese, enumerated in paragraph 122 of said act (30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]). *United States v. Roessler & Hasslacher Chemical Co.* (U. S.) 131 Fed. 576.

MILLING IN TRANSIT.

"Milling in transit" refers to cases where freight is shipped a long distance, and the carrier will at his own cost defray the expense of its change in form en route, because of the easier handling in the more compact shape. Under Laws 1899, p. 801, c. 164, § 13, providing that any carrier charging one person more than another for the same service is guilty of discrimination, a railroad company carrying raw material to factories cannot charge a factory which agrees to ship the manufactured product by the same road less for the same service than it charges a factory which will make no such agreement; the carrier not being in a position to justify under "milling in transit." *Hilton Lumber Co. v. Atlantic Coast Line R. Co.* (N. C.) 48 S. E. 813, 816.

MIND.

See "Sound Mind and Memory"; "Unsound Mind."

MINE.

As land, see "Land."

MINERAL.

Sand, according to the circumstances, may or may not be a mineral, in the commercial sense intended by Act May 8, 1876 (P. L. 142), providing that, if any person or corporation shall dig minerals in the land of another without the consent of the owner, he shall be liable for double the value thereof. *Hendler v. Lehigh Valley R. Co.*, 58 Atl. 488, 489, 209 Pa. 263.

MINING CLAIM.

As property, see "Property."

MINISTERIAL ACT.

A ministerial act may perhaps be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done. *Bair v. Struck*, 74 Pac. 69, 71, 29 Mont. 45, 63 L. R. A. 481 (citing *Throop*, Pub. Off. § 537).

MINISTERIAL OFFICER.

The clerk of a court is essentially a ministerial officer. He has nothing to do with the character or purpose of papers which are tendered to him to be filed. When suit is ordered or process directed to be issued, it is his duty to comply, if the party is *prima facie* entitled to it, and for failure to do so he is liable for any loss; the measure of his liability being the damages which have resulted therefrom. In an action on the official bond of a clerk of the circuit court for refusal to issue a summons, the plaintiff must state, in his declaration, enough to show that he had a good cause of action against the parties whom he desired to sue. He cannot simply claim as damages the amount for which he wanted to bring suit. Any declaration or complaint which does nothing more is demurrable. *United States v. Bell* (U. S.) 127 Fed. 1002, 1003 (citing 7 Cyc. 196).

MISCARRIAGE.

See "Debt, Default, or Miscarriage of Another."

MISCONDUCT.

After the jury is sworn, misconduct on the part of an individual juror is misconduct of the jury. *State v. Mott*, 74 Pac. 728, 730, 29 Mont. 292.

MISDELIVERY.

Misdelivery of goods is the same as a total failure to deliver them at all, and is deemed a conversion of the property by the carrier. Leaving goods at the wrong place may constitute a misdelivery and conversion of them, as well as delivering them to the wrong person. *Cleveland, O., C. & St. L. Ry. Co. v. C. & A. Potts & Co. (Ind.)* 71 N. E. 685, 689 (citing *Elliott, Railroads*, § 1526; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476; *Perkins v. Smith*, 1 Wils. 328; *Houston & T. C. Ry. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Jeffersonville R. Co. v. White*, 69 Ky. [6 Bush] 251; *Claffin v. Boston & L. R. Co.*, 89 Mass. [7 Allen] 841).

MISDEMEANOR.

A contempt proceeding is classified as a misdemeanor, and not as a felony. *Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. (U. S.)* 129 Fed. 105, 107, 63 C. O. A. 607.

The offense of having in possession and selling counterfeit trade-marks and labels, in violation of Pen. Code, § 364, subd. 4, is a "misdemeanor," and hence defendants, acting in concert in the commission of such offense, may be properly tried together. *People v. Strauss*, 88 N. Y. Supp. 40, 43, 94 App. Div. 453.

MISREPRESENTATION.

See "Material Misrepresentation."

MISSISSIPPI RIVER.

The term "Mississippi river," used in the enabling act (Act Cong. Aug. 6, 1846, c. 89, § 9 Stat. 56) descriptive of the boundary between Wisconsin and Minnesota, applies to the broad expanse of water flowing in a generally southerly direction, known at the date of such act as such river, not any bayou upon either side thereof. *Franzini v. Layland (Wis.)* 97 N. W. 499, 501.

MISTAKE.

Impression equivalent, see "Impression."

The code provision that the court may at any time permit a pleading or mistake in any other respect to be amended authorizes the substitution of a sufficient appeal

bond in an election contest, where the bond given has failed to comply with the statutory requirements. *Galloway v. Bradburn* (Ky.) 82 S. W. 1013, 1016.

MISTAKE OF FACT.

"Mistake of fact," for which a contract may be avoided, is defined in Civ. Code, § 1577, to be "an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract." *White v. Stevenson*, 77 Pac. 828, 830, 144 Cal. 104.

MITER BOX.

A miter box is a rough three-sided box, without top or ends, into the two upright sides of which slits are sawed at the proper angle. *Metzler v. McKenzie*, 76 Pac. 114, 115, 34 Wash. 470.

MITIGATE.

Extenuate synonymous, see "Extenuate."

MIXED TRAIN.

A train consisting of four freight cars and a passenger coach is a "mixed train." *Holland v. St. Louis & S. F. R. Co.*, 79 S. W. 508, 509, 105 Mo. App. 117.

MODE.

The examination of a party before trial, authorized by Code Civ. Proc. N. Y. § 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of the declaration of Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], that, in addition to the mode of taking the depositions of witnesses in causes pending in the federal District and Circuit Courts, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. "Mode" usually means the manner in which a thing is done, and this act relates to the manner of taking 'depositions and testimony,' which the title treats as equivalent terms, and which may be so regarded so far as the question before us is concerned. But it is contended that the word 'mode,' as used in the act, has a broader significance, and embraces the production of evidence, thereby qualifying section 861, Rev. St. [U. S. Comp. St. 1901, p. 661], which prescribes the mode of proof. We cannot concur in this view." *Hanks Dental Ass'n v. International Tooth Crown Co.*, 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989.

MODEL OF IMPROVEMENT.

Exact models of steamships of improved design, showing the details of the vessels,
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valued at about \$1,000 each, and intended for exhibition in steamship offices, are models of improvements in the art of shipbuilding, and are free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], covering "models of inventions and of other improvements in the arts." *Boas v. United States* (U. S.) 128 Fed. 470.

MODIFY.

The word "modify," as used in a corporate charter, providing that, upon the report of commissioners to appraise property which the corporation seeks to acquire as a right of way, the judge of the district court shall confirm the report, modify it, or refer it back to the present or new commissioners, does not give the court authority to increase the amount found by the commissioners. *Louisiana Western R. Co. v. Crossman's Heirs*, 35 South. 784, 785, 111 La. 611.

MOMENTARILY UNCONTROLLED.

Generally it may be said that the event sought to be described by the phrase "momentarily uncontrolled" is wholly inconsistent with a condition where a horse is moving along the road in the course of a struggle for mastery. It is substantially limited to those spasmodic movements which often occur while the horse is generally within the control of his driver, but where the particular movement is so quick and unexpected that it and its results can take place before efforts to control can be exerted. A horse shied to one side, and then at a gallop ran forward 60 to 90 feet, the driver all the time pulling back on the lines, so that the horse was drawing the vehicle by the bit and resisting the efforts to stop him, till a defect in the highway was reached and an accident occurred. The horse could not be held to have been only "momentarily uncontrolled," within the law as to liability of a municipality for defects in highways. *Ehleiter v. City of Milwaukee*, 98 N. W. 934, 935, 121 Wis. 85, 66 L. R. A. 915.

MONEY.

See "Bond for the Payment of Money"; "Condemnation Money"; "Lawful Current Money."

MONEY AT INTEREST.

The phrase "money at interest" includes all forms of interest-bearing securities, whether represented by bonds, notes, or otherwise, unless the contrary appears from the assessment itself. *Sweetsir v. Chandler*, 56 Atl. 584, 586, 98 Me. 145.

MONEY LENT.

Money deposited in a bank in New York at interest and subject to check constitutes "money lent" to the banker, within Civ. Code La., art. 3538 (3503), requiring actions for the payment of money lent to be brought within three years. *Schinotti v. Whitney* (U. S.) 130 Fed. 780, 781 (quoting *Morse, Banks*, § 298).

MONEY OF THE UNITED STATES.

See "Current Money of the United States."

MONEY ORDER.

Pay check synonymous, see "Pay-Check."

MONEYED BUSINESS.

The expressions "moneyed business" or "moneyed man" are often used, and in their common acceptation and generally understood meaning are not applied solely to the business of handling and loaning money, or to a man whose property merely consists of money. A person is commonly referred to as a moneyed man because of his large possessions, yet those possessions may consist exclusively of real estate. *State v. Fidelity & Deposit Co. of Maryland (Tex.)* 80 S. W. 544, 553.

MONEYED CORPORATION.

The term "moneyed corporation" is defined in 1 Rev. St. N. Y. p. 593, § 51, to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances, and is defined by the New York act of 1890 (Laws 1890, c. 563) to be one formed under or subject to the banking or the insurance law. A Kansas trust company, empowered to receive deposits and to loan money on real estate and personal security, is a "moneyed corporation," within this definition and within the meaning of Code Civ. Proc. N. Y. § 394, prescribing a three-year limitation for actions to enforce stockholders' liabilities. *Platt v. Willmot*, 24 Sup. Ct. 542, 545, 193 U. S. 602, 48 L. Ed. 809.

The expression "moneyed corporation," in *Sayles' Ann. St.* 1897, art. 5063, providing for the taxation of all personal estate of moneyed corporations, means all classes of corporations organized and created for business purposes, as distinguishable from public or charitable or other corporations which are exempted by law from taxation. The Legislature evidently did not intend to use it in the restrictive sense, as applied only to corporations that dealt exclusively in money. *State v. Fidelity & Deposit Co. of Md. (Tex.)* 30 S. W. 544, 553.

MONEYED MAN.

See "Moneyed Business."

MONOMANIA.

The term "monomania" implies "partial insanity, and excludes the idea of any sort of ratiocination as to the particular subject to which the partial insanity relates. Monomania cannot be implied because a person takes a narrow, or prejudiced, or utterly illogical view of a particular subject. It is not the result of any conclusion. The person does not arrive at his conviction because of any attempt either at reasoning or investigation. The partial insanity is the offspring of a disordered intellect." The conclusion that a testator was a monomaniac is not warranted by the bare circumstance that, actuated by a spirit of resentment against his wife, he disinherited her in his will, for the sole reason that she had interfered with him in carrying out his deliberate choice to lead an immoral and dissolute life. *Bohler v. Hicks*, 48 S. E. 306, 307, 120 Ga. 800.

MONTH.

A month is a definite period of time, commencing on the 1st day thereof, and ending on the 28th, 29th, 30th, or 31st day. *Derby v. Dancey*, 36 South. 795, 796, 112 La. 891.

MORAL CERTAINTY.

Moral certainty is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is also declared to be a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. *People v. Lew Fook*, 75 Pac. 183, 141 Cal. 548.

MORAL OBLIGATION.

A moral obligation on the part of the state must have something more substantial than legislation obnoxious to the fundamental law to rest upon; something more for a foundation or starting point than a statute which is itself immoral. A moral obligation can never be deemed to rest upon the people of the state to discharge a contract made by the Legislature in direct violation of the Constitution. *Minnesota Sugar Co. v. Iverson*, 97 N. W. 454, 457, 91 Minn. 30 (citing *Adsit v. Osmun*, 84 Mich. 420, 48 N. W. 81, 11 L. R. A. 534).

MORTGAGE.

At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and under the statutes of many states a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as "both a lien in equity and a conveyance at law." *United States v. Commonwealth Title Ins. & Trust Co.*, 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830 (citing *Pom. Eq. Jur.* § 1191).

"Under Georgia law the word 'mortgage' is used in a double sense. Sometimes it refers to a mortgage which creates a lien, and at other times as passing title as a security for the debt. An instrument containing a defeasance clause describing the debt, and showing on its face that it is intended as security, is a mortgage, and passes no title. A writing in the form of an absolute bill of sale, but in fact intended only as security for a debt, conveys title, but is treated as an equitable mortgage." *Denton v. Shields*, 48 S. E. 423, 120 Ga. 1076.

A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. *Mueller v. Renkes* (Mont.) 77 Pac. 512, 513.

One of the essentials of a mortgage is the existence of an indebtedness, payment of which the mortgage is designed to secure. An instrument, in form a conditional bill of sale, is not made a mortgage by reason of the fact that it contains a provision that the instrument shall be void if the grantors pay a certain sum of money by a certain day. *Smith v. Hope* (Fla.) 35 South. 865, 866.

The word "mortgage," as used in Const. art. 13, § 4, providing that a mortgage by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in property affected thereby, has reference to mortgages on realty alone, an employment of the word countenanced even in legal usage, where "mortgage" is generally employed and meant to apply to the creation of liens upon real estate, while like liens upon personalty are designated as "chattel mortgages." *Bank of Woodland v. Pierce* (Cal.) 77 Pac. 1012, 1013.

MORTGAGEE IN POSSESSION.

The expression "mortgagee in possession" has been adopted by the courts and law writers as a convenient phrase to describe the condition of a mortgagee, who is in possession of mortgaged premises under such circumstances as to make the satisfaction of his lien a prerequisite to his being

dispossessed, even in jurisdictions where the mortgage itself can confer no possessory right, either before or after default. *Stouffer v. Harlan* (Kan.) 74 Pac. 610, 611, 64 L. R. A. 320.

MORTGAGOR.

See "Creditors of the Mortgagor."

MOTION FOR NEW TRIAL.

A motion for a new trial is, in this state, a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided in the statute. The losing party must pursue the requirements of the statute, or else he cannot avail himself of the remedy. *State v. District Court of Second Judicial Dist.*, 74 Pac. 414, 415, 29 Mont. 176.

MOTION FOR NONSUIT.

A motion for nonsuit is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence falls in some particular matters. *State v. Eubank*, 74 Pac. 378, 33 Wash. 293 (citing *State v. Hyde*, 22 Wash. 551, 61 Pac. 719).

MOTION FOR VERDICT.

A motion for verdict is considered in law as in the nature of a demurrer to the evidence, and on a motion for a verdict the province of the court is not to weigh the evidence and ascertain where the preponderance is, but it is limited to a determination as to the existence of evidence from which, if true, it may be reasonably inferred that the fact affirmed exists, excluding the effect of all modifying or contrary evidence. *Bass v. Rublee* (Vt.) 57 Atl. 965, 966.

MOTIVE.

Intent distinguished, see "Intent."

MUCK BAR.

"'Muck bar' is more advanced than pig iron, for it is the product of pig iron after its conversion into wrought iron in the puddling furnace. But to make muck bar the wrought iron is rolled through a set of rolls. This rolled iron comes from the rolls in bar form. * * * Knight's Mechanical Dictionary defines 'muck bar' as 'bar iron which has passed once through the rolls.'" *Moorehead Bros. & Co. v. United States* (U. S.) 127 Fed. 779.

MULTIFARIOUS.

A bill is generally understood to be multifarious when distinct and independent matters are improperly joined in one bill, and thereby confounded, as, for example, where several perfectly distinct and unconnected matters against one defendant are united in one bill. *Baumgartner v. Bradt*, 69 N. E. 912, 913, 207 Ill. 345.

MULTIPHASE SYSTEM.

Technically the "multiphase system," as used in the transmission of electric power, consists of the use of two or more alternate currents of equal period, but differing in phase. *Harrison v. Detroit, Y., A. A. & J. Ry.* (Mich.) 100 N. W. 451, 452.

MUNICIPAL.

The term "municipal," as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special. *Merchants' Nat. Bank v. Escondido Irr. Dist.*, 77 Pac. 937, 938, 144 Cal. 329.

MUNICIPAL AFFAIR.

The power to impose a license tax for revenue purposes, granted by the state to a municipality for municipal purposes, became a "municipal affair," within Const. art. 11, § 6, providing that cities and their charters shall be subject to and controlled by general laws, except in municipal affairs, and the Legislature was without authority to withdraw or modify such power. *Ex parte Braun*, 74 Pac. 780, 783, 141 Cal. 204.

A provision in a charter authorizing a municipality to impose and collect a license tax for purposes of municipal revenue is a "municipal affair," and within the proper scope of a municipal charter. *Ex parte Jackson*, 77 Pac. 457, 460, 143 Cal. 564.

MUNICIPAL CORPORATION.

A municipal corporation is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, instituted for the purpose of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it deems adequate to the ends to be accomplished. *State v. Butler*, 77 S. W. 560, 570, 178 Mo. 272 (quoting *Nashville v. Ray*, 86 U. S. [19 Wall.] 468, 475, 22 L. Ed. 164).

A municipal corporation is a subordinate subdivision of the state government. It derives its existence, powers, and privileges from the state. *State v. City of Aberdeen*, 74 Pac. 1022, 1023, 34 Wash. 61.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. *People v. Sours*, 74 Pac. 167, 172, 31 Colo. 369 (citing 1 Dill. Mun. Corp. § 23).

Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative powers. *Wolff v. City of Denver* (Colo.) 77 Pac. 364, 365 (citing *Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248).

A municipal corporation, in the machinery of the state, is a mere agency. It possesses no inherent and independent authority to create rights in others which affect the public interests. *Rhinehart v. Redfield*, 87 N. Y. Supp. 789, 791, 93 App. Div. 410.

MUNICIPAL OFFICER.

Judges of city courts, organized by Rev. St. 1899, c. 87, § 240, are municipal officers, within Const. art. 9, § 11, providing that the fees, salary, or compensation of no municipal officer elected or appointed for a definite term shall be increased or diminished during the term. *Wolf v. Hope*, 70 N. E. 1082, 1087, 210 Ill. 50.

A private policeman or watchman employed by a private corporation, who is paid by the corporation and who may be discharged by it, is not a municipal officer, so as to make his wages exempt from garnishment, notwithstanding the fact that he was empowered to make arrests and subject to the supervision and control of the city police department. *Tabb v. Mallette*, 47 S. E. 587, 588, 120 Ga. 97.

MUNICIPAL ORDINANCE.

A municipal ordinance is a local law, affecting the property, rights, and liberty of citizens, who are entitled to know at what time and under what circumstances it acquires that status. *Mayor and Board of Trustees of Town of New Iberia v. Moss Hotel Co.*, 36 South. 552, 553, 112 La. 525.

MURDER.

See "Assault with Intent to Murder." Manslaughter distinguished, see "Manslaughter."

Murder is where a person of sound memory and discretion unlawfully kills any human being under the peace of the state,

with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from manslaughter and every other kind of homicide, and therefore indispensably necessary to be proved, is malice preconceived or aforethought. *State v. Brinte* (Del.) 58 Atl. 258, 262.

The crime of murder is the unlawful killing of a human creature in being with malice aforethought, either express or implied. If the killing is proved, it must be also proved that it was done with malice, either express or implied, before the person charged can be convicted of murder; but such malice may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief, or a reckless disregard of human life. The deliberate selection of a deadly weapon has been held to be evidence of malice, and where malice exists, together with the killing, the crime of murder is complete. *State v. Scott* (Del.) 57 Atl. 534, 535.

MURDER IN FIRST DEGREE.

Willful, deliberate, and premeditated killing, without any motive appearing at all, is murder in the first degree. *State v. Jaggers* (N. J.) 58 Atl. 1014, 1015.

To constitute murder in the first degree it is not essential that there should be any appreciable space of time between the intent to kill and the act of killing; i. e., any interval "capable of being appreciated or duly estimated." The intent to kill must be formed deliberately and with premeditation; but, when so formed, there need be no appreciable space of time between the intent and the act. *People v. Suesser*, 75 Pac. 1093, 1097, 142 Cal. 354.

If a person inflicts upon another a fatal wound, intending thereby to cause that other's death, and such intention is effected, there being no attending circumstances rendering the homicide justifiable or excusable, such person is guilty of murder in the first degree. *Cupps v. State* (Wis.) 97 N. W. 210.

If a person takes the life of another by an act naturally calculated to produce that result, in the absence of any explanatory circumstance or circumstances rendering the homicide excusable or justifiable, or criminal in some degree less than the highest, or creating a reasonable doubt in regard to one of such contingencies, the law presumes that he intended the result effected, and he is guilty of murder in the first degree. *Cupps v. State* (Wis.) 97 N. W. 210.

MURDER IN SECOND DEGREE

Murder in the second degree is where there is no such deliberate mind and formed design to take life, but where, nevertheless, the killing is malicious and without justifica-

tion or excuse, without any provocation, or without sufficient provocation to reduce the homicide to the grade of manslaughter. *State v. Emory* (Del.) 58 Atl. 1036, 1038.

MUTILATE.

"Mutilate" is defined by the Standard Dictionary as follows: "To cut off or deprive of a limb or essential part of, as an animal body; maim; cut or break off, or otherwise remove any part of, as a statue; disfigure; to retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect, as a literary composition; as to mutilate a speech." The main idea of such a definition is the removal of an essential part, so that the whole is rendered imperfect. A railroad ticket is not mutilated, within the meaning of a stipulation on the face thereof that it should not be good for passage if mutilated in any way, where both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, and that together they form the entire ticket. *Young v. Central of Georgia R. Co.*, 47 S. E. 556, 120 Ga. 25, 65 L. R. A. 436.

MUTUALITY.

A contract is void for lack of "mutuality" where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined whether he will want any of the commodity, or what quantity he will want. *Higbie v. Rust*, 71 N. E. 1010, 1011, 211 Ill. 333.

An engagement lacks "mutuality" where one party is bound and the other is not; for example, where one offers to supply another with such goods of a certain kind as he may choose to order or may wish during a certain time, and the other accepts the offer. In such case, there is no consideration for the promise or offer; for the promisee has not bound himself to anything and has incurred no legal liability at all. *Steinwender-Stoffregen Coffee Co. v. F. T. Guenther Grocery Co.* (Ky.) 80 S. W. 1170, 1171 (citing 7 Cyc. 327).

MY.

All my property, see "All."

My farm.

A devise of "my farm" includes, not only the testator's homestead, but also other outlying lots, which had been used by the tes-

tator in carrying on the business of farming for years before he wrote his will, and which had been referred to in business transactions as his farm. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

My legal heirs.

A clause in a will providing for the division of property among "my legal heirs" refers to the next of kin and legal heirs of the testator, and does not include the next of kin or legal heirs of his wife. *Miller v. Metcalf*, 58 Atl. 743, 744, 77 Conn. 176.

My moneys, bonds, etc.

A bequest to a hospital of "my moneys, bonds, notes, and money in savings bank" included railroad stock and scrip, when considered in the light of the other provisions and the general construction of testator's will, which provided for the payment of all testator's debts and two small legacies, then disposed of testator's live stock, household furniture, and land to the hospital, which left to be disposed of merely notes, bonds, money in savings bank, and the railroad stock and scrip; the stock and scrip being avails of the bonds, and the testator's evident intention being to dispose of the bulk of his whole estate to the hospital. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

NARROW.

See, also, "Galloon."

The word "narrow," as used in the definition of "galloon" as a "narrow, tapelike fabric used for binding hats, shoes, etc.," is a relative term of varying meanings. It is easy to conceive of a tapelike fabric so narrow as to come within the definition, and equally easy to conceive of one so wide that it must fall without it. There is nothing in the dictionary which indicates just where the dividing line occurs. Certain woven cotton articles, from 1 to 2½ inches wide, chiefly used as hat bands for trimming men's hats, are not galloons, under Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule I, par. 263, 23 Stat. 529. *United States v. Walter H. Graef & Co.* (U. S.) 127 Fed. 688, 689, 62 O. C. A. 414.

NATURAL STATE.

See "Arrowroot in Its Natural State."

NAVIGABLE.

A stream which in its natural state can be practicably used for the floating of shingle bolts to market is a navigable stream. *Monroe Mill Co. v. Menzel*, 77 Pac. 813, 815, 35 Wash. 487.

The navigability of a stream is shown where it appears that, a great many years

previously, boats navigated it at certain seasons of the year, and there is no evidence that its condition has changed. *Miller & Lux v. Enterprise Canal & Land Co.*, 75 Pac. 770, 771, 142 Cal. 208, 100 Am. St. Rep. 115.

A navigable stream is a highway open to the use of all. *State v. Charleston Light & Water Co.*, 47 S. E. 979, 983, 68 S. C. 540.

"If a stream is 'navigable in fact, it is navigable in law.' Gould, Waters (3d Ed.) § 67. The capability of being used for purposes of trade and travel in the usual and ordinary mode is the test, and not the extent and manner of such use. * * * Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town on the shore, with numerous streets and wharves, or whether * * * one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access to the land. It is the navigability of the water that is the test." *State v. Twiford* (N. C.) 48 S. E. 586, 587.

A slough emptying into the sea, which during the ebb and flow of the tide is navigable for scows and for rafting and booming logs, is a navigable stream. *Dawson v. McMillan*, 75 Pac. 807, 808, 34 Wash. 269.

NAVIGABLE WATER OF THE UNITED STATES.

The Erie Canal, which, though lying wholly within the state of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with the Hudson river, is a navigable water of the United States, as contradistinguished from a navigable water of the state. *Perry v. Haines*, 24 Sup. Ct. 8, 11, 191 U. S. 17, 48 L. Ed. 73.

NAVIGATION.

Navigation is defined by Bouvier as whatever relates to traversing the sea in ships; the art of ascertaining the geographical position of a ship and directing its course. The construction of a dock, while it may be useful to individuals engaged in navigation, is not involved in the public right of navigation as understood by the law. *Trustees of Town of Brookhaven v. Smith*, 90 N. Y. Supp. 646, 651.

NECESSARILY INCLUDED.

To be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. *People v. Kerrick*, 77 Pac. 711, 712, 144 Cal. 48.

NECESSARY.

The word "necessary," as used in Rev. St. 1898, c. 48, providing for the taxation of railroads according to gross profits, and section 1038, subd. 14, declaring that all the track, right of way, depot grounds, and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad, shall be exempt from taxation for any purpose, except special assessments for local improvements, means neither inevitable nor merely convenient or profitable, but refers to a stage of utility or materiality to the general business of a common carrier less than the first and greater than the latter of such expressions. *Chicago, St. P., M. & O. R. Co. v. Douglas County* (Wis.) 99 N. W. 1030, 1031.

The word "necessary," as used in Rev. St. c. 34, § 26, making it the duty of the county board of each county to provide a suitable courthouse when "necessary" and the finances of the county will justify it, "is not to be interpreted as referring to such measures as are absolutely and indispensably necessary, but as including all appropriate means which are conducive or are adapted to the end to be accomplished, and which in the judgment of the board will most advantageously effect it." *Coles County v. Goehring*, 70 N. E. 610, 617, 209 Ill. 142.

NECESSARY EXPENSES.

Any and all necessary expenses, see "Any."

NECESSARY IMPLICATION.

"Necessary implication means, not natural necessity, but so strong a probability of an intention that an intention contrary to that which is imputed to the testator cannot be imposed. *Galloway v. Durham* (Ky.) 81 S. W. 659, 660 (quoting 1 Ves. & B. 468).

NECESSARY PARTY.

See "Not a Necessary Party."

NECESSITY.

See "Work of Necessity."

NEGATIVE PREGNANT.

A denial that the defendants are indebted to plaintiff in the precise sum charged in the petition, and that the use and occupation of the premises is worth the sum mentioned in the petition, is a "negative pregnant," and is no denial at all; and where such a pleading is filed by way of an answer the allegations of the petition are treated as admitted. *Jackson v. Green*, 74 Pac. 502, 503, 13 Okl. 314.

Where a plaintiff alleges that he is and has been for the last 10 years the owner and in possession of land, an answer denying that plaintiff is and has been for the last 10 years the owner and in possession of the land, is in form a "negative pregnant." *J. I. Porter Lumber Co. v. Hill* (Ark.) 77 S. W. 905, 906.

A finding by a jury that a sheriff had not neglected and failed to present and have approved his official bond as sheriff, and take the oath of office, within the time prescribed by law, amounts to a "negative pregnant," and should be treated as an admission of the implied fact. *State v. Box* (Tex.) 78 S. W. 982, 984.

NEGLECT.

The word "neglect," as used in Rev. St. Idaho, § 4100, providing that, when a person's death is caused by the wrongful act or neglect of another, his heirs and personal representatives may maintain an action for damages against the person causing the death, stands in the same category with wrongful act, and implies some omission of duty. The death of a free passenger on a railway train, not due to the omission on the part of the railway company of any duty owing to deceased, cannot be considered as caused by the neglect of the railroad company, and hence the heirs or personal representatives of the deceased cannot maintain an action under the section. *Northern P. R. Co. v. Adams*, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513.

NEGLIGENCE.

See "Actionable Negligence"; "Contributory Negligence"; "Gross Negligence"; "Hazardous Negligence"; "Ordinary Negligence"; "Wanton Negligence."

Negligence is the absence of care, according to the circumstances. *Martin v. City of Williamsport*, 57 Atl. 1063, 208 Pa. 590; *Drinkwater v. Quaker City Cooperage Co.*, 57 Atl. 1107, 208 Pa. 649.

The simplest definition of negligence is absence of due care under the circumstances. *Nord v. Boston & M. Consol. Copper & Silver Min. Co.* (Mont.) 75 Pac. 681, 684.

Negligence implies a failure to do something which duty or prudence requires should have been done. *Gill v. Fugate* (Ky.) 78 S. W. 188, 191.

Negligence is the failure to do something that the doer in the exercise of ordinary care should have done. *Shemwell v. Owensboro & N. R. Co.* (Ky.) 78 S. W. 448, 449.

Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situations. *L. W. Pomerene Co. v. White* (Neb.)

97 N. W. 232, 233 (citing Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209).

Negligence is the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances. Kentucky & I. Bridge & R. Co. v. Shrader (Ky.) 80 S. W. 1094, 1095.

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care." Northern P. R. Co. v. Adams, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513 (quoting Pollock, Torts, p. 355, quoting from Baron Alderson in Blyth v. Birmingham Waterworks Co., 11 Exch. 784).

Negligence in a legal sense is a failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. While the obligation to exercise care in the conduct of one's business varies under different circumstances, there always remains the duty to exercise such reasonable care as should be exercised by a person of ordinary prudence under like circumstances. Szymanski v. Blumenthal (Del.) 56 Atl. 674, 675 (citing Tully v. Philadelphia, W. & B. R. Co. [Del.] 2 Pennewill, 537, 47 Atl. 1019, 82 Am. St. Rep. 425).

Negligence is the doing of something which under the circumstances a reasonable person would not do, or the omission to do something, in the discharge of a legal duty, which under the circumstances a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. Williams v. Belmont Coal & Coke Co. (W. Va.) 46 S. E. 802, 804 (quoting Washington v. Baltimore & O. R. Co., 17 W. Va. 190).

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion. Klenk v. Oregon Short Line R. Co., 76 Pac. 214, 215, 27 Utah, 428.

Negligence is the want of ordinary care, or such care as persons of average prudence would exercise under the same circumstances. A mere error in judgment is not necessarily negligence. Carney v. Concord St. Ry. Co., 57 Atl. 218, 222, 72 N. H. 364.

An essential ingredient to any conception of negligence is that it involves the vio-

lation of some legal duty which one person owes another—a duty to take care for the safety of the person or property of the other. This duty may be assumed by contract, or it may be imposed by implication of law. Phoenix Light & Fuel Co. v. Bennett (Ariz.) 74 Pac. 48, 50, 63 L. R. A. 219.

Negligence has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. It has been termed the failure to observe, for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Di Prisco v. Wilmington City R. Co. (Del.) 57 Atl. 906, 909.

Negligence is not a thing, but a relation. "The word 'negligence' implies a duty to use due diligence, and such a duty may be owed to one person, and not to another." Boston & M. R. R. v. Sargent, 57 Atl. 688, 691, 72 N. H. 455 (quoting Mowbray v. Merryweather [1895] 2 Q. B. Div. 640, 647).

There can be no negligence where there is no legal duty. Cumberland Telegraph & Telephone Co. v. Martin's Adm'r (Ky.) 77 S. W. 718.

An act done willingly and on full information is not done negligently. Negligence is the result of inattention or oversight. Dean v. St. Louis Woodenware Works (Mo.) 80 S. W. 292, 296.

An essential ingredient of any conception of the law of negligence is that it involves the violation of a legal duty which one person owes another, the duty to take care for the safety or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Saylor v. Parsons, 98 N. W. 500, 502, 122 Iowa, 679, 64 L. R. A. 542 (quoting Thomp. Neg. § 3).

Negligence consists in doing or permitting an act by which a legal duty or obligation has been violated. Glaser v. Rothschild (Mo.) 80 S. W. 332, 334 (citing Sweeny v. Old Colony & N. R. Co., 92 Mass. [10 Allen] 372, 87 Am. Dec. 644).

Negligence and carelessness are generally esteemed as not only not willfulness, but rather the opposite. Schooler v. Harrington, 81 S. W. 468, 469, 106 Mo. App. 607 (following Gibeline v. Smith, 80 S. W. 961, 106 Mo. App. 545).

Negligence, when applied to a railroad company and its employes and servants while receiving and transporting passengers, means the failure to use that degree of care which very cautious, prudent, and competent persons usually exercise. St. John v. Gulf, C. & S. F. Ry. Co. (Tex.) 80 S. W. 235, 236.

Negligence of a railroad company, whereby fire is communicated to adjacent premises, may consist in not being provided with the best appliances to prevent the unnecessary escape of fire from its locomotives, in not keeping such appliances in repair, in not keeping its right of way free from combustible material, in operating its locomotives so as to unnecessarily scatter fire, and in not arresting the spread of fire after it has been set by its engines from its negligence on its right of way. *Louisville & N. R. Co. v. Fort* (Tenn.) 80 S. W. 429, 434 (citing *Thomp. Neg.*).

The question of negligence is determinable by what an ordinarily prudent person would have done under the same or similar circumstances. If a person of ordinary prudence, standing in the place of an engineer, would have kept a lookout and discovered the burning bridge in time to have stopped the engine or slackened its speed, so that plaintiff, the fireman, could have alighted with reasonable safety before reaching the bridge, the failure of the engineer to do what such person of ordinary prudence would have done would constitute negligence. *Missouri, K. & T. R. Co. v. Keaveney* (Tex.) 80 S. W. 387, 389.

NEGLIGENT OPERATION.

Negligent operation is the failure to use the proper means at hand in a proper and careful way as persons of ordinary prudence do under like conditions for their own safety. *Central Coal & Iron Co. v. Pearce* (Ky.) 80 S. W. 449, 450.

NEGOTIABLE INSTRUMENT.

A negotiable instrument is one that is simple, certain, and unconditional, and is so defined by the law merchant. It has always been held, both at the common law and by the decisions of most states, that any instrument which does not come within this definition should not be construed to be a negotiable instrument. *Randolph v. Hudson*, 74 Pac. 946, 948, 12 Okl. 516.

NEITHER PARTY, ETC.

The entry of "Neither party, no further action, same cause," means that by agreement neither party further appears in court in that suit, and it also involves a stipulation that the plaintiff shall maintain no further action for the same cause. The plaintiff's cause of action is extinguished. *Gendron v. Hovey*, 56 Ati. 523, 98 Me. 139.

NET PROFITS.

Net profits may be construed to mean what is left after deducting from the selling price the actual cost price, together with all

expenses incidental to the procurement of the property. *Cooke v. Cain*, 77 Pac. 682-684, 35 Wash. 353.

NEW BILL.

If the amendment or substituted bill presents a measure that has no relation to the bill as originally introduced, it cannot stand, for it is in substance a new measure or bill. If the substitute has a clear relation to the subject of the original bill, it can be said to be germane, and will not be treated as a new bill. A bill to provide for a board of county auditors for a designated county was introduced and referred to a committee. The committee reported the bill, with a substitute identically like the original bill, except that another county was substituted for that of the county mentioned in the original bill. Under the definition this change made the substitute a new bill. *People v. Loomis* (Mich.) 98 N. W. 262, 265.

NEW CAUSE OF ACTION.

The expression "new cause of action" can be taken, when used on the subject of amendment, as intending nothing more than a new right or claim arising out of the same transaction. If it were not so—that is, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint—then it would constitute what we have sometimes designated as an entirely new cause of action, and one which could not be introduced into the complaint by amendment, if objected to. Identity of transaction is therefore the basis for the introduction by way of amendment of counts on new claims or rights arising out of the same. *Nelson v. First Nat. Bank*, 36 South. 707, 709, 139 Ala. 578.

NEW STRUCTURE.

Where the owner of a building remodeled and reconstructed internally, and also reconstructed with new material some or all of its walls, so as to substantially enhance the value of the premises, such new parts and the remodeling and improvements of the old may be returned by the assessor as "new structures," within Rev. St. 1892, § 2753, requiring the assessor to make and return a list of all new structures of any kind. *Lewis v. State*, 69 N. E. 980, 982, 69 Ohio St. 473.

NEW TRIAL.

See "Motion for New Trial."

NEWSPAPER.

A "newspaper" is defined as a publication issued at regular stated intervals, con-

taining, among other things, the current news or news of the day. A publication printed daily, except Sundays and legal holidays, and devoted to the dissemination of news on a great variety of topics of interest to the general reader, but giving special prominence to legal news, including the proceedings in the Supreme Court of the state and of the local courts sitting in the state, is a newspaper. *Puget Sound Pub. Co. v. Times Printing Co.*, 74 Pac. 802, 804, 33 Wash. 551 (citing 21 Am. & Eng. Enc. Law [2d Ed.] p. 533).

A weekly publication, printed and circulated in a city, containing the current news and matters of general interest, as well as the local happenings, is a "newspaper," within the meaning of the statute requiring the publication of city ordinances, although its circulation may be very limited. *Kansas City v. Overton* (Kan.) 75 Pac. 549, 550.

NEXT FRIEND.

The guardian and next friend, in conducting a civil action, are a "species of attorney, whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. *Williams v. Cleaveland*, 58 Atl. 850, 853, 76 Conn. 428.

NEXT HIGHEST BIDDER.

The phrase "next highest bidder," as used in Act Cal. March 11, 1901, relating to the granting of a street railway franchise by a municipality to the next highest bidder on the failure of a successful bidder to make the requisite deposit within a specified time, refers to bids already made, and not to a bid or bids to be made. It expresses the relation between bids in existence—those already made and pending before the council. It is only in comparison with the next highest of those that the words have significance. *Pacific Electric R. Co. v. Los Angeles*, 24 Sup. Ct. 586, 589, 194 U. S. 112, 48 L. Ed. 896.

NEXT OF KIN.

"The term 'next of kin' is used to signify the relatives of a person, sometimes in the sense of nearest blood relatives and at other times in the sense of relatives entitled to take under the statute of distribution." *Graham v. Whitridge* (Md.) 57 Atl. 609, 617, 66 L. R. A. 408, Id., 58 Atl. 36, 66 L. R. A. 408 (citing 21 Am. & Eng. Enc. Law, 537).

The words "next of kin," as used in Code Civ. Proc. § 2643, relating to letters of administration with will annexed, where there is no executor qualified to act, and providing in subdivision 3 that where the residuary, principal, or specified legatee, or the

guardian of a minor, entitled to letters, either do not exist or will not accept administration, letters shall issue to one or more of the next of kin, must be limited to such of the next of kin as are entitled to share in the unbequeathed assets of the estate, and who are therefore persons interested therein; and a person having no such right is to be excluded. *In re Goggin's Estate*, 88 N. Y. Supp. 557, 559, 43 Misc. Rep. 233.

It is only as to the adopting parent that the adopted child is made heir or next of kin by the statute, Comp. Laws 1897, § 8780, providing that an adopted child shall become the heir at law of the person adopting it; and the adopted child, therefore, is not heir by right of representation of the kindred of the person who adopted it. *Van Derlyn v. Mack* (Mich.) 100 N. W. 278, 280, 66 L. R. A. 437 (quoting *Helms v. Elliott*, 14 S. W. 930, 89 Tenn. 446, 10 L. R. A. 535).

NEXT OF KINDRED.

The words "next of kindred," as used in a will limiting a remainder on a trust estate after the beneficiary's death to her next of kindred, include the beneficiary's nephew and niece in preference to her grandnephews and grandnieces. *Graham v. Whitridge* (Md.) 57 Atl. 609, 617, 66 L. R. A. 408; Id., 58 Atl. 36, 66 L. R. A. 408.

NO CAUSE OF ACTION.

The direction of a verdict of "no cause of action" at the close of plaintiff's proof, on motion for nonsuit on the ground of failure to prove absence of contributory negligence, is equivalent to a nonsuit because of insufficiency of the evidence, and not because of the insufficiency of the complaint. *Romaine v. New York, N. H. & H. R. Co.*, 86 N. Y. Supp. 248, 249, 91 App. Div. 1.

NO FURTHER ACTION.

See "Neither Party, Etc."

NOMINAL DAMAGES.

"Nominal damages are a small and trivial sum, awarded for a technical injury, due to a violation or invasion of some legal right, and as a consequence of which some damages must be awarded to determine the right. They are not given as an equivalent for the wrong, but in recognition of a technical injury. There need be no actual damage, however small. They are called nominal damages, in contradistinction to actual, substantial, or compensatory damages. They are damages in name only, not in fact. They have been described as a peg on which to hang costs; but they are still recognized as the subject of a substantial legal claim, and the party is entitled to them if he can show

any injury to his right. If he establishes a cause of action—that is, an injury in its technical sense—and fails to show any damage, or damage, he can recover nominal damages.” *Chaffin v. Fries Mfg. & Power Co.*, 47 S. E. 226, 228, 135 N. C. 95.

NOMINATION.

See “Party Nomination.”

NONJOINER OF PARTIES.

“A nonjoinder, or, as expressed in the Code, ‘a defect, of parties plaintiff or defendant,’ means sufficient parties, and has no application to a case of too many parties, or the joining of a person having no interest in the litigation.” *Mader v. Plano Mfg. Co.* (S. D.) 97 N. W. 843, 845.

NONPECUNIARY DAMAGES.

Nonpecuniary damages are those the amount of which cannot be determined by any known rule, but depend upon the enlightened judgment of an impartial court or jury. In this class are included damages for pain, suffering, loss of reputation, impairment of faculties, etc. *L. W. Pomerene Co. v. White* (Neb.) 97 N. W. 232, 234.

NONRESIDENT.

The words “nonresidents of that estate,” as used in Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, pp. 508, 509], providing that any suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction, may be removed into the Circuit Court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that state, are equivalent to the words “not being citizens of that state.” *Madisonville Traction Co. v. St. Bernard Min. Co.* (U. S.) 130 Fed. 789, 791 (citing *Martin v. Baltimore & O. R. Co.*, 151 U. S. 676, 677, 14 Sup. Ct. 533, 38 L. Ed. 311).

NONSUIT.

See “Motion for Nonsuit.”

Retraxit distinguished, see “*Retraxit*.”

NOON.

The word “noon” in an insurance policy means noon by sun time. *Meier v. Phoenix Ins. Co.*, decision of lower court of Ohio, affirmed in the Supreme Court on an equal division, and unreported. See 32 Ins. Law J. 192.

In construing a policy of insurance on a vessel, ending at “noon” of a certain date, it

is held that the parties must be considered as regarding the meridian of the place where the contract is made, unless some other one is mentioned in it. *Walker v. Protection Ins. Co.*, 29 Me. 317, 321.

NORTH RIVER.

The words “North river,” as used in a marine policy on a scow, containing the following provision: “Warranted by the assured to be employed exclusively in the freighting business, and to navigate only the waters of the bay and harbor of New York, the North and East rivers, and inland waters of New Jersey”—cannot be extended by construction to include tributaries of the Hudson in the state of New York, and there can be no recovery under the policy for an injury to the scow received while she was lying in a dock in Rondout Creek, 2½ miles from the Hudson. *Hastorf v. Greenwich Ins. Co.* (U. S.) 132 Fed. 122, 124.

NOT A NECESSARY PARTY.

The term “not a necessary party” means that the suit can proceed just as well without him, and in that event, if his presence has the effect to hinder or burden the case, he may be dropped. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 528.

NOTE.

See “Action on a Note”; “Promissory Note.”

As property, see “Property.”

NOTICE.

See “Actual Notice”; “Constructive Notice”; “Immediate Notice”; “Requisite Notice.”

Actual knowledge synonymous, see “Actual Knowledge.”

Citation distinguished, see “Citation.”

The word “notice” means actual notice, in Pub. St. 1882, c. 144, § 9, providing that, when an account of a trustee is settled in the absence of a person adversely interested and without notice to him, such account may be opened on the application of such person. *Parker v. Boston Safe Deposit & Trust Co.*, 71 N. E. 806, 807, 186 Mass. 393.

NOVATION.

A novation is the substitution of one obligation for another. *Tilden v. Gordon & Co.*, 74 Pac. 1016, 1017, 34 Wash. 92.

A novation requires the creation of new contractual relations, as well as the extinguishment of old. There must be the con-

sent of all the parties to the substitution, resulting in the extinction of the old obligation and the creation of a valid new one. *Held v. Caldwell-Easton Co.*, 89 N. Y. Supp. 954, 955, 97 App. Div. 301.

NOW DUE AND PAYABLE.

The allegation of a counterclaim, that plaintiff's indebtedness is "now due and payable," even treated as a statement of fact, does not show that the counterclaim existed at the time of the commencement of the action, as required by Code Civ. Proc. § 438. *Provident Mut. Building Loan Ass'n v. Davis*, 76 Pac. 1034, 1035, 143 Cal. 253.

NOXIOUS POTION OR SUBSTANCE.

"Noxious" means "hurtful, harmful, baneful, pernicious, destructive." "Potion" means "draught used as a liquid, medicine, or dose" (Webster, Dict.). "Poison" has been defined as "any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life" (Beck, Med. Jur.), and "as a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life" (Wharton & Stillé). The term "noxious potion or substance" is a broader term than "poison." "Poison" would not include powdered glass or boiling water, while "noxious potion or substance" would not only embrace poisons, but the latter. As used in a statute inflicting a punishment on any one mingling "any other noxious potion or substance with any drug, food, or medicine, with intent to kill or injure any person," the word "potion" applies to some hurtful or baneful liquid; and the words "noxious substance" means some solid of hurtful or baneful character. The phrase "noxious potion or substance" means some character of poison. *Runnels v. State (Tex.)* 77 S. W. 458, 460.

NUISANCE.

"Anything that worketh hurt, inconvenience, or damage to another, or his property, may constitute a nuisance." *Missouri, K. & T. Ry. Co. of Texas v. Anderson (Tex.)* 81 S. W. 781, 787 (quoting *Burditt v. Swenson*, 17 Tex. 489, 501, 67 Am. Dec. 665).

A nuisance is defined as an unreasonable, unwarrantable, or unlawful use of one's own property to the annoyance, inconvenience, discomfort, or damage of another. *Pritchard v. Edison Electric Illuminating Co.*, 87 N. Y. Supp. 225, 226, 92 App. Div. 178.

"'Nuisance,' in its largest sense, signifies anything that worketh hurt, inconvenience, or damage. It is either public, annoying all

the parties in the community, or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual" (Blackstone). "A 'nuisance,' in the ordinary sense in which the word is used, is anything that produces an annoyance, anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Indeed, it may be stated as a general proposition that every enjoyment by one of his own property, which violates the right of another in an essential degree, is a nuisance, and actionable as such at the suit of the party injured thereby. While it is true that every person has and may exercise exclusive dominion over his own property of every description, and has a right to enjoy it in all the ways and for all the purposes in which such property is usually enjoyed, yet this is subject to the qualification that his use and enjoyment of it must be reasonable, and such as will not prejudicially affect the rights of others." *Baker v. McDaniel*, 77 S. W. 531, 537, 178 Mo. 447 (quoting *Wood, Nuis.*).

"The term nuisance has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance." *Boyd v. Board of Councilmen (Ky.)* 77 S. W. 669, 673.

"What is a nuisance is a relative question oftener than it is an abstract fact. Blackstone was wise in not attempting an explicit and invariable definition, and in confining himself to general terms. He said a nuisance is 'anything that worketh hurt, inconvenience, or damage.'" *City of St. Louis v. Galt*, 77 S. W. 876, 879, 179 Mo. 8, 63 L. R. A. 778.

"The test of nuisance is not injury and damage simply, but injury and damage resulting from the violation of the legal right of another. There is no nuisance, however much of injury and damage may ensue; but, if a right is violated, there is an actionable nuisance, even though no actual damage results therefrom. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 78 S. W. 646, 647, 104 Mo. App. 713 (quoting *Wood, Nuis.* 1015).

"Under the statutes anything which produces noxious exhalations, offensive smells, or other annoyances, injurious to the health, comfort, or property of individuals, is a nuisance. It is not necessary that these odors be deleterious to health. It is sufficient if they offend the senses in such a manner as to produce actual discomfort." *Rhoades v. Cook*, 98 N. W. 122, 123, 122 Iowa, 336.

NULL

The terms "null" and "void" are used interchangeably. "Void" is defined as having no legal force, entirely null, incapable of confirmation or ratification; and "null" is defined as of no legal or binding force or validity, of no efficacy, invalid, void, nugatory, useless, or of no account or significance. *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 74 Pac. 1088, 1091, 29 Mont. 397 (citing *Standard Dict.*).

O. K.

"O. K." may have no title to be classed as elegant English, but in the business life of this country it has for many years been in common use, and has acquired a meaning which is not at all obscure or uncertain. *Webster's International Dictionary* defines it as "all correct." The *Century Dictionary* gives its meaning as "all right; correct; now commonly used as an indorsement, as on a bill." It is neither more nor less than a brief, but expressive, certificate of the correctness of the bill or claim on which it is indorsed. Hence mere "O. K." indorsements on bills by architects are a sufficient compliance with a contract for the erection of a building requiring an estimate to be given by the architect for 85 per cent. of work and materials, and providing that payments shall be made on written certificates of the architects, without designating any particular form of certificate. *Getchell & Martin Lumber & Mfg. Co. v. Petterson & Sampson* (Iowa) 100 N. W. 550, 554.

OATH.

The word "oath" does not necessarily imply perjury, for an oath may be taken outside of judicial proceedings, or by other lawful authority, and, although false, would not be perjury, but only false swearing. *United States v. Howard* (U. S.) 132 Fed. 325, 338.

OBITER DICTA.

"Made 'by the way,' and without argument or consideration." *Commonwealth v. Paine*, 56 Atl. 317, 319, 207 Pa. 45.

OBJECT.

"The object of an action is the relief demanded; the recovery of damages or the land or personality sued for; the restraint or other relief demanded." *Lassiter v. Norfolk & C. R. Co.* (N. C.) 48 S. E. 642, 643.

OBLIGATION.

See "Moral Obligation"; "Pecuniary Obligation."

A loan to the owner of a homestead, to pay a note due for the purchase money of the

homestead, the lender taking the owner's note, with an indorsement of a third person thereon to whom he looks for payment, is not an "obligation," within a constitutional exception rendering a homestead liable for an obligation contracted for the purchase thereof. *Wilhelm v. Locklar* (Fla.) 35 South. 6.

OBSCENE.

The word "obscene," when used, as in the statute, to describe the character of a book, pamphlet, or paper, means containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall, whose minds are open to such immoral influences. *United States v. Moore* (U. S.) 129 Fed. 159, 161 (citing *United States v. Clark* [U. S.] 88 Fed. 732).

A remark to a married woman: "Look me in the eye. Are you satisfied with the man you married?" will not sustain a conviction for using obscene and vulgar language in the presence of a female, where there is nothing in the evidence to indicate that the remark was intended to convey an obscene and vulgar meaning. *Roberts v. State*, 47 S. E. 511, 512, 120 Ga. 177.

OBSERVE.

The word "observe" is defined to mean "to notice with care; to be on the watch respecting." An employé has the right to assume that a machine is safe, and is chargeable with notice of dangers or defects that are plain and obvious to view, but is not bound to make an inspection to ascertain if the machine is free from defects; that is, he is not required "to take notice with care" and "to be on the watch" for defects or imperfections, which would be implied from the use of the word "observe" in an instruction that the law required him to be observing, and that his failure to observe what he should have observed would defeat a recovery. *Rock Island Sash & Door Works v. Pohlman*, 71 N. E. 428, 430, 210 Ill. 133.

OBTAIN.

"Obtain" means "to get hold of by effort," "to get possession of," or "to have in possession." On an indictment for obtaining money under false pretenses, it appeared that defendant, in Pennsylvania, to establish a financial credit, made written statements to a company in New York, which relied on the same, and accepted his order for goods, and delivered them to a carrier, and they were received in Pennsylvania by the person making the order. Held that, such statements being false and fraudulent, defendant was guilty of "obtaining" goods in Pennsylvania under false pretenses. *Commonwealth v. Schmunk*, 56 Atl. 1088, 1089, 207 Pa. 544, 99 Am. St. Rep. 801.

OCCUPANCY — OCCUPATION — OCCUPY.

See "Action for Use and Occupation"; "Actual Occupancy"; "Ready for Occupancy"; "Unoccupied."

"Occupancy" does not necessarily include residence. Webster defines "occupancy" as "the act of taking or holding possession," and an "occupant" as "one who occupies or takes possession; one who has the actual use or possession, or is in possession of a thing." *Twiggs v. State Board of Land Com'rs*, 75 Pac. 729, 731, 27 Utah, 241.

The word "occupation," as used in a statute providing that every contract or agreement for the leasing, rent, and occupation of buildings, not in writing, shall be a tenancy from month to month, terminable only by a month's written notice, does not mean a mere possession of premises by any one who happens to be in them or get in them, but means an occupation pursuant to an agreement between the owner and the occupier, sufficient to create the relation of landlord and tenant. Permission of a landlord to a tenant, on moving out, to leave boxes in the building for a few days, on the understanding that the tenant would turn the premises over clean and in good condition, is not such an occupation. *Sterling v. Helmann* (Mo.) 82 S. W. 539, 540.

"Occupied" implies actual possession, not constructive possession. A testator gave to his housekeeper for life the use of certain premises occupied by him. A portion of the premises was at the time of his death occupied by him as a residence, and a portion by a bank paying a monthly rental. The housekeeper acquired the use of the portion of the premises occupied as a residence only. In *re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

Under White's Ann. Pen. Code, arts. 839a, 845a, 845b, declaring that the term "private residence" shall be construed to be any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence, it is not necessary that the family be personally present at the very time it is burglarized, in order to constitute the offense of burglary of a private residence. It is sufficient, if it is actually used at the time as a private residence, though at the time it was burglarized the family was temporarily absent. *Handy v. State* (Tex.) 80 S. W. 526.

OCCUPATION.

The application for a life policy stated that assured's occupation was "dealer in pumps and well supplies." The policy stipulated that enumerated occupations, such as "blasting, mining, and handling or transporting of inflammable or explosive substances"

were risks not assumed by the insurer during the first year. The assured died within the year by reason of an explosion during an attempt to blow out a well casing with dynamite in the course of his designated business. The risk of using the dynamite did not constitute a risk not assumed by the insurer; the stipulation in the policy relating to an occupation different from that named in the application as assured's occupation. *Mortensen v. Central Life Assur. Ass'n* (Iowa) 99 N. W. 1059.

OCCUPIED BY ITS TRACKS.

The phrase "occupied by its tracks," in Pub. St. 1882, c. 113, §§ 32, 33, requiring every street railway company to keep in repair the paving of the portion of the street occupied by its tracks, refers to the rails and the space between them over which the cars pass. *City of Boston v. Boston Elevated Ry. Co.*, 71 N. E. 295, 186 Mass. 274.

OFFENSE.

See "Same Offense"; "Second Offense."

The term "offense," as used in Rev. St. §§ 4304-20a, 4304-20b, which provide for an election in any municipality to determine whether or not the sale of intoxicating liquors as a beverage shall be permitted, and which declare that whoever shall sell where sales are prohibited shall be guilty of a misdemeanor, and which prescribe the punishment for the first offense and for a second offense, embraces the entire charge, though there may be a number of counts, and means a conviction. Hence an affidavit charging three separate sales to different persons on the same day, without alleging a previous conviction, is in legal effect a charge of a first offense only. *Carey v. State*, 70 N. E. 955, 956, 70 Ohio St. 121.

OFFER.

To support a conviction for a violation of a statute punishing every person who shall corrupt or attempt to corrupt a juror, by offering to give any gift with intent to bias the juror, it is not necessary to prove an actual tender of the gift offered as a bribe, so as to enable the juror to at once accept or reject the same. Evidence showing a proposal or a willingness to give a bribe to bias the juror's verdict is sufficient. *State v. Woodard*, 81 S. W. 857, 861, 182 Mo. 391.

OFFICE.

See "Continuance in Office"; "Public Office."

A license to keep a dramshop is not an "office," which can be tested or vacated by

quo warranto. *Hargett v. Bell*, 46 S. E. 749, 750, 134 N. C. 394.

OFFICER.

See "City Officer"; "Judicial Officer"; "Legislative Officer"; "Ministerial Officer"; "Municipal Officer"; "Peace Officer"; "Public Officer"; "Salaried Officer"; "State Officer."

An "officer" is defined to be "one who is lawfully invested with an office." *State v. Kelly*, 77 S. W. 996, 997, 103 Mo. App. 711 (quoting *Bouvier*, Law Dict.).

The word "officer," as used in Greater New York Charter, Laws 1901, p. 109, c. 466, § 255, providing that the corporation counsel shall be the attorney for the city and each and every officer, and shall conduct all the law business in which the city is interested, and shall be the legal adviser of the mayor and city boards and officers, and shall furnish them such advice and legal assistance as may be required, clearly related to those officers who were on the same general footing as the mayor, city boards, and officers, etc., and not to the subordinate officers. *Donahue v. Keeshan*, 87 N. Y. Supp. 144, 147, 91 App. Div. 602.

Under Rev. St. 1889, § 5777, declaring the term "officers" to include any person holding any situation under the city government or any of its departments, with an annual salary or for a definite term of office, a person appointed to perform certain engineering duties with regard to sewers in a city of the third class, for no definite term, and to receive a per diem wage, is not an "officer," entitled to perform such work under section 5848, requiring the same to be performed by a city engineer or other officer. *Weesner v. Central Nat. Bank*, 80 S. W. 819, 820, 106 Mo. App. 668.

Inspector of buildings.

St. Louis City Charter, art. 4, § 43, defines the term "officers" to include "all persons holding any situation under the city government or its departments, with an annual salary or for a definite term." An inspector to assist the commissioner of public buildings in the inspection of private buildings in the course of erection is an officer. *Magner v. City of St. Louis*, 78 S. W. 782, 784, 179 Mo. 495.

School trustee.

A school trustee is an "officer," within the meaning of the word as used in a constitutional provision that all officers shall take a prescribed oath before entering on the duties of their office. *Buchanan v. Graham* (Tex.) 81 S. W. 1237, 1239.

OFFICER DE FACTO.

See "De Facto."

OFFICER OF THE COURT.

Bailiffs and criers of the federal courts, appointed to attend the same, as authorized by Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], though not constitutional officers, are "officers of the court." *United States v. McCabe* (U. S.) 129 Fed. 708.

OFFICIAL SURVEY.

An "official survey," under St. 1890, §§ 1734, 1735, must show distinctly of what piece of land it is a survey, at whose request it was made, what owners were notified and present at the date of the survey, and the name of the chairman; and if such essentials are omitted it cannot be treated as an official survey. *Watkins v. Havighorst*, 74 Pac. 318, 319, 13 Okl. 128.

OIL.

See "Linseed Oil"; "Manufacture of Oil."

OIL DEPOT.

See "Negligent Operation."

Any warehouse or place where oils are stored in large quantities is a depot within the meaning of a statute imposing a tax on "oil depots," wherein petroleum or other oils are stored in bulk or tank. *Standard Oil Co. v. Commonwealth* (Ky.) 82 S. W. 1020, 1022.

OLEOMARGARINE.

"Oleomargarine is a manufactured product made of oleo oil, neutral lard, milk and cream, and pure butter, although pure butter is not used in all grades, and butter and milk and cream and other coloring matter is evidently used for the purpose of giving it the semblance of the true dairy product." *State v. Armour Packing Co. (Iowa)* 100 N. W. 59, 60.

ON.

In calling for the Ohio river as the northern boundary of a magisterial district which bordered on it, the designation of the beginning point as "on the Ohio river" means that the district line begins in the line of the county on its northern shore. *Commonwealth v. Louisville & E. Packet Co. (Ky.)* 80 S. W. 154, 155.

ON OR ABOUT.

The words "on or about," in an indictment alleging that defendant "did, on or about the 1st day of April, 1901," commit the offense charged, do not render the month and the year, as well as the day, uncertain. The meaning of the language to the general understanding is that the time of the crime

was near the 1st day of April in the year 1901. There is no uncertainty as to the year. The words "April, 1901," mean April in the year 1901, and no resource of ingenuity can make them mean anything else. An averment in this language is of a time within the year, and if any day within the year may be proved the allegation is sufficient. An averment of time in an indictment is a matter of form, not generally material, and, in view of Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720], which provides that no indictment shall be deemed insufficient by reason of any defect in matter of form only, as well as under the Oregon statute, adopted by rule in the federal courts in that state, which provides that the precise time need not be stated, an indictment alleging the time of commission of the offense as on or about a day named is sufficient, except in cases where the time is an ingredient of the offense. *United States v. McKinley* (U. S.) 127 Fed. 168, 171.

ONE DWELLING HOUSE.

The words "one dwelling house," as used in a conveyance of land declaring that the grantee shall not occupy the premises, except for one dwelling house to each lot, are used in the sense in which the words are ordinarily used. A building planned and designed for two or more dwellings cannot properly be described as one dwelling house. A building designed and planned for two families, one to occupy the ground floor and one the second floor, each to have a separate entrance, violates the restriction in the conveyance. *Harris v. Roraback* (Mich.) 100 N. W. 391, 392.

OPEN COURT.

An "open court" contemplates the presence of the judge and the clerk of the court, or a duly qualified deputy, the regular opening and closing of the court, and the presence of the clerk's docket, upon which should be entered, under the eye of the court, the successive steps taken in open court in each case. *Hays v. Philadelphia, W. & B. R. Co.* (Md.) 58 Atl. 439, 441.

OPENED.

The word "opened," as used with reference to streets and public places, refers to the time when the city becomes vested with the title to the land on which the street or avenue is to run. But it was not used in that sense in *Laws 1895, p. 2037, c. 106, § 2*, relating to the discontinuing and closing of streets, and providing that the contiguous street bounding the plot or square wherein is situated the land sought to be closed and occupied has been opened; but the purpose of the act was to substitute one system of the public highways for another by opening new streets and closing old ones, and it was not

intended to physically close the streets of one system without providing something to take their places. *Johnson & Co. v. Cox*, 86 N. Y. Supp. 601, 603, 42 Misc. Rep. 801.

OPENLY.

An answer setting up that a waste ditch was used continuously, openly, peaceably, etc., sufficiently shows that the use was not clandestine, as the word "openly" sufficiently shows that fact. *Abbott v. Pond* (Wash.) 76 Pac. 60, 142 Cal. 393.

OPERATING.

Where railroad employes were transporting ballast on a push car for repair of a track, and had to remove the car from the track between trips and replace it on the track, they were "operating the car" within a statute providing that a railroad company shall be liable for injuries to a servant, in operating a car, through the negligent act of any other servant. *Seery v. Gulf, O. & S. F. Ry. Co.* (Tex.) 77 S. W. 950, 951.

In *Gen. Laws 1899, p. 214, c. 125, § 1*, providing that whenever freight, baggage, or other property has been transported over two or more railroads operating any part of their roads in this state and having an agent in this state, or operated by any assignee, trustee, or receiver of such railways, suit for loss or damages thereto may be brought against any one or all of such railroad corporations, the term "operating any part of their roads in this state" means that such corporations are engaged in the transportation of freight, baggage, or other property within the state. Where the undisputed evidence showed that a railway track did not extend into the state, and that the company was not engaged in the transportation of any freight, baggage, or other property within the limits of the state, but, in the course of business between it and another railroad company as connecting lines, the engines and cars of each road reciprocally passed over the boundary line of the states of Texas and Arkansas, in no sense could it be said that such interchange of business is within the term "operating any part of their roads within this state." *St. Louis, I. M. & S. R. Co. v. J. H. White & Co.* (Tex.) 80 S. W. 77, 79.

OPPOSITE PARTY.

The term "opposite party," as used in a statute providing for the reversal of a decree entered on a bill taken for confessed, and requiring reasonable notice to the opposite party of the motion to reverse, does not mean only the plaintiff, but any party to the suit, who has an interest in upholding the decree sought to be reversed, whose pecuniary or profiting interest would be prejudiced by reversal. It means opposite in interest. Mor-

rison & Co. v. Leach (W. Va.) 47 S. E. 237, 238.

OPTION.

Contract of sale distinguished, see "Contract of Sale."

"An option conveys no title to the thing sold, but creates rights in personam, which may be again sold or assigned by the vendee." *Womack v. Coleman* (Minn.) 100 N. W. 9, 11.

While an option to purchase, if based upon a sufficient consideration, binds the party granting it, it is not a contract of purchase, but simply a contract granting to the holder of the option the privilege of purchasing, and binds the party by whom it is given to sell and convey the property involved, upon the acceptance of the option, in accordance with the terms, and the compliance on the part of the acceptor with its requirements. *Tilton v. Sterling Coal & Coke Co.* (Utah) 77 Pac. 758, 760.

OR.

The use of the disjunctive "or" in "where goods, wares or merchandise are manufactured or offered for sale," means either where they are manufactured, or where they are offered for sale. *Baltimore & O. S. W. R. Co. v. Cavanaugh* (Ind.) 71 N. E. 239, 242.

The disjunctive "or," in an allegation that the death of a servant was caused by the negligence of the officials or some one of the employes of defendant, and especially by the negligence of the employes of defendant or its officers, indicates that the words "officers," "officials," and "employes" meant the same thing—co-employes or fellow servants of deceased. *State v. Chesapeake Beach Ry. Co.* (Md.) 56 Atl. 385, 386.

The meaning of the term "proper party," as used in the phrase "is not a proper or necessary party," is not so clear as the meaning of the term "not a necessary party." The word "or" may be used in two forms. In one it corresponds to "either," and in that sense the term "proper or necessary" would mean either proper or necessary; that is, one or the other. In the other form it means to express the same thing alternatively in different words. In that sense, the term "not proper or necessary" would imply that it was not proper; that is, not necessary. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 528.

ORDER.

See "Good Order"; "Taking Orders." Warrant synonymous, see "Warrant."

An order of the probate court discharging an order upon the executrix to show cause 8 Wds. & P.—60

why the homestead devised by the will of the testate should not be sold to pay debts of the estate is an "order refusing to direct the sale of real estate," within the meaning of subdivision 3, § 4665, Gen. St. 1894, and such order can be reviewed by appeal only, and not upon certiorari. In *re Wilson's Estate*, 97 N. W. 647, 91 Minn. 115; *Dee v. Wilson*, *Id.*

ORDER OF COURT.

The expression "orders of court" has been treated as covering not only orders of the courts in session, but orders of the absent judges. *United States v. McCabe* (U. S.) 129 Fed. 708, 711.

ORDINANCE.

See "Criminal Ordinance"; "Municipal Ordinance."

ORDINARY CARE.

Due care distinguished, see "Due Care."

The mere exercise of one's best judgment is not necessarily ordinary care. Men of average prudence sometimes arrive at erroneous conclusions from a heedless or careless consideration of the subject before them, or from want of ordinary care in other respects. *Carney v. Concord St. Ry. Co.*, 57 Atl. 218, 222, 72 N. H. 364.

No rule can be formulated fixing definitely the standard of ordinary care. "Every attempt to do it has resulted in failure. What is ordinary care in one case might be the grossest negligence in another." *Kube v. St. Louis Transit Co.*, 78 S. W. 55, 59, 103 Mo. App. 582 (quoting *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 595).

The term "ordinary or reasonable care," applied to the conduct of a child, means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. *Rohloff v. Fair Haven & W. R. Co.*, 58 Atl. 5, 7, 76 Conn. 689.

There is a want of ordinary care on the part of the plaintiff only when, under all of the circumstances and surroundings of the case, he has done, or omitted to do, something which "an ordinarily careful and prudent person," in a like situation as the plaintiff, would not have done, or omitted to do, and which was the efficient and proximate cause of plaintiff's injury. *Hone v. Mammoth Min. Co.*, 75 Pac. 381, 383, 27 Utah, 168.

"Ordinary care exercised by those who make a business of using electricity for profit to prevent injury to others therefrom requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater dan-

ger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention in avoiding injury to another to constitute what the law terms 'ordinary care.'" *Commonwealth Electric Co. v. Melville*, 70 N. E. 1052, 1053, 210 Ill. 70.

"The term 'ordinary care and diligence,' when applied to the management of electric railway cars in motion, must be understood to import all the care, circumspection, prudence, and discretion which the particular circumstances of the place or occasion require of the servants of the * * * company, and this will be increased or diminished as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of such cars." *Di Prisco v. Wilmington City R. Co.* (Del.) 57 Atl. 906, 909 (citing *Tully v. Philadelphia, W. & B. R. Co.* [Del.] 3 Pennwlll, 455. 50 Atl. 95).

ORDINARY DOCILITY.

Sheep are domestic animals of ordinary docility, within the rule that railroads must fence against "all domestic animals of ordinary docility." *Cotton v. Wiscasset, W. & F. R. Co.* (Me.) 57 Atl. 785, 786, 98 Me. 511.

ORDINARY NEGLIGENCE.

Ordinary negligence is the omission to exercise ordinary care—that degree of care generally exercised by an ordinarily prudent person under like circumstances. *Cummings v. Wichita R. & Light Co.* (Kan.) 74 Pac. 1104, 1105.

ORDINARY REPAIRS.

The replacing of a dozy or rotten round in a 40-foot extension ladder used in the business of an electric light company is not such ordinary repairs as a workman is usually expected to make, in the absence of proof that the defective condition of the round was known to the servant. *Twombly v. Consolidated Electric Light Co.*, 57 Atl. 85, 87, 98 Me. 353, 64 L. R. A. 551.

ORE.

See "Extra Good Ore."

ORGANIZED TOWN.

An incorporated village is an "organized town" within the statute requiring a duplicate of the auditor's notice of the meeting of the county board of commissioners to pass on the petition of the judge of the county seat to be posted, 10 days before such meeting, in a public place in each organized town of the county. *Tucker v. Board of Com'rs of Lincoln County*, 97 N. W. 103, 104, 90 Minn. 406.

ORIGINAL APPLICATION.

The "original application," as used in Rev. St. § 4897 [U. S. Comp. St. 1901, p. 3386], providing that a second application may be made within two years after the allowance of original application, means the first application. *Western Electric Instrument Co. v. Empire Electric Instrument Co.* (U. S.) 131 Fed. 90, 91.

ORIGINAL ENTRIES.

See "Book of Original Entries."

ORIGINAL UNDERTAKING.

If no other person is liable for the same debt for which the undertaking is made, although another person may be liable for a distinct debt which is the measure of the one in question, the undertaking is an original one. *Jolley v. Walker's Adm'ra*, 26 Ala. 690, 702.

ORNAMENT.

A watch and fob are embraced in the terms "jewels" and "ornaments," as used in Act 1879, p. 185, c. 145, relating to the liability of the proprietor of a hotel for the keeping of any jewels and ornaments belonging to a guest. Mr. Webster defines the word "jewel" as an ornament of dress, usually made of a precious metal, having enamel or precious stones as a part of its design; but we are of the opinion that it was used by the Legislature in the common meaning attributed to it as an ornament or useful article of value, and embraces a watch used for a timekeeper or chronometer, and in which precious stones may or may not form a part. The fob is evidently an article kept and worn both for use and ornament. *Rains v. Maxwell House Co.* (Tenn.) 79 S. W. 114, 117, 64 L. R. A. 470.

ORNAMENTAL FEATHERS.

Peacock feathers in a crude condition, used in that state for ornamental purposes, are dutiable under the provision in paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675], for "ornamental feathers," and not under that in the same paragraph for "feathers crude." *George Silva & Co. v. United States* (U. S.) 127 Fed. 781.

ORPHAN ASYLUM—ORPHANAGE.

Lexicographers are not unanimous, but lean toward a meaning for "orphanage" or "orphan asylum" suggesting destitution of those relieved, rather than a profit-seeking enterprise. *Standard Dict. "Orphanage."* "An institution for the care of destitute orphans;

orphan asylum." Cent. Dict. "Orphanage." "An institution or home for orphans; orphan asylum; an asylum or home for destitute orphan children." Webst. Dict. "Orphanage." "An institution or asylum for the care of orphans." Id. "Asylum." "An institution for the protection or relief of some class of destitute, unfortunate, or afflicted persons." *Baker v. State* (Wis.) 97 N. W. 568, 569.

OTHER.

See "Any Other."

Other accidental or natural causes.

Testator recited that having in mind the many catastrophes resulting from the action of the elements, and the great suffering, etc., caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes, etc., he devised the remainder of his estate to trustees to invest and pay the income for the charitable purpose of relieving the wants, distress, and suffering arising from such causes, and for the purpose of aiding such persons as the trustees deemed advisable who were victims of such accidents and catastrophes, and enjoining the trustees to select subjects worthy of assistance, and to use the fund for the greatest possible benefit to suffering humanity. In determining whether there was a sufficiently definite designation of beneficiaries, the court said: "Can it be doubted that the testator intended by the word 'such' to limit the relief to sufferers from some causes, accidents, or catastrophes, as distinguished from others not within his mental category? We think not. Certainly he intended that some causes, some accidents and catastrophes, should be excluded from those whose victims were to be the subjects of the annual expenditures of the income of this fund. If so, then is it not possible for the court to find some line of differentiation, which was in the mind of the testator, with sufficient certainty and definiteness to enable it to decide, in any concrete instance of expenditure or proposed expenditure, whether it is authorized? We are convinced that it is possible. Obviously the purchase of food for the homeless victims of the New Richmond cyclone would be justified. We think it equally obvious that expenditure to aid the cure of consumptives or inebriates would be forbidden to the trustees. Whether famine sufferers of a drouth-stricken region might be relieved, would perhaps be a question of more doubt than either of the other two, for they would not be victims of storm, fire, or flood. The inquiry, therefore, would be whether drouth would be a 'natural cause' so similar in character or results to those specified that we must conclude that the testator had it in mind in enlarging the field otherwise limited by the three expressed causes. We must presume that he had in

mind a class of causes illustrated by the three named, though not strictly confined to them, but similar enough to be within the same general conception of possible suffering which he desired to relieve. Such is the unavoidable force and significance of the words used." *Kronshage v. Varrell* (Wis.) 97 N. W. 928, 929.

Other animal.

The words "or other animal," in New York Sanitary Code, § 195, providing that no person owning a stable or other premises shall keep therein any dog or other animal which shall by noise disturb any person in the vicinity, applies to animals ejusdem generis, and does not apply to horses kept in stables. *People v. Edelstein*, 86 N. Y. Supp. 861, 91 App. Div. 447.

The words "other animals," as used in a contract for the shipment of live stock that the value for which the carrier should be liable in case of loss should not exceed for a horse or mule \$100, cattle \$30 each, other animals at \$5 each, include hogs. *Nashville, C. & St. L. Ry. v. Stone & Haslett* (Tenn.) 79 S. W. 1031, 1038, 65 L. R. A. 298.

Other borate material.

The enumeration in paragraph 11, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627], of "other borate material," refers only to borate materials found in nature in a raw condition, such as the "borates of lime or soda" included in the same provision, and does not embrace borate of manganese or bormangan, which is a manufactured article made from manganese and borates of lime or soda, and which is held to be dutiable as a chemical compound or salt under paragraph 3 of said act, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]. *Hempstead v. Thomas* (U. S.) 129 Fed. 907, 908.

Other building.

An awning in front of a building extending 13 feet from the house line to the curb, supported by five posts and covered with a roof of transparent glass, is not covered by the words "dwelling house or other building" in a deed providing that the front line of any messuages, dwelling houses, or other buildings shall recede eight feet from the street line. *Olcott v. Sheppard, Knapp & Co.*, 89 N. Y. Supp. 201, 202, 96 App. Div. 281.

Other causes.

The words "other causes," as used in a contract of sale of a specified number of cars daily of furnace coke during a specified period of time, subject to strikes, accidents, or other causes, relate to shortage of cars, and hence a shortage of cars is a legal excuse for nondelivery. *Hatfield v. Thomas Iron Co.*, 57 Atl. 950, 953, 208 Pa. 478.

Other circumstances.

The "other circumstances" referred to in Code Civ. Proc. §§ 872, 882, requiring that the affidavit to take the testimony of a witness shall show that the witness is about to depart from the state or is sick, or that some other special circumstances exist requiring his examination in advance, means such as will make the presence and evidence of the witness at the trial doubtful and uncertain as bearing on the probability of his future attendance. *W. P. Davis Mach. Co. v. Robinson*, 85 N. Y. Supp. 574, 575, 42 Misc. Rep. 52.

Other disability.

The nondeclaration of the result of an election for Governor is not a disability of the Governor such as is meant by Const. § 16, art. 7, providing that, in case of the death, conviction on impeachment, failure to qualify, resignation, or "other disability" of the Governor, the president of the Senate shall act as Governor until the vacancy is filled or the disability removed. It is simply non-action or incomplete action by the agencies of the law assigned to vest the title in the candidate. It is not like insanity. Conviction of the officer for crime, continued absence, or other disability connected with the person of the Governor, death, conviction on impeachment, failure to qualify, or resignation would produce a vacancy, and it would seem that the language "or other disability" means something of a different character from those cases named—something attaching to the person of the Governor and disabling him; and this construction seems confirmed by the after language of the section, providing that "the president of the Senate shall act as Governor until the vacancy is filled or the disability is removed," thus using the words "vacancy" and "disability" as meaning different things; "vacancy" referring to death, conviction, failing to qualify, and resignation, but "disability" referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word "other." *Carr v. Wilson*, 9 S. E. 31, 35, 32 W. Va. 419, 8 L. R. A. 64.

Other duties.

The general words "other duties," in Const. art. 13, § 11, requiring that the board of equalization shall perform such other duties as may be required by law, must be restricted to mean other duties of general character, with duties indicated in the previous provision to be performed by the board. *State v. Eldredge*, 76 Pac. 337, 340, 27 Utah, 477.

Other lands.

The phrase "owner of other lands," used in Rev. Civ. St. 1897, art. 4218fff, permitting owners of other lands contiguous to school lands, or within a radius of five miles there-

of, to buy such school lands, which article is a part of the act of 1897 which permitted a settler to buy four sections of school land in all, provided not more than two were classed as agricultural lands, does not include the owner of a lot or lots in town, but applies only to persons engaged in agricultural or stockraising pursuits. *Conn v. Terrell* (Tex.) 80 S. W. 608, 609.

Other matter or thing.

The general words "or other matter or thing," in Rev. St. § 1782 [U. S. Comp. St. 1901, p. 1212], prohibiting a United States senator from receiving compensation for rendering services to any person in relation to any proceeding, contract, etc., or other matter or thing in which the United States is a party, were intended to cover kindred subjects, like preliminary examinations and inquiries necessary to enable the government, acting through one of its departments, to determine whether a proceeding should be instituted, a charge or accusation made, or an arrest ordered, or whether a contract or claim should be made. *United States v. Burton* (U. S.) 131 Fed. 552, 556.

Other means.

The phrase "by mechanical or other means," as used in the statute making it a misdemeanor for any person, not licensed, to record or register, by mechanical or other means, bets or wagers on trials of speed, etc., embraces something outside the mechanical class, and covers the registration of such bets by means of the initials or private marks of the parties written on cards. *State v. Villines* (Mo.) 81 S. W. 212, 213.

Other reasonable cause.

The words "for other reasonable cause," as used in Gen. St. 1902, § 815, which provides that courts of common pleas may grant new trial for mispleading or discovery of new evidence, or want of actual notice of suit to any defendant, or of a reasonable opportunity to appear and defend, when a just defense, in whole or in part, exists, or for other reasonable cause, according to the usual rules in such cases, should be construed to mean causes of the same general character as those specified, and hence the section did not authorize the granting of a new trial on the ground that, by reason of the death of the trial judge before filing findings, the plaintiff was precluded from reviewing errors of law, alleged to exist in the judgment, on an appeal. *Ethells v. Wainwright*, 57 Atl. 121, 124, 76 Conn. 534.

Other roads.

The phrase "other roads," as used in Acts 1895, p. 174, c. 82, granting the board of county commissioners power to purchase toll roads, and declaring that when conveyed the roads shall be free and shall be kept in re-

pair as provided by law for the repair of other roads, must be construed as meaning other free roads of the class or kind to which those purchased would belong when conveyed to the county. *State ex rel. Shanks v. Board of Com'rs of Carroll County (Ind.)* 70 N. E. 138, 142, 162 Ind. 183.

Other structure.

The phrase "other structure," in 71 Ohio Laws, p. 168, § 1, providing that any person who shall perform labor or furnish machinery or materials for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, fixture, bridge, or other structure, by virtue of a contract with the owner or owners, shall have a lien to secure the payment of the same, must be limited to improvements on the same class as those specifically named, and cannot be extended so as to include a railroad. *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559, 563.

OTHER INSURANCE.

Where the insured, at the time of applying for insurance, informed the company's agent that there was a certain amount of insurance on the property, and that additional insurance was desired, and the company issued additional insurance, the continuation of the existing insurance, either by renewals of policies, already thereon, or by substituting other policies, was not "other insurance," within the company's policy, stipulating that it should be void if the insured should thereafter procure other insurance. *Lewis v. Guardian Fire & Life Assur. Co.*, 87 N. Y. Supp. 525, 98 App. Div. 157.

OUR CHILDREN.

The phrase "our children," in a will giving and bequeathing to testator's wife all his property, "to hold and dispose of as she may think best for the welfare of herself and our children," and suggesting that a son be given at his maturity whatever sum is necessary to make his property equal to the other son's property at his majority, and providing that in case of further issue the same rule to apply, embraces an after-born child, and an after-born child is included with the children living at the date of the will in the benefit, if any, of the provisions for the children. *Kidder's Ex'rs v. Kidder (N. J.)* 56 Atl. 154.

OUT OF THE STATE.

A foreign corporation is "out of the state," within Gen. St. 1901, § 4449, providing that when a cause of action accrues against a person, if he be out of the state, the period limited for the commencement of the action shall not begin to run until he

comes into the state. *Williams v. Metropolitan St. Ry. (Kan.)* 74 Pac. 600, 602, 64 L. R. A. 794.

OUTSTANDING LEGAL TITLE.

An outstanding mortgage or deed of trust, without entry of foreclosure, though the condition has been broken, is not such an "outstanding legal title" as will defeat a recovery in an action of ejectment; but where such mortgage or deed of trust has been foreclosed, and the legal title has been transmitted to a purchaser at the foreclosure sale, such title constitutes an outstanding title which will defeat ejectment, even between third persons not claiming thereunder. *Benton Land Co. v. Zeitler*, 81 S. W. 193, 197, 182 Mo. 251.

OVER THE WHOLE LINE OF ITS ROAD.

In a statute regulating the additional charges of way freight over through freight, the words "over the line of its road" mean, and only mean, freight which is taken on at one terminus and discharged at the other, and do not mean the pro rata allowance which may fall to the road in question under the disposition of the products of transportation of through freights proper—those freights which, in their transit, pass over more than one railroad, and merely traverse this road as a stage in a more extended shipment. *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559, 597.

OVERT ACT.

An overt act essential to establish an attempt to commit a crime is an act done to carry out the intention, and it must be such as would naturally effect that result unless prevented by some extraneous cause. *People v. Mills*, 70 N. E. 786, 790, 178 N. Y. 274.

OWN.

There is no substantial difference between the meaning of the words "possess" and "own." They are equivalents in common speech, and according to all the lexicographers. *Thomas v. Blair*, 35 South. 811, 813, 111 La. 678.

"Own," as an adjective, means "peculiar, proper, exclusive, particular, individual, private, and as indicative of possession." In certifying the acknowledgment of a woman, the officer stated that she acknowledged the same to be her own act and deed. The use of the word does nothing more than indicate that the signing of the deed was her act in compliance with the statute. It does not convey the idea that she had willingly signed, and the certificate was not a sufficient

compliance with the statute requiring that the wife should acknowledge the instrument to be her act and deed, should declare that she had freely and willingly signed and sealed it, and that she wished not to retract. *Tiemann v. Cobb* (Tex.) 80 S. W. 250, 251 (citing Cent. Dict. in verb "Own").

OWNER.

See "Riparian Owner."

The word "owner," standing alone, signifies absolute power, or owner in fee simple, not a qualified or limited estate in the land. *Phillips v. Hardenburg*, 80 S. W. 891, 895, 181 Mo. 463.

The word "owner," as used in Act June 4, 1897, c. 2, § 1, 30 Stat. 34 [U. S. Comp. St. 1901, p. 1541], providing that, in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may relinquish the tract to the government, and select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, refers only to one who holds both the legal and equitable title to the patented land. *United States v. Hyde* (U. S.) 132 Fed. 545, 548.

By the expression "the owner of the house for the time being," as used in Act April 10, 1849, § 4 (P. L. 600), providing that in all conveyances the right to compensation for a party wall shall pass to the purchaser, unless otherwise expressed, and the owner of the house for the time being shall have all the remedies with respect to such party wall as he may have in relation to the house to which it is attached, must be understood the owner when the wall is injured. The obvious intent of the act is to give the right of compensation to the person who is injured. The injury arises from the use of the wall in the construction of an adjoining building. Until such use there is no injury. *Lea v. Jones*, 57 Atl. 1113, 209 Pa. 22.

Agent.

In a city charter authorizing the city to require "owners" of dangerous buildings to remove the same at their own expense, while it may be convenient, in the exercise of the power granted by the provisions of the charter, to extend the application of the term to agents of the owners, it is not a reasonably necessary incident to the express power granted, which confines it to the owners. The rule is that it not only must be reasonably incident to the express powers granted or convenient for the exercise of such power, but it must be essential and indispensable to the purposes to be accomplished by the corporation. *City of St. Louis v. J. E. Kalme & Bro. Real Estate Co.*, 79 S. W. 140, 142, 180 Mo. 309.

Creditor secured by deed of trust.

Creditors secured by a deed of trust are not owners of land within the meaning of an act providing that the owners shall be given notice and opportunity to be heard before assessments for improvements are levied against the property. *City of Richmond v. Williams*, 47 S. E. 844, 845, 102 Va. 733.

Lessee.

The word "owner," as used in Civ. Code, §§ 542-544, providing that, when the owner of any tract of land abutting on a railroad constructs a fence about it on all sides except along the railroad, it shall be the duty of the railroad company to construct a fence along its right of way, means the owner of the fee, and does not include a lessee. *Crary v. Chicago, M. & St. P. R. Co.* (S. D.) 100 N. W. 18, 19.

Of import.

One having full dominion over property, with a right to sell or otherwise dispose of it without accountability to any one, may be considered the "owner" within Customs Administrative Act June 10, 1890, c. 407, § 5, 26 Stat. 132 [U. S. Comp. St. 1901, p. 1889], requiring that, "whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port at the time of entry by the owner, importer, consignee, or agent," etc., and hence he might properly make the required declaration. *United States v. Ninety-Nine Diamonds* (U. S.) 132 Fed. 579.

Of street.

In Code Civ. Proc. § 3358, the word "owner" is defined as including all persons having any estate, interest, or easement in the property to be taken. In proceedings to condemn property in a public street, the fee of which was in a private individual for the erection and maintenance of a telephone system, neither the municipality nor its board of trustees has, as such, any estate, interest, or easement in the property sought to be taken, and they were in no sense "owners" of the property within the meaning of that term as used in the statute. *New Union Telephone Co. v. Marsh*, 89 N. Y. Supp. 79, 82, 98 App. Div. 122.

Of vessel.

The word "owner," as used in the statute creating a lien on vessels, does not include a charterer. *Ballinger's Ann. Codes & St.* § 5953, providing that all steamers, vessels, etc., are liable for the nonperformance or malperformance of any contract for the transportation of passengers or property between places within the state, or to or from places within the state, made by their respective owners, masters, agents, or assign-

ees, does not create a lien on the vessel for breach of contract of affreightment made by her charterer. *Guffey v. Alaska & P. S. S. Co.* (U. S.) 130 Fed. 271, 279 (citing *The C. W. Moore* [U. S.] 107 Fed. 957).

OWNER'S RISK.

See "At Owner's Risk."

OWNERSHIP.

See "Imperfect Ownership"; "Perfect Ownership"; "Sole and Unconditional Ownership."

OWNERSHIP IN FEE SIMPLE.

See "Fee Simple."

P. N. R.

A physician's prescription which does not state that intoxicating liquor prescribed is a necessary remedy is not a prescription within a statute prohibiting the sale of liquors by pharmacists, except on a prescription stating that such liquor is "prescribed as a necessary remedy," although it contains the letters "P. N. R." *State v. Manning* (Mo.) 81 S. W. 223, 225.

PACKAGE.

See "Cumbersome Package."

PAPER.

See "Manufacture of Paper."

PAPER ENVELOPES, PLAIN.

Pieces of paper cut into shapes ready to be made into envelopes, known as "flat envelopes," are not "paper envelopes, plain," within paragraph 309, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]. *Hunter v. United States* (U. S.) 126 Fed. 894, 895.

PARCHESI.

The word "Parchesi" cannot be monopolized in the United States as a trade-mark for a game introduced from India, where it had long been known by a name similar in sound. *Selchow v. Chaffee & Selchow Mfg. Co.* (U. S.) 132 Fed. 996, 997.

PARDON.

A pardon is a remission of guilt. *State v. Lewis*, 35 South. 816, 817, 111 La. 693 (citing *Territory v. Richardson*, 9 Okl. 579, 60 Pac. 244, 49 L. R. A. 440).

PARK.

A park is a place for the resort of the public for recreation, air, and light. *Village of Riverside v. MacLain*, 71 N. E. 408, 414, 210 Ill. 308, 66 L. R. A. 288.

A "park" is defined in the *Century Dictionary* as a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye, as well as opportunity for open-air recreation. The term "park" is not applicable to private inclosures enjoyed by a few, nor to a game and fish preserve. *Commonwealth v. Hazen*, 56 Atl. 263, 265, 207 Pa. 52.

PARKING.

The term "parking," as used in Code, § 792, providing that cities shall have power to improve any street by parking the same or any part thereof, is incapable of any plausible definition which does not involve the idea of beautifying those portions of the street not necessarily occupied by walks and roadways. Hence the parking need not be confined to that part of a street between the lot line and the driveway, but the driveway may be divided by a strip of parking along the center line. *Downing v. City of Des Moines* (Iowa) 99 N. W. 1060, 1067.

PAROL DEMURRER.

At common law, when the heir was sued at law upon a specialty obligation of the ancestor chargeable upon the inheritance, he might pray that "the parol demurrer"—that is to say, that the pleadings or proceedings be stayed till he should attain his majority. This privilege was based on feudal reasons, and was confined to heirs. It did not extend to devisees. *Plasket v. Beeby*, 4 East, 490. The privilege was not merely on account of the inability of the infant heir to defend himself by reason of his infancy, but from an absolute deficiency of funds, arising out of the nature of the feudal tenures. For during the subsistence of wardships the estate of the heir in chivalry was during his minority in the hands of the guardian in chivalry, who had the whole profits. How the privilege came to be extended at common law to other heirs is lost in antiquity. The rule remained in England and the older states, greatly modified by statutory provision, however, long after the policy on which it was founded became obsolete, and now the parol demurrer has been abolished by statute in England, New York, and probably other states. *Joyce v. McAvoy*, 31 Cal. 273, 280, 89 Am. Dec. 172 (citing *Whart. Law Dict.* 558; 2 Kent, Comm. 245, note "b").

PART.

See "Child's Part."

Any part of, see "Any."

PART PERFORMANCE.

While the phrase "part performance" is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term "part performance" falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon and in pursuance of the oral agreement, and so connected with the performance of the contract that from the nature of the case the defendant should understand it was done in reliance upon his agreement. *Borrow v. Borrow*, 76 Pac. 305, 307, 34 Wash. 684.

Payment of a part, or even of the whole, of the purchase money, under an oral agreement for the sale of land, is not an act of "part performance" to take the contract out of the statute of frauds. *Cooper v. Colson* (N. J.) 58 Atl. 387.

PARTICEPS CRIMINIS.

"Mere presence at the scene of the perpetration of the crime does not render a person particeps criminis. To constitute him a party to the criminal act, there must be not only presence upon the scene, but an actual participation and aiding and abetting in the crime committed." The failure of a spectator to interfere does not make him a participant in the crime. It is a circumstance to be considered with the other evidence in determining whether he was present as an aider and abettor. *State v. Fox* (N. J.) 57 Atl. 270.

PARTICULARS.

See "Bill of Particulars."

PARTITION.

As proceeding in rem, see "In Rem."

PARTITION IN KIND.

A "partition in kind" is but a transfer of the interest of the co-owners to one of the co-owners. It is but a sale of such interest to a co-owner, and this the law permits. If a co-owner can sell to a perfect stranger his interest in the property, subject to the usufruct, or may mortgage it, and thus have such interest sold for him at judicial sale, how much greater reason is there that co-

owners may partition the property among themselves! The result obtained in either instance is the same—a transfer of the interest of the co-owner to another. *Maguire v. Fluker*, 36 South. 231, 238, 112 La. 76.

PARTNERS.

The phrase "partners," etc., following the names of the defendants to an action, is simply descriptive, and does not make the firm, as such, a party to the action. *Bastian v. Adams* (Neb.) 97 N. W. 231.

PARTNERSHIP.

The ultimate and conclusive test of a partnership is the co-ownership of the profits of a business. If there is community of profits, a partnership follows. When it appears that the parties are not joint owners in the business, or that one alone is principal and the other receives his share as compensation, it is not a partnership. *Altgelt v. Alamo Nat. Bank* (Tex.) 79 S. W. 582, 586 (citing *Buzard v. Bank of Greenville*, 67 Tex. 83, 84, 2 S. W. 54, 60 Am. Rep. 7; *Bates, Partn.* § 86; *George, Partn.* § 9).

"The requisites of a partnership are that the parties must have joined together to carry on a trade or venture for their common benefit, each contributing property or services, and having a community of interest in the profits." The Virginia Pilot Association is an unincorporated association of pilots, formed for the purpose of controlling and regulating the business of its members, and through them, in effect, act by joint co-operation in performing their duties as pilots. The association elects officers, leases offices, owns property, including the pilot boats used, assigns its members to service in turn, and collects all pilotage fees earned by them, which are paid into bank to its credit, and divided between the members after payment of the expenses of the association. The members of the association were partners, and jointly liable for the negligent performance by one of its members of his duties as a pilot. *Donald v. Guy* (U. S.) 127 Fed. 228, 232 (quoting *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835).

Seven persons associated themselves together to manufacture cheese at a factory owned by three of them, who received a certain sum for the use of the factory. The association adopted no name, and was known by several different names. All expenses of manufacture and sale were to be deducted from the proceeds of the sale of the product, and the balance divided in proportion to the amount of milk furnished by the parties. The association constituted a partnership. *Sullivan v. Sullivan* (Wis.) 99 N. W. 1022, 1025 (citing 22 Am. & Eng. Encyc. of Law [2d Ed.] 13; *Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749).

The community of a husband and wife is not a partnership. *Well v. Jacobs' Estate*, 85 South. 599, 604, 111 La. 357.

PARTY.

See "Adverse Party"; "Opposite Party"; "Political Party"; "Prevailing Party"; "Proper Party"; "Third Party."
See "Defect of Parties"; "Nonjoinder of Parties."

"Where the word 'party' occurs in the statute relating to nominations (for public office), it should be construed to mean a number of persons united in the manner usual to the then existing political parties." A party—that is, an organized political party—cannot have at the same time more than one candidate for the same county office. *State v. Metcalf* (S. D.) 100 N. W. 923, 924.

In practice.

The words "the party recovering a judgment," as used in Rev. St. U. S. § 916 [U. S. Comp. St. 1901, p. 684], providing that "the party recovering a judgment in any common law cause in any Circuit or District Court shall be entitled to similar remedies" on the same as are provided in like causes by the laws of the state in which such court is held, include the government. *Allen v. Clark* (U. S.) 126 Fed. 738, 740, 62 O. C. A. 58 (citing *Green v. United States*, 76 U. S. [9 Wall.] 655, 19 L. Ed. 806; *Fink v. O'Neill*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196).

The term "party," as employed in Const. art. 4, § 8, and Code Pub. Gen. Laws, art. 75, § 102, providing that in all suits or actions at law, on suggestion in writing under oath of either of the parties to the proceedings that such party cannot have a fair and impartial trial, the court shall direct the record to be transmitted to some other court, when applied to civil actions, must be taken in a collective and representative sense, and joint defendants cannot remove a cause without the consent of all their co-defendants. *Baltimore County Com'rs v. United Rys. & Electric Co. (Md.)* 57 Atl. 675, 676.

In *Hurd's Rev. St.* 1903, p. 1406, § 48, providing that in all civil actions each party shall be entitled to a challenge of three jurors without showing cause for such challenge, the word "party" includes all persons, plaintiff or defendant, however numerous they may be, and all persons, plaintiff or defendant, are entitled in the aggregate to but three peremptory challenges. *Illinois, I. & M. R. Co. v. Freeman*, 71 N. E. 444, 446, 210 Ill. 270.

An officer of a corporation litigant is not a "party" within B. & C. Comp. § 843, providing that if either party request it the judge may exclude from the courtroom any witness of the adverse party not at the time

under examination, especially where no showing is made that he possessed any special information or knowledge concerning the case on trial which would render it necessary that he should remain in the courtroom to protect the interests of the defendant. *Trotter v. Town of Stayton (Or.)* 77 Pac. 395, 396.

An officer of a domestic corporation is a "party" for the purpose of verifying a pleading, within Code Civ. Proc. § 525, subd. 1, providing for verification by a party, by an officer of a domestic corporation, or by an agent or attorney of a foreign corporation having knowledge of the facts. *Henry v. Brooklyn Heights R. Co.*, 89 N. Y. Supp. 525, 526, 43 Misc. Rep. 589.

One by intervening in opposition to the application of a receiver appointed in an action, to make a certain expenditure, and by consenting to the order settling the receiver's account, does not become a party to the action, or any other special and collateral proceeding therein other than that in which he intervenes. In *re Elliott (Cal.)* 77 Pac. 1109, 1112.

PARTY AGGRIEVED.

See "Aggrieved Party"

PARTY INTERESTED.

See "Interested"

PARTY NOMINATION.

Party nominations are made by large masses of people, organized as parties, holding caucuses and conventions. In *re Smith*, 85 N. Y. Supp. 14.

PASS.

The term "pass by will or by the intestate laws of this state," in the collateral inheritance tax law (Acts 1896, p. 38, No. 46), imposing a tax on all property which shall "pass by will or by the intestate laws of this state," means to pass by virtue of the law governing intestate or testate succession, and, as the succession of debts due to a decedent domiciled within the state from nonresidents of the state is governed by the state of the residence of the debtors, the act does not impose a tax on such debts. *Miller v. Wilbur (Vt.)* 56 Atl. 280, 281.

PASSABLE HIGHWAY.

Where a part of a consideration of a deed was an agreement by the grantee to open a "passable highway" for public utility, the width of the highway not being specified, the parties contemplated that the way

should be suitable to the particular locality. *Vanatta v. Waterhouse (Ind.)* 71 N. E. 159, 160.

PASSAGE.

While an act of the Legislature is passed when it is approved by the Governor, the decisions are uniform in holding that the language "at the time of the passage of the act" means when the act takes effect. *Mills v. State Board of Osteopathic Registration and Examination (Mich.)* 98 N. W. 19.

PASSENGER.

A passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as payment of fare, or that which is accepted as an equivalent therefor. Where an employé accompanies live stock in transit, and his transportation has been included in the price paid by the owner, he is a "passenger" within Act April 4, 1868 (P. L. 58), which relieves a railroad company from liability for injuries received by any person not a passenger, and, being a passenger, he cannot at the same time be an employé or a quasi employé within the provisions of the act. *Rowdin v. Pennsylvania R. Co.*, 57 Atl. 1125, 1126, 208 Pa. 623 (quoting *Pennsylvania R. Co. v. Price*, 96 Pa. 256).

A person becomes a passenger on a street car by contract, express or implied. He may become one in attempting to get on a car at a place provided for that purpose, and where people are expected to take passage, though his attempt fails. But a man does not become a passenger by making such an attempt at a place where he is not expected, and when the carmen are ignorant of his presence. The case differs from that of a man who, by license of a defendant, was at a place so usually occupied by persons that the defendant was under the duty of looking out for his welfare. *McCarty v. St. Louis & S. R. Co.*, 80 S. W. 7, 8, 105 Mo. App. 596 (citing *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827).

A passenger may become such without a contract, even against the will of the carrier. The carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur, and are so exceptional, as to vary the general rule too slightly for practical consideration. A person riding on a pass void under a statute, is a passenger. *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, 767, 135 N. C. 682.

The mere silent acquiescence of the conductor in a person's riding on an engine did not make him a passenger, and he did not become a passenger on the train merely

because he went to the station for that purpose. But where one goes to a railway station at a reasonable time before the departure of a train, for the purpose of traveling thereon, he may be regarded as a passenger in so far as it may relate to an injury received through the negligence or carelessness of the company while in or about the station or attempting to board the train. *Radley v. Columbia R. Co.*, 75 Pac. 212, 214, 44 Or. 332.

An express messenger, while riding in a railway car in the performance of the duties of his employment, is not a passenger, nor does the railroad company occupy the relation of common carrier toward him, but of a private carrier only, and there is no public policy which forbids the parties from contracting for its exemption from liability for negligence in the carrying of such messenger; and a contract with the express company by which the messenger, as a condition of his employment, assumes all risk of injury while so riding, and one between the express and railroad companies by which the former agrees to hold the latter indemnified against claims for injuries to its employes, whether arising from negligence or otherwise, are valid and effective to prevent a messenger injured in collision due to the negligence of railroad employes from recovering therefor against the railroad company. *Long v. Lehigh Valley Co. (U. S.)* 130 Fed. 870, 873 (citing *Blair v. Erie Ry. Co.*, 66 N. Y. 313, 23 Am. Rep. 55).

PASSENGER FROM A FOREIGN PORT.

An unmarried woman, a native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by the treaty with Spain, is not, on her arrival at the port of New York from Porto Rico, a passenger from a foreign port, but is a passenger from territory or other place subject to the jurisdiction of the United States. *Gonzales v. Williams*, 24 Sup. Ct. 177, 181, 192 U. S. 1, 48 L. Ed. 317.

PASSENGER TICKET.

As contract, see "Contract."

PATENT.

See "Letter Patent."

The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location, together with all veins, lodes, and ledges which have their apex therein; whereas the patent to a placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes, and ledges within its area. A patent of a placer claim will not convey the

title to a known vein or lode within its area, unless that vein or lode is specifically applied and paid for. *Clipper Min. Co. v. Ell Mining & Land Co.*, 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944.

PATENTING.

The word "patenting," as used in Act Cong. Feb. 8, 1887 (24 Stat. 389) § 6, providing that on the completion of allotments to lands to Indians, "and the patenting of the lands to said allottees," each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside, means the preliminary patent that is issued as soon as the allotment is made. *United States v. Kiya* (U. S.) 126 Fed. 879, 881.

PATIENT.

Where a physician is called to treat a patient against his will, the latter becomes a patient by operation of law, and any information which is acquired by the physician in order to enable him to act is acquired in attending a patient in a professional capacity, within Code Civ. Proc. § 834, and is privileged. *Meyer v. Supreme Lodge K. P.* (N. Y.) 70 N. E. 111, 112, 178 N. Y. 63, 64 L. R. A. 839.

PAVE.

The term "pave," in its generic sense, means to place some substance on the street so as to form an artificial roadway or wearing surface, which shall change the natural condition of the street. The word is much more comprehensive than the term "macadamize," but it embraces all that the term "macadamize" covers. *Ross v. Kendall* (Mo.) 61 S. W. 1107, 1109, 183 Mo. 338.

PAY CHECK.

The terms "pay check" and "money order" mean practically the same thing. *Barnes v. State* (Fla.) 35 South. 227, 228.

PAYABLE.

See "Now Due and Payable."

PAYMENT.

See "Bond for the Payment of Money"; "Direct Payment of Money"; "Voluntary Payment."

Payment involves more than the passing of money, or its accepted equivalent,

from one to another. The acceptance of money or other thing of value, in satisfaction of a debt, or in exchange for labor, goods, or other commodity, will be a payment, where it was so intended by the payor. Generally, there must be something shown in addition to the mere passing of money from one to the other. *Galbraith v. Starks* (Ky.) 79 S. W. 1191, 1192.

In Laws 1899, p. 1593, c. 712, § 46, providing that if, when a street railway franchise tax is due, the company has paid to a city for its use, under any agreement therefor or under any statute requiring the same, any sum based on a percentage of gross earnings or any other income, or any license tax, or any sum on account of the special franchise, "which payment was in the nature of a tax," all amounts so paid shall be deducted from the franchise tax, the term "payment" includes all the sums designated, so that the right to the deduction in each case depends on whether it is in the nature of a tax. *Heerwagen v. Crosstown St. Ry. Co.*, 86 N. Y. Supp. 218, 90 App. Div. 275.

PEACE OFFICER.

A policeman is a peace officer, and has the right without a warrant to arrest for an offense against a municipal ordinance, happening in his presence. *Springer v. State* (Ga.) 48 S. E. 907, 908.

PEACEABLE POSSESSION.

"Peaceable possession," in the statute authorizing the maintenance of a bill to quiet title to real property where complainant is in peaceable possession of the lands, is not a possession which is peaceable as to third persons, but only peaceable as to the defendant, and, as to the defendant, that it is a possession undisturbed by any act of the defendant in or upon the locus in quo for which the defendant would be suable in an action by which the title to the property could be determined. *Bradley v. McPherson* (N. J.) 59 Atl. 105, 106.

PECUNIARY DAMAGES.

Pecuniary damages are those which can be accurately estimated as loss of wages, cost of medical attendance, etc. *L. W. Pomerene Co. v. White* (Neb.) 97 N. W. 232, 234.

PECUNIARY OBLIGATION.

A silver certificate issued by the United States is a "pecuniary obligation" or security of the government and an article of value within Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], subjecting to punishment any person employed in any department of

the postal service who shall secrete any letter containing any note, bond, certificate of stock, or other pecuniary obligation or security of the government. *Bromberger v. United States* (U. S.) 128 Fed. 846, 851, 63 C. O. A. 76.

PEDDLER.

The word "peddler" in its ordinary sense means a traveling trader; one who travels about retailing small wares. In *re Watson* (S. D.) 97 N. W. 463, 466 (quoting *Webst. Dict.*).

The word "peddler," as used in a municipal ordinance providing that no person shall exercise the vocation of a peddler within the municipality without first paying an annual license, includes one peddling the produce of his own farm or garden, as well as one peddling farm or garden products which he has purchased from others. *State v. Jensen* (Minn.) 100 N. W. 644, 645.

Peddling is the occupation of an itinerant peddler of goods, who sells and delivers the identical goods he carries with him. It is not the business of selling by sample and taking the order for goods to be thereafter delivered, and to be paid for, wholly or in part, upon their subsequent delivery. Neither a person exhibiting a sample of a range, nor a person making delivery of such ranges, after their sale, in the original packages, are peddlers, within the meaning of a provision in the revenue law that any person carrying a wagon, cart, or buggy, or traveling on foot, for the purpose of exhibiting or delivering any wares or merchandise, shall be considered a peddler, and imposing a license tax. *Wrought Iron Range Co. v. Campen*, 47 S. E. 658, 664, 135 N. C. 506.

PENAL ACTION.

An action under section 7 of the Anti-Trust Law, Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], providing that any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act may sue therefor in any Circuit Court of the United States, and shall recover threefold the damages by him sustained, is not a "penal action" within the meaning of Rev. St. U. S. § 1047 [U. S. Comp. St. 1901, p. 727], prescribing a limitation of five years for a suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States. But the action is one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect. *City of Atlanta v. Chattanooga Foundry & Pipe Works* (U. S.) 127 Fed. 23, 29, 61 C. C. A. 387, 64 L. R. A. 721.

PENALTY.

Proceeding to recover penalty as civil action, see "Civil Action—Case—Suit—etc."

A penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done. The imposition of a fine or imprisonment is not in any legal sense a penalty. *People v. Sloan*, 90 N. Y. Supp. 762, 763 (citing *Village of Lancaster v. Richardson* [N. Y.] 4 Lans. 136).

PENDING.

See, also, "Suit Pending."

An action is deemed to be pending until the time for appeal has passed. *Grannis v. Superior Court of City and County of San Francisco*, 77 Pac. 647, 649, 143 Cal. 630.

PEON.

See "Condition of Peonage."

A "peon" is defined as "a debtor held by his creditor in a qualified servitude to work out the debt." The involuntary servitude prohibited by the federal Constitution is a personal servitude. An unwilling servitude enforced by the stronger to collect a debt is to reduce the victim to the condition of a peon, and logically to a condition of peonage. *United States v. McClellan* (U. S.) 127 Fed. 971, 976 (quoting *Black, Law Dict.*).

PER SE.

See "Libelous Per Se"; "Slander Per Se."

PERCOLATING WATER.

Percolating waters may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream, which have so far left the bed and other waters as to have lost their character as part of the flow. *Montecito Valley Water Co. v. City of Santa Barbara* (Cal.) 77 Pac. 1113, 1116 (citing *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820).

PERFECT INSTRUMENT.

Instruments are said to become "perfect" on registration being had or on noting for registration, because they are then good as to all the world from that time. *Wilkins v. McCorkle* (Tenn.) 80 S. W. 834, 837.

PERFECT OWNERSHIP.

Ownership is "perfect" when it is perpetual. Where a claim against a city was

assigned to a person in payment of a debt due him, and on further condition and consideration that he should devote the balance to be collected pro tanto to the payment of the debts due to the assignor's other creditors in whose favor to that extent such person bound himself by written contracts, as to such proportion of the claim as was needed to pay the debt due to such person his ownership was perfect, being perpetual and unincumbered by conditions. *Sintes v. Commerford*, 36 South. 656, 659, 112 La. 706.

PERFECT TITLE.

"A perfect title is one which shows the absolute right of possession and of property in a particular person." *Henderson v. Beatty* (Iowa) 99 N. W. 716, 718 (citing *Wilcox Lumber Co. v. Bullock*, 109 Ga. 532, 35 S. E. 52).

PERFORMANCE.

See "Part Performance."

PERIOD.

See "Such Period."

PERIODICAL.

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature, or some special branch of learning, or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel, or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects. A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but, in fact, that it ordinarily contains a story, essay, or poem, or a collection of such by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their

character." Books complete in themselves are not, because published at stated intervals and in consecutive numbers, "periodical publications," within Act March 3, 1879, c. 180, § 10, 20 Stat. 359 [U. S. Comp. St. 1901, p. 2646], declaring that mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals. *Houghton v. Payne*, 24 Sup. Ct. 590, 592, 194 U. S. 88, 48 L. Ed. 888.

The refusal by the Postmaster General to admit to the mails, as a periodical publication entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with a greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts. *Bates & Guild Co. v. Payne*, 24 Sup. Ct. 595, 194 U. S. 106, 48 L. Ed. 894.

PERJURY.

Perjury is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath, or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. *Herring v. State*, 46 S. E. 876, 879, 119 Ga. 709 (quoting *Wharton on Crim. Law*).

Etymologically, the signification of the word "perjury" is the false swearing upon oath lawfully administered in some judicial proceeding. *United States v. Howard* (U. S.) 132 Fed. 325, 338 (citing *Worcester, Dict.*; 2 Bouv. Dict. tit. "Perjury").

PERMANENT ABODE.

A permanent abode is a home which a party may leave as interest or whim may dictate, but which he has no present intent to abandon. *Sullivan v. Detroit*, Y. & A. A. R. Co. (Mich.) 98 N. W. 756, 760, 64 L. R. A. 673 (citing *Dale v. Irwin*, 78 Ill. 170).

PERMANENT EMPLOYMENT.

"Permanent employment" means employment for an indefinite time, which may be severed by either party. The term "permanent employment," as used in a contract whereby a corporation agreed to give an attorney permanent employment as counsel if he would render certain services and the scheme involved should prove a success, is satisfied by his employment thereafter for

the period of a year at a fixed salary. *Sullivan v. Detroit, Y. & A. A. R. Co.* (Mich.) 98 N. W. 756, 760, 64 L. R. A. 673 (quoting *Bouv. Law Dict.*).

PERMIT.

The word "permit" means to resign; to allow; to suffer; to put up with; not to prohibit. *Murphy v. Roney* (Ky.) 82 S. W. 396, 398.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference, through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, cl. a, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]. *Bogen & Trummel v. Protter* (U. S.) 129 Fed. 533.

PERPETUITY.

Remainders created by the will of a life tenant under a power of appointment to the descendants of persons who were themselves not in esse when the grantor of the power died and his will conferring it took effect are in violation of the rule against perpetuities, for the period fixed and prescribed by law for the future vesting of an estate is a life or lives in being at the time of its commencement, and 21 years and a fraction of a year beyond, to cover the period of gestation; and where property is rendered inalienable, or its vesting is deferred for a longer period, the law denounces the devise or grant as a perpetuity and declares it void. *Graham v. Whitridge* (Md.) 57 Atl. 609, 611, 66 L. R. A. 408.

A devise of a life estate, and, after the death of the life tenant, to his widow and children, is not a "perpetuity," under Ky. St. § 2360, as the remainder must vest within 21 years after a life in being; but a conveyance of a life estate after the death of the life tenant, to go to his children until the youngest reaches the age of 25 years, when the estate is to be divided, is a perpetuity. *Johnson's Trustee v. Johnson* (Ky.) 79 S. W. 293, 294; *Johnson v. Merritt*, Id.

A provision in a will for the deposit of money in bank, the interest to be used to keep testator's burial lot in good condition yearly, creates a perpetuity, in violation of a constitutional prohibition thereof. *McIlvain v. Hockaday* (Tex.) 81 S. W. 54, 55.

PERSON.

See "Injury to the Person."

All persons, see "All."

Any other person, see "Any Other."

Any person, see "Any."

Corporation.

A city ordinance providing that it shall be unlawful for any engineer, conductor, or other "person" to run or permit to be run on any railroad track within the limits of the city any locomotive engine, car, or train at a greater speed than eight miles per hour applies to railroad corporations operating railroads within the city. *Southern R. Co. v. Jones* (Ind.) 71 N. E. 275.

A corporation is included in the term "person" as used in the statutes. *Goldzier v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 214, 215, 43 Misc. Rep. 667 (citing *Scharmann & Sons v. De Palo*, 72 N. Y. Supp. 1008, 66 App. Div. 29).

The word "persons," in *Mills' Ann. St.* § 413, providing that any person who shall employ a child under 14 years of age in a mill shall be guilty of a misdemeanor, applies to corporations as well as to natural persons. *Overland Cotton Mill Co. v. People* (Colo.) 75 Pac. 924, 925.

The expression "person engaged chiefly in farming or the tillage of the soil," in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, and any corporation principally engaged in manufacturing, may be adjudged an involuntary bankrupt, applies only to natural persons, and not to corporations. In re *Lake Jackson Sugar Co.* (U. S.) 129 Fed. 640, 643.

County.

Each organized county is a body corporate, and as such deemed to be a "person," within Const. art. 6, § 2, which provides that no person shall be deprived of life, liberty, or property without due process of law. *Harris v. Stearns* (S. D.) 97 N. W. 361, 362.

Estate.

A "person" includes a corporation and a joint-stock company, but it does not include an estate, or where an action is brought by the representative of an estate or trust as such; for the estate or the trust, and not the person who represents it, is really the party. *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

PERSON INTERESTED.

See "Interested."

PERSON LOSING.

All those who have lost more than they have won during a sitting by playing at cards are "persons losing," within the meaning of *Hurd's Rev. St.* 1901, c. 38, § 132, which provides that any person who shall at any time or sitting by playing at cards

lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit. *Zellers v. White*, 70 N. E. 669, 672, 208 Ill. 518, 100 Am. St. Rep. 243.

PERSONAL INJURY.

See, also, "Injury to the Person."

The words "personal injuries," as used in Laws 1886, c. 572, p. 801, relating to actions against municipal corporations for damages for personal injuries, includes injuries resulting in death. *Orapo v. City of Syracuse*, 90 N. Y. Supp. 553, 555.

PERSONAL PROPERTY.

Personal property is the right or interest which a person has in things personal. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

At common law fixed and movable machinery are alike regarded as personal property. *Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co. (Md.)* 58 Atl. 211, 212.

Mirrors resting on mantels or slabs, and secured at the top by iron spikes driven into the wall, through which screws were driven into the mirror frames, which had been treated by the owners both of the personal property and the realty as personal property, are held to be "personal property," although the frames were painted in the same style as the woodwork of the room. *Cranston v. Beck* (N. J.) 56 Atl. 121.

Shares of stock in a corporation are personal property belonging to the respective shareholders, and are within the scope and operation of Const. art. 3, § 51, which declares that the personal property of residents in the state shall be subject to taxation in the county or city where the resident bona fide resides for the greater part of the year for which the tax may be levied, and not elsewhere, except goods and chattels permanently located, which shall be taxed in the city or county where they are so located. *City of Baltimore v. Allegany County Com'rs* (Md.) 57 Atl. 632, 636.

Rev. St. Ohio 1890-92, § 2731, providing that "all property, whether real or personal, in this state, * * * and all money, credits, investments and bonds, stocks and otherwise, of persons residing in this state, shall be subject to taxation," when construed in connection with the related sections, which require the listing for taxation of property held by trustees or agents for others, includes, and subjects to taxation as "personal property," every form of such property having a situs in the state, including such forms as money, credits, bonds, or stocks, whether such situs is given by reason of the residence

of the owner in the state, in which case such forms of property are taxed without regard to the place of their deposit, or whether by reason of their being held within the state by an agent of a nonresident owner; and municipal bonds deposited with the state superintendent of insurance by a foreign insurance company for the protection of Ohio policy holders, as required by section 3660, are taxable, and when not returned by either the company or the superintendent of insurance may properly be listed by the auditor of the county in which they are held. *Western Assur. Co. of Toronto v. Halliday* (U. S.) 126 Fed. 257, 265, 61 C. C. A. 271.

A suit in equity in a federal circuit court, to enjoin the further prosecution therein of an action at law against complainant, on a promissory note, by a citizen and resident of the state in which the suit is brought, and to have such note canceled and delivered up to complainant, on the ground that it was one obtained by fraud, is one to enforce an equitable claim to "personal property" within the district, within the meaning of the judiciary act of March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], and the court is authorized by an order made thereunder to bring in the nonresident payee of the note, who is alleged in the bill to have or claim some interest therein, the note being personal property. *Manning v. Berdan* (U. S.) 132 Fed. 382, 383.

PERSONAL REPRESENTATIVE.

The words "personal representatives," as used in a statute relative to the foreclosure of mortgages by advertisement, which requires notice to be served upon the mortgagor or his personal representatives, means executors or administrators, and not heirs or devisees. *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 260, 54 W. Va. 32.

The words "heirs" and "personal representatives," as used in 2 Ballinger's Ann. Codes & St. § 4828, providing that, when the death of a person is caused by any injury received from the wrongful act of another, his heirs or personal representatives may maintain an action, include only the widow and children of the deceased person, and do not authorize an action by the mother for the wrongful death of her unmarried adult son, on whom she was dependent. *Manning v. Tacoma Ry. & Power Co.*, 75 Pac. 994, 84 Wash. 406.

PERSONAL SERVITUDE.

The involuntary servitude prohibited by the federal Constitution is a "personal servitude," and this "consists in the subjection of one person to another. If it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not

slavery, it consists simply in the right of requiring of another what he is bound to do or not to do. This right arises from all kinds of contracts or quasi contracts." *United States v. McClellan* (U. S.) 127 Fed. 971, 978 (quoting 2 Bouv. Law Dict. 986).

PETITION.

The word "petition," as used in a statute relating to the granting of liquor licenses, means a request by eligible citizens to a county court to grant a dramshop license to a designated applicant to keep a dramshop in a designated locality. A blank form of petition, not addressed to any court, and failing to designate the town where the signers are residents, or to ask for the granting of a license to any person, the signers' names being appended to blank books, circulated independent of the blank form, is insufficient. *State ex rel. Marbury v. Tulloch* (Mo.) 82 S. W. 645, 646.

PHYSICAL IMPOSSIBILITY.

"Physical impossibility," when applied to the ability of a party to perform his contract, means "practical impossibility according to the state of knowledge and of the day." One who signed on April 28th a contract to convey land on April 23d of the same year is not bound because of the impossibility of performance of such contract. *Le Roy v. Jacobosky*, 48 S. E. 798, 801 (quoting 9 Cyc. 326).

PHYSICIAN.

See "County Physician"; "Traveling Physician."

"The relation of physician and patient (so far as Code Civ. Proc. § 834, prohibiting the disclosure by a physician of professional information, unless waived by the patient, is concerned) springs from the fact of professional treatment, independent of the causes which led to such treatment." *Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 112, 178 N. Y. 63, 64 L. R. A. 839.

PICKING.

Picking at one may mean mere innocent amusement, and it may not tend to show anything criminal. Where, on a prosecution for rape, defendant denied that he was intimate with prosecutrix, and denied that while in the tent of a certain person he had been reproved for his conduct with prosecutrix, it was error subsequently to permit the husband of such person to testify for the state that he and his wife were in their tent, and that defendant was then talking to the girl, and that he kept "picking at her," and that witness' wife then said that she did not want

any such conduct in the tent, and that if there had to be anything of the kind between defendant and prosecutrix she did not want defendant there any more; the phrase "picking at her" being indefinite, and the remarks of witness' wife probably indicating to the jury that the conduct of defendant was indecent. *Denton v. State* (Tex.) 79 S. W. 560, 561.

PIER.

See "Public Pier."

A pier is a structure extending from the solid land out into the water to afford convenient passage for persons and property to and from vessels along side of the pier. Its use is thus shown to be essentially the same as that of a way, and it bears to the vessels moored beside it relations similar to those which a way bears to contiguous places. A pier may also be, as a way, either public or private, and when the state granted the right to build piers on this land the right covered public as well as private piers. *Borough of Seabright v. Allgor*, 56 Atl. 287, 288, 69 N. J. Law, 641.

PISTOL

As deadly weapon, see "Deadly Weapon."

The furnishing of a Stevens 32-caliber rifle by a father to his minor son was not an offense, within Rev. St. 1898, § 4397, prohibiting any person from giving any "pistol or revolver" to a minor. *Taylor v. Seil* (Wis.) 97 N. W. 498.

PLACE.

See "Public Place"; "Suspicious Place." Any place, see "Any."

The word "place," as used in Rev. Codes 1899, § 7605, providing that all places where intoxicating liquors are sold in violation of law shall be common nuisances, means the particular place, room, or apartment wherein the liquor was kept for sale or sold in violation of law. Where a boarder at a hotel kept intoxicating liquor in his bedroom, and on three or four occasions sold liquor to persons in the hotel, but without the knowledge or consent of the owner of the building, or of the proprietor thereof, the hotel could not be adjudged a common nuisance, and the particular place or room where the liquor was kept or sold could only be adjudged a nuisance and abated, on its being particularly identified in the proofs. *State ex rel. Kelly v. Nelson* (N. D.) 99 N. W. 1077, 1078.

The word "place," as used in a plat showing a pond with trees, which had not been planted about it, should be construed as meaning "park"; it being perfectly clear

that the donors intended that the space should be used for a pleasure ground for the public. *Fessler v. Town of Union* (N. J.) 56 Atl. 272, 276.

The words "time and place," in Gen. St. 1902, § 1130, requiring a description in the notice of the time and place of the occurrence of the injury, means a statement of the day and hour when, and a description of the locality where, the person injured received the direct injury to his person or property from the defendant's negligent act, as nearly as these facts can be given. *Peck v. Fair Haven & W. R. Co.*, 58 Atl. 757, 758, 77 Conn. 161.

PLACER GOLD.

As merchandise, see "Merchandise."

PLACER LOCATION.

"A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after the patent therefor has been issued. There being no necessary connection between the placer and the vein, Congress * * * has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered." *Clipper Min. Co. v. Eli Mining & Land Co.*, 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944.

PLAIN.

See "Paper Envelopes, Plain."

PLANS.

Plans may be important, or even necessary, to indicate the methods to be followed and the results to be accomplished in carrying out a building contract. But there is a distinction between them and specifications that provide for the kinds, quality, and quantity of materials to be used and the work to be done, and the time and manner of doing it, without which the contract would be incomplete and ineffective. They are not in the same sense nor to the same extent an integral part of the contract. Their office is rather to illustrate and explain what is to be done. In order to sustain a mechanic's

lien, specifications which are expressly made a part of the contract, or are referred to as a part thereof, must be filed with the contract; but the plans of the work, not being, like the specifications, an integral part of the contract, need not be filed. *Knelly v. Horwath*, 57 Atl. 957, 958, 208 Pa. 487.

PLANT.

The word "plant" in Code 1896, § 1749, declaring that a master is liable for any injury to his servant caused by any defect in the ways, works, machinery, or plant, comprises whatever apparatus, fixtures, or tools a master uses in his business. Any injury resulting to an employé from the negligence of the employer, or of another employé intrusted by the common master with the duty of seeing that his plant is in proper condition, in not providing suitable tools, implements, or appliances, or in allowing such tools, implements, or appliances to be in a defective condition, is within such provision. *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 36 South. 181, 184, 139 Ala. 425.

PLANTER.

A planter is one who is engaged in the business of producing crops from the soil, and it is immaterial whether he sows and reaps with his own hand, with the hand of a tenant, the hand of a cropper, or the hand of a hired laborer. *Butler, Stevens & Co. v. Georgia & A. Ry. Co.*, 47 S. E. 320, 322, 119 Ga. 959.

PLEA IN ABATEMENT.

A "plea in abatement" is one in which is set up matter tending to defeat or suspend the suit or proceeding in which it is interposed, but which does not debar the plaintiff from recommencing another action at some other time or in some other way. *Chicago & Bloomington Stone Co. v. Nelson*, 69 N. E. 705, 706, 32 Ind. App. 355.

"Plea in abatement" do not deny the merits of plaintiff's claim, but simply tend to delay the remedy, and to support such a plea it must appear that the two suits are for the same cause or causes of action, or the identity of the matters involved must be such that a judgment in the first could be pleaded in bar as a former adjudication. *Botto's Ex'r v. Botto* (Ky.) 80 S. W. 174.

PLEA OF CONTRIBUTORY NEGLIGENCE.

The defense or "plea of contributory negligence" is in the nature of a confession and avoidance. It, standing alone, necessarily admits that the plaintiff was injured by the negligence of defendant. *Buechner*

v. City of New Orleans, 36 South. 603, 605, 112 La. 599, 66 L. R. A. 334.

PLEA OF GUILTY.

Under a provision of the Penal Code, providing that if a jury shall find any person guilty of murder they shall also find the degree, and if any person shall plead guilty to murder a jury shall be summoned to find the degree, etc., a trial of a prosecution for murder is precisely the same under the plea of guilty as under the plea of not guilty, and in such a case a plea of guilty is not tantamount to a confession of murder in the first degree. *Murray v. State* (Tex.) 78 S. W. 927.

PLEA TO THE JURISDICTION.

A plea to the jurisdiction is an affirmative plea, for it is only by asserting an affirmative position that the plea can prevail. On the trial of an issue of fact raised by a plea to the jurisdiction the burden is on defendant to establish the averments of his plea. *J. B. Pyron & Son v. Ruohs*, 48 S. E. 434, 435, 120 Ga. 1000.

PLEADING.

The section of the Code relating to verification of pleadings has no application to an application and affidavit under Code, § 3901, providing for the examination of an attachment defendant on oath respecting his property when it appears by the affidavit of plaintiff that not enough property is known on which attachment can be executed to satisfy the plaintiff's claim. *Carpenter v. Clements*, 98 N. W. 129, 131, 122 Iowa, 294.

PLEADS.

The words "avers," "says," and "pleas," as used in a pleading, are equivalent terms, and the use of the word "pleads" means no more than the preceding words, and signifies no more than they would, to characterize the language as a plea, than if it had not been used. *Mylin v. King*, 35 South. 908, 1000, 139 Ala. 319.

PLEDGE.

"A pledge is a bailment of personal property to secure an indebtedness. A pledge cannot be created by delivery of title deeds." A third person paying the purchase money at the instance of the vendee, and taking the title to the land direct to the vendor, holds neither the land nor title as pledgee. Such a transaction is the equivalent of the vendor's conveyance to the vendee, and a conveyance by the vendee to the person paying the purchase money as security for

the debt. *Fleming v. Georgia R. Bank*, 48 S. E. 420, 422, 120 Ga. 1023 (citing Civ. Code 1895, § 2958; *Davis v. Davis*, 88 Ga. 191, 14 S. E. 194).

A pledge is trust property, and the character of a pledgee is that of a trustee. The law does not permit a pledgee to purchase the pledge at his own sale except upon an agreement with the pledgor, because he has a duty to perform in relation to the property inconsistent with the character of a purchaser, and such a sale is voidable at the option of the pledgor. *Wetherell v. Johnson* (Ill.) 70 N. E. 229, 231, 208 Ill. 247 (citing *Union Trust Co. v. Rigdon*, 93 Ill. 458; 22 Am. & Eng. Encyc. of Law [2d Ed.] 891; *Cook, Stock and Stockholders*, § 479).

POLICE OFFICER.

The chief of police of a city is a police officer, within the rule of the board of police examiners, created by the charter of the city, providing that no member of the police force should be permitted to be a delegate to any caucus or take part in any political canvass. *Brownell v. Russell* (Vt.) 57 Atl. 103, 104.

POLICE POWER.

The subjects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals; and, fifth, the general welfare and safety of the citizens. *Commonwealth v. Reinecke Coal Min. Co.* (Ky.) 79 S. W. 287, 290.

"Police power" includes everything essential to the public safety, health, and morals, and justifies the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. *Bland v. People* (Colo.) 76 Pac. 339, 362, 65 L. R. A. 424 (citing *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385).

"What is called police power appertains to the sovereignty of the state, but is exercised by that sovereignty through the agency of municipalities, as well as through direct statutory enactments operative throughout the commonwealth. That is to say, the power to enact regulations for the welfare, health, and good morals of a community within the limits of a city or town is largely delegated by the state to its municipal governments. But in every case of municipal legislation under the guise of the police power, express or implied authority for the ordinance must be found in the charter of the city or in some other statute." *Carpenter v. Reliance Realty Co.*, 77 S. W. 1004, 1008, 103 Mo. App. 480.

POLICEMAN.

As peace officer, see "Peace Officer."

POLITICAL PARTY.

Any combination or aggregation of electors with sufficient coherence and organization to have acted together for a common purpose, and sufficient strength and certainty to have polled 2 per cent. of the highest vote at the next preceding election, is a "political party," within Act June 10, 1893, § 2 (P. L. 419), relating to the putting of nominations on the ballot by certificate by any political party which at the election next preceding polled at least 2 per cent. of the largest entire vote for any office cast in the state or in the electoral district or division. Independence Party Nomination, 57 Atl. 344, 346, 208 Pa. 108.

POLITICAL RIGHT.

"Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses." *Winnett v. Adams* (Neb.) 99 N. W. 681, 684 (quoting 2 Bouv. Law Dict.).

POLITICAL SUBDIVISION.

A school district is not a "political subdivision of the state," within the meaning of that term as used in a constitutional provision giving the Supreme Court jurisdiction of appeals in cases where a county or other political subdivision of the state is a party. *School Dist. No. 1 v. Boyle* (Mo.) 81 S. W. 409, 410, 182 Mo. 347.

POLL TAX.

As tax, see "Tax."

PORT.

See "Home Port."

The word "port" is defined in Rev. St. U. S. § 2767 [U. S. Comp. St. 1901, p. 1861], as including any place from which merchandise can be shipped for importation or at which merchandise can be imported. The word as used in the revenue act rests somewhat in theory, and involves intention and perhaps certain acts to make its operation effectual. The language of the statute is that it may include places where cargoes are received and discharged, thus indicating a distinction between a commercial and a fiscal port. It cannot be the intention of the law that a

vessel must report at the barge office before it can be considered in port, since there are several piers or docks between that office and the mouth of the river. The statutes of Illinois provide that the city of Chicago shall have jurisdiction over Lake Michigan for a distance of three miles beyond the city limits, and the ordinances of that city give the city harbor master control over lake water outwardly for the same distance between the north and south lines of the city. Held, as to certain barges in tow which had reached a place within these limits within the outer harbor works, where it was usual for such a tow to be broken up so that the barges might be taken to their separate docks, that they should be considered as in the port of Chicago for the purpose of fixing the time their cargoes became dutiable, though the arrival had not been reported at the barge office. *Hartwell Lumber Co. v. United States* (U. S.) 128 Fed. 306, 307.

PORTION.

See "Lowermost Portion."

POSSESS.

Own synonymous, see "Own."

An allegation that a person was "seised and possessed" of land *prima facie* imports seisin in fact, not mere seisin in law. *Bragg v. Wiseman* (W. Va.) 47 S. W. 90, 91.

POSSESSION.

See "Actual Possession"; "Adverse Possession"; "Peaceable Possession"; "Property in Possession."

The word "possession" means *prima facie* actual possession. *Bragg v. Wiseman* (W. Va.) 47 S. E. 90.

The word "possession," as used in Mont. Code Civ. Proc. § 1340, giving the remedy of partition to cotenants "who hold and are in possession of" realty, means the possession which the law imputes to the holder of the legal title. *Heinze v. Butte & B. Consol. Min. Co.* (U. S.) 126 Fed. 1, 3, 61 C. C. A. 63.

Evidence that a defendant was one of a party engaged in a common unlawful enterprise, that of shooting game in the closed season, is sufficient upon which to base a conviction of such defendant upon the charge of having in his "possession" game protected by the statute, although the game when taken is shown to have been in a buggy not occupied or being driven by the defendant. *McMahon v. State* (Neb.) 97 N. W. 1035.

Possession is the having or holding or detention of property in one's power or command. Defendant formed a plot to obtain possession of certain indictments for the purpose of destroying them by bribing the as-

sistant district attorney having them in charge to deliver them to him for a certain consideration. A third party, pretending to act for the district attorney, delivered them to him, and he took possession of them, and walked away, whereon he was arrested and the indictments recovered. It was held that defendant was properly convicted under Pen. Code, § 531, of an attempt to commit grand larceny in the second degree. *People v. Mills*, 70 N. E. 786, 178 N. Y. 274 (quoting *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517).

"Possession is the having, holding, or detention of property in one's power or command; actual seizure or occupancy." The mere fact that one who works elsewhere lodges and boards on premises the legal title to which is in him with whom he boards, and who claims and exercises full power, control, and dominion over the property by virtue of such legal title, does not constitute possession such as would be notice, in and of itself, of any equitable interest that such lodger or boarder would have in and to the premises or any part thereof. *Derrett v. Britton* (Tex.) 80 S. W. 562, 563.

"The character of possession for the statutory period necessary to toll the right of entry by the legal title holder must be such as amounts constantly to a trespass against the true title (that is, it must be an actual physical entry upon or control of the premises, and be continuous); it must be open (that is, it must of itself be such as to afford notice to the rightful owner of its hostile nature); it must be adverse (that is, it must be against and in defiance of the claim of the real title holder, and be such as to exclude his authority); and it must be accompanied by the claim by the occupant that it is his property." *Owsley v. Owsley* (Ky.) 77 S. W. 397, 401.

POSSIBLE.

See "If Possible."

Results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. *Douglass v. New York Cent. & H. R. R. Co.*, 58 Atl. 160, 161, 209 Pa. 128 (citing *South Side Passenger Ry. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672).

POST OFFICE.

As contemplated in the statutes of the United States, and in the sense in which the

word is ordinarily used, "post office" is the room or building where the local business of the postal department is conducted. A policy insuring articles sent by mail provided that no article should be considered as insured until a letter of advice, with a description of the property, be deposited in the post office at the place of mailing, and that the article should be deposited and registered at the post office. The word "post office" as used in the policy was used in this sense, and a mail box was not included. *Banco De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 100 N. W. 532, 534.

POTENTIAL EXISTENCE.

"Potential" means existing in possibility; anything that may be possible; and "potential existence" means that the thing may be at some time. Webster. Where a building contract provided for the payment of the stipulated price in installments as the work progressed, the debt accruing thereunder from the owner to the contractor has a sufficient potential existence, after the contract was made, to sustain a parol equitable assignment of a portion thereof. *Campbell v. J. E. Grant Co.* (Tex.) 82 S. W. 794, 796.

POTION.

See "Noxious Potion or Substance."

POWER.

"A power exists in law only for some purpose, and, when fully executed by the accomplishment of its purpose, it is exhausted." *City of Philadelphia v. Johnson*, 57 Atl. 1114, 208 Pa. 645.

POWER COUPLED WITH AN INTEREST.

"A power coupled with an interest is when the power or authority is coupled with an interest in the thing itself actually vested in the agent. It must not be merely an interest in that which is produced by the exercise of the power. The former is irrevocable, while the latter is revocable, though expressed to be irrevocable." *Angle v. Marshall* (W. Va.) 47 S. E. 882, 886 (quoting *Walker v. Denison*, 86 Ill. 142).

When a power of attorney is coupled with an interest, by such interest is not meant an interest in that which is produced by the exercise of power, but it must be an interest in the property in which the power is to operate. The authority to sell on commission is not an authority coupled with an interest. *Taylor v. Burns* (Ariz.) 76 Pac. 623, 625 (citing *Trickey v. Crowe* [Ariz.] 71 Pac. 968).

Where one H. made written application for a loan from M., and in such application

appointed M.'s agent his attorney in fact to execute a note and mortgage in case H. failed to do so, and thereafter H. died before the loan was advanced or the application accepted by M., such power of attorney was not a "power coupled with an interest," and was terminated by the death of H. *Brown v. Skotland*, 97 N. W. 543, 545, 12 N. D. 445.

PRACTICABLE.

See "As Soon as Practicable."

PRACTICE OF MEDICINE AND SURGERY.

"The term 'practice of medicine and surgery' embraces probably the larger, and certainly by far the most profitable, part of the treatment of diseases, but is not coextensive with the latter term, and cannot be made so, unless surgery and medicine are adopted as the state system of treatment, and all other methods are made indictable." A statute designating who are eligible to practice medicine and surgery, and defining the expression "practice of medicine and surgery" as meaning "the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operations, surgical or mechanical appliances, or by any other method whatsoever," attempts to create a monopoly, and is void. *State v. Biggs*, 46 S. E. 401, 405, 133 N. C. 729, 64 L. R. A. 139, 98 Am. St. Rep. 731.

PRECEDENT.

See "Condition Precedent."

PRECINCT.

See "Proper Precinct."

PRECIOUS STONES.

Articles, such as bowls, vases, trays, wine pitchers, teacups, altar sets, flower stands, and other completed articles, manufactured from jade by cutting, carving, or other means, are not "precious stones," within paragraph 435, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1633], but are dutiable under paragraph 97, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], covering "articles and wares composed wholly and in chief value of mineral substances." *C. L. Tiffany & Co. v. United States* (U. S.) 126 Fed. 255.

PRE-EMPTION INTEREST.

A pre-emption interest is a right to purchase at a fixed price, within a limited time, in preference to others. *Davenport v. Farrar*, 2 Ill. (1 Scam.) 314, 316.

PREFERENCE.

In order to constitute a "preference," within the meaning of the bankruptcy act, the debtor must do some act to facilitate the proceedings. Submissive inactivity is not enough. *Johnson v. Anderson* (Neb.) 97 N. W. 339, 342.

A "preference," such as offends the bankruptcy act, must be one likely in its results to defeat the collection by other creditors of their claims. Essential to such a preference, therefore, is insolvency. Knowledge or a reasonable cause to believe that a preference is intended involves knowledge of a reasonable cause to believe that insolvency exists as a matter of fact. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 99 N. W. 121, 123, 123 Iowa, 432.

To constitute a preferential transfer, it is immaterial, under the bankruptcy act, to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others. A creditor of a bankrupt cannot escape the consequences of the bankrupt act regarding unlawful preferences by assigning his account to a purchaser of the property of the bankrupt, under an arrangement whereby such purchaser offers to assume the liability and satisfy such account, contingent upon the purchase of the bankrupt's property, and where, in the sale of such bankrupt's property, as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same. *Hackney v. Hargreaves Bros.* (Neb.) 99 N. W. 675, 677 (citing 5 Cyc. 294; *Goldman v. Smith* [U. S.] 93 Fed. 182).

To constitute a "preference," it must appear that the bankrupts have made a transfer of their property, the effect of which was to enable one of their creditors to obtain a greater percentage of his debt than others of such creditors of the same class. *Engel v. Union Square Bank*, 87 N. Y. S. 1070, 1074, 94 App. Div. 244.

Transfers of property amounting to preferences, within the bankruptcy act of 1898, contemplate the parting with the bankrupt's property for the benefit of the creditors and the consequent diminution of the bankrupt's estate. It is such transactions operating, to defeat the purposes of the act, which under its terms are preferences. Insolvents, by depositing money in a bank on an open account, subject to checks, do not thereby make a transfer of property amounting to a preference. *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 201, 192 U. S. 138, 48 L. Ed. 380.

The payment of a bank by an insolvent, within four months prior to bankruptcy, of notes given to third persons, but which have

been indorsed to and are owned by the bank, constitutes a preferential payment, within Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. In re George M. Hill Co. (U. S.) 130 Fed. 315, 318, 66 L. R. A. 68.

PREFERENCE IN DESIGNATION.

The words "preference in designation," as used in Rev. St. 1898, § 35, providing that, when two or more conventions or caucuses shall be held and the nominees thereof certified, each claiming to be the regular convention or caucus of the same political party, "preference in designation" shall be given to the nominations of the ones certified by the committee which has been officially certified to be authorized to represent the party, suggests at once and unmistakably two or more designations, one for the party ticket which is regular, and one for each of those which are irregular. *State v. Houser* (Wis.) 100 N. W. 964, 974.

PREJUDICE.

Prejudice is a leaning toward one side of a question from other considerations than those belonging to it; in law, a bias on the part of judge, jury, or witness which interferes with fairness of judgment. It applies as well to prejudice in favor of the adverse party as to prejudice against a party making an application for transfer of a cause on the ground of prejudice of the judge. *Keen v. Brown* (Fla.) 35 South. 401, 402.

PREMEDIATE.

To premeditate is to think of a matter before it is executed. The word "premeditate" would seem to imply something more than deliberate, and may mean that the party not only deliberated, but had formed in his mind the plan of destruction. *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289.

PREMEDITATED DESIGN.

The meaning of the words "premeditated design," as used in the statutory definition of the crime of murder in the first degree, "not being technical words of the common law, is to be found in their meaning as used in the best dictionaries and standard authorities. 'Premeditation' is composed of 'pre' and 'meditation,' and means the act of premeditating; previous deliberation; forethought. Deliberation and premeditation are synonymous. Century Dict. 'And Isaac went out to meditate in the field at eventide.' Gen. xxiv, 63. 'This book of the law shall not depart out of thy mouth, but thou shalt meditate thereon day and night.' Josh. i, 8. 'Meditate upon these things; give thyself wholly to them.' 1 Tim. iv, 15. 'Let the words of my mouth and the meditations of my heart be acceptable,' etc. Psalm xix, 14.

The word 'meditate,' as thus used in the Bible, implies all the thoughts which can be generated in the mind by the exercise of the discursive or regulative faculties. It certainly implies everything that is implied in the word 'deliberate' and more." In a prosecution for murder, an instruction to the effect that no specific time is required to constitute premeditation, but if the mind of the accused was in a condition to form a purpose, there was sufficient time for the forming of that purpose, and for the mind to be conscious of that purpose to kill, it is sufficient time to constitute premeditation, and if the jury believe beyond a reasonable doubt that defendant had fully formed a purpose to shoot and kill, and that he was conscious of that purpose when he fired the shot, they would find him guilty of murder in the first degree, does not afford a clear and correct interpretation of the meaning and design of the Legislature in the use of the phrase "premeditated design" in a statute providing that the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, etc., shall be murder in the first degree. *Cook v. State* (Fla.) 35 South. 605, 671, 678.

"Intent to kill means just what the ordinary signification of the words suggest, whether it be described by the words 'actual intent,' 'design,' or 'premeditated design' makes no difference. When we leave entirely out of view those subtleties, often indulged in, in discoursing on the meaning of 'premeditated design,' and give to words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated, or thought of, because, without mental action, the purpose could not be formed. So, when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design, or premeditated design. That the word 'premeditated,' as used in the statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term 'premeditated design,' where used inclusively in murder in the first degree, as to 'design,' where that word alone is used exclusively in murder in the third degree and manslaughter in the first, second, and third degrees." *Cupps v. State* (Wis.) 98 N. W. 546, 549.

PREMEDITATION.

"Premeditation," in the statute declaring it murder in the first degree for any person

to purposely and in his deliberate and premeditated malice kill another, is the mental operation of thinking over an act or line of action already decided in the mind before carrying the act or line of action into execution. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

PREMISES.

The term "premises" may or may not include land, but may be held to mean only the right, title, or interest conveyed; and its exact meaning, when found in contracts and conveyances, must be determined according to the intention of the parties as ascertained from the contract and the facts and circumstances attending its making. *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 71 N. E. 22, 27, 210 Ill. 26.

An owner contracted to sell land on which the purchaser, as lessee, had erected buildings, with a right to remove the same. The contract provided that the owner should advance the purchaser a specified sum, and that the purchaser should keep "said premises insured for the benefit of the owner." The purchaser gave to the owner a bill of sale of the buildings and improvements, which recited that it was supplemental to the contract for the purchase of the real estate and security only for the payments called for, and that it should be void when all the payments were made. At the time of the sale there were other buildings on the land than those which belonged to the purchaser. The word "premises," as used in the contract, which the purchaser was to keep insured for the benefit of the owner, referred to buildings other than those belonging to the purchaser as lessee. *Dankwardt v. Prussian Nat. Ins. Co.*, 98 N. W. 603, 604, 123 Iowa, 70.

PREMIUM.

See "Gross Premium Plan"; "Gross Premiums"; "Installment Premium Plan"; "Renewal Premium."

PREPONDERANCE OF THE EVIDENCE.

An instruction that by a "preponderance of the evidence" is meant a greater weight of evidence is correct. *Ewen v. Wilbor*, 70 N. E. 575, 578, 208 Ill. 492.

PRESCRIPTION.

Adverse possession distinguished, see "Adverse Possession."

PRESENCE.

See "Constructive Presence."

PRESENT.

See "For the Present."

PRESENT FAIR CONSIDERATION.

The words "present fair consideration" must be determined from all the facts and conditions surrounding the purchase, and if the price paid was in cash, and an amount equal to the fair value of the goods, under all the circumstances, the consideration would be present and fair. *Schilling v. Curran* (Mont.) 76 Pac. 998, 1002.

Under Bankr. Act July 1, 1898, c. 541, § 573, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which requires a "present fair consideration" to support a mortgage given within four months prior to bankruptcy, a mortgage securing notes for \$1,500, bearing 6 per cent. interest, for which the consideration was a loan of \$1,310, the remainder being for additional interest and bonus, will be sustained, where taken in good faith, but only to the extent of the money actually advanced, with interest. Where the security is taken for a loan of money, the present fair consideration cannot ordinarily be greater than the sum of money lent. *In re Sawyer* (U. S.) 130 Fed. 384.

PRESENTED.

An indictment is "presented" when it is delivered by the foreman, in the presence of the grand jury, to the court, and filed with the clerk. *Shivers v. Territory*, 74 Pac. 899, 901, 13 Okl. 466.

PRESS.

See "Liberty of the Press."

PRESUMPTION.

A presumption is a deduction which the law expressly directs to be made from particular facts. *Lake County v. Neillon*, 74 Pac. 212, 214, 44 Or. 14.

"A presumption is a rule of law that a court or jury shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (quoting *Lawson*, Presump. Ev. 639, 640).

A presumption is a deduction which the law expressly directs to be made from certain facts, and unless controverted, the finding must be according to the presumption. *Alferitz v. Arrivillaga*, 77 Pac. 657, 658, 143 Cal. 646.

A presumption is defined as an inference, affirmative or disaffirmative, of the truth or falsity of any proposition of fact, drawn by

a process of probable reasoning, in the absence of actual certainty of its truth or falsity, or until such certainty can be ascertained. *In re Dailey's Estate*, 89 N. Y. Supp. 538, 540, 43 Misc. Rep. 552.

"Presumptions are a sort of proof, and a substitute in certain stages of a case for affirmative testimony. A disputable presumption may operate as a prima facie case upon a particular point. A presumption acting as a prima facie case stands as proved until the prima facie is destroyed by controverting evidence." The casting of the burden of proof on one party or the other in a given case does not destroy the presumptions in favor of a party which exist under the general law of evidence. *The Wildcroft (U. S.)* 130 Fed. 521, 528.

The law does not attach the presumption of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt, upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words "presumption" and "prima facie evidence" must be understood, when employed in this connection. *State v. Brady*, 97 N. W. 62, 64, 121 Iowa, 561.

PRESUMPTION OF FACT.

"A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved. A presumption is an inference as to the existence of a fact, not actually known, arising from its usual or necessary connections with others, which are known. Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon common principles of induction. Presumptions of fact are at best but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments." *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (quoting *Lawson, Presump. Ev.* 639, 640).

PRESUMPTION OF LAW.

A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (citing *Lawson, Presump. Ev.* 639, 640).

PRESUMPTIVE EVIDENCE OF GUILT.

Although the term "presumptive evidence of guilt," as applied to a certain state

of facts, may perhaps sometimes indicate no more than that the facts referred to may be considered by the jury as evidence from which guilt may be inferred as a matter of fact, and not as a matter of law, yet it is always unwise, in giving the jury instructions as to the evidence, to say that from any particular fact a presumption of guilt arises. The question of guilt is one to be determined by the jury on all the facts. *State v. Poe*, 98 N. W. 587, 591, 123 Iowa, 118.

PRETENSE.

See "False Pretense."

PRETERMITTED DEFENSE.

Where a defendant, in an action to recover the penalty for the maintenance of an existing fence encroaching on a highway, fails to avail himself of the defense of title to land where the fence is located, such defense has become what is called a "pretermitted defense," to which equity will not listen as a ground for affirmative relief, and he is not entitled to maintain a suit in equity to restrain the supervisors from removing a contemplated fence, to be located on substantially the same ground. *Swennes v. Sprain (Wis.)* 97 N. W. 511, 512.

PREVAILING PARTY.

Where, in an action to establish a lien on a chattel in favor of plaintiff, to the total exclusion of a warehouseman's lien in favor of defendant, defendant's lien for a portion of his charges was sustained, plaintiff was not entitled to costs, as being the "prevailing party," within Municipal Court Act, Laws 1902, p. 1584, § 330, awarding costs to the prevailing party in the Municipal Court. *Singer Mfg. Co. v. Becket*, 85 N. Y. Supp. 391.

A person appearing and filing with permission of the court a motion to dismiss the action becomes thereby a party, and if his motion is sustained, and action dismissed, he is the "prevailing party," and is entitled to costs, under Rev. St. 1883, c. 82, § 130. *Thomas v. Thomas*, 56 Atl. 651, 653, 98 Me. 184.

PRICE.

See "Satisfactory Price."

PRIMA FACIE EVIDENCE.

The law does not attach the presumption of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence

of guilt, upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words "presumption" and "prima facie evidence" must be understood, when employed in this connection. *State v. Brady*, 97 N. W. 62, 64, 121 Iowa, 561.

PRINCIPAL

See "Vice Principal."

Where defendant proposed a scheme by which he was to obtain possession of certain indictments, for the purpose of destroying them, and under such scheme the indictments were actually removed from the files of the court and delivered to him, he was a "principal" throughout the transaction; and if he took them from the person actually removing them, either with or without his consent, he was guilty of a theft of public records. *People v. Mills*, 70 N. E. 786, 791, 178 N. Y. 274, 18 N. Y. Cr. R. 269 (citing *Pen. Code*, § 29; *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883).

"To constitute one a principal in the second degree, he must not only be present when the crime is committed, but must aid and abet the actual perpetrator of the crime. One who is present when the crime is committed, but neither assists in its commission nor shares in the criminal intent of its perpetrator," is not a principal in the second degree. *Thornton v. State*, 46 S. E. 640, 641, 119 Ga. 437.

PRINCIPAL PLACE OF RESIDENCE.

"Principal place of residence" means place of residence. A person cannot, legally speaking, have two places of residence; and the word "principal" may be properly treated as surplusage, in a petition alleging that the petitioner has his principal place of residence within a certain district. *Ross-Lewin v. Goold*, 71 N. E. 1028, 1029, 211 Ill. 884.

PRINCIPALLY ENGAGED.

The words "principally engaged," in a statute exempting from execution certain articles necessary to carry on the occupation in which one is principally engaged, are not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and that engrosses the most of his time and attention, not for a day, or a week, or month,

but through the year. *Smalley v. Masten*, 8 Mich. 529, 530, 77 Am. Dec. 467.

PRINTED.

Under Gen. St. 1901, § 1076, providing that, if there is no newspaper printed, printed notices must be conspicuously posted, notices printed on a typewriter are sufficient to meet the statutory requirements. *State ex rel. Coleman v. City of Oakland* (Kan.) 77 Pac. 694, 696.

PRINTED MATTER.

Paper bags, with incidental printing thereon, are not "printed matter," within the meaning of Tariff Act, July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. *Kraut v. United States* (U. S.) 130 Fed. 392.

PRIOR DISCOVERY.

To constitute a "prior discovery," which will support a location on public grounds as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of his claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil on adjoining lands. *Bay v. Oklahoma Southern Gas, Oil & Mining Co.*, 73 Pac. 936, 940, 13 Okl. 425.

PRISON.

See "State Prison."

PRIVATE CORPORATION.

Private corporations are those created for the immediate benefit and advantage of the individuals constituting them, and the franchises conferred are to be exercised for their advantage. The corporation stands to them in the relation of trustee, holding the property owned by it, and dividing the profits arising from its management and the employment of its franchises, for these individuals as *cestuis que trust*. *Trustees of Carrick Academy v. Clark* (Tenn.) 80 S. W. 64, 67.

A railroad company is a "private corporation," in the purview of Const. § 87, providing that the operation of any general law shall not be suspended by the Legislature for the benefit of any individual or private corporation. *Yazoo & M. V. R. Co. v. Southern Ry. Co.*, 36 South. 74, 76, 83 Miss. 746.

PRIVATE FERRY.

A private ferry is for the transportation of one's own property in his own boat. *Parsons v. Hunt* (Tex.) 81 S. W. 120, 122.

PRIVATE PROPERTY.

A public office is not private property. *Mial v. Ellington*, 46 S. E. 961, 134 N. C. 131, 65 L. R. A. 697.

PRIVATE ROAD.

"Private roads" are not to be understood as being synonymous with "ways" at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass. *Hartley v. Vermillion*, 74 Pac. 987, 991, 141 Cal. 339 (citing *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577).

PRIVATE WAY.

"The common-law writers divided private ways into several classes, according to the purpose or purposes for which the right of way could be used. Thus, Lord Coke, adopting the civil law, divided them into three kinds: A footway, called 'iter'; a footway and horseway, called 'actus'; and a cartway, which embraced the other two, called 'via'; to which was added a driftway—a road over which cattle could be driven. Woolrych also makes these four classes of ways: Footways; footways and horseways; foot, horse, and carriage ways; and driftways. But these old classifications of private ways are not exhaustive of the subject, for as a private way for any particular purpose could always be created by a grant, and in theory always rested upon a grant, it is evident that when one person granted to another a right of way extending from the land of the grantee over the land of the grantor, for the private use of the grantee, in any manner and for any particular purpose, a private way was created." A right of way for a private railroad across the lines of others, for a person or corporation engaged in the business of quarrying granite or other stone, is a private way. *Jones v. Venable*, 47 S. E. 549, 550, 120 Ga. 1.

"There are different kinds of public ways and different kinds of private ways, but all ways are included in the one or the other general classification, though some may partake of the nature of both, being maintained and operated for private gain and for use by the public. *Jones v. Venable*, 47 S. E. 549, 550, 120 Ga. 1.

PRIVILEGE.

See "Conditionally Privileged"; "Terms and Conditions, Rights and Privileges."

Where a lease provided a rental payable monthly for a certain term "with the privilege at the same rate and terms each year thereafter from year to year," such lease did

not entitle the lessee to a perpetual right of renewal, but constituted a letting from month to month after the expiration of the term specified. *Tischner v. Rutledge*, 77 Pac. 388, 35 Wash. 285.

PRIVILEGED COMMUNICATION.

A libelous communication is regarded as privileged, if made bona fide, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains incriminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. *Kersting v. White* (Mo.) 80 S. W. 730, 734 (citing *Byam v. Collins*, 11 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726).

In *Hix v. State* (Tex.) 20 S. W. 550, the definition of a "privileged communication" from *Ormsby v. Douglas*, 37 N. Y. 477, is quoted approvingly as follows: "The rule is well settled that a communication which would otherwise be slanderous and actionable is privileged if made in good faith upon a matter involving an interest or duty of the party making it, though such duty be not strictly legal, but an imperfect obligation to a person having a corresponding interest or duty." *Stayton v. State* (Tex.) 78 S. W. 1071.

PRIVITY.

"In the law of estoppels, privity signifies merely succession of rights—that is, the devolution in whole or in part of the rights and duties of one person upon another; * * * the derivation of rights by one person from and holding in subordination to those of another, as in the case of a tenant. No one can be bound by or take advantage of the estoppel of another, who does not succeed or hold subordinate to his position." Tenants in common are not in privity to each other, so as to entitle them to take advantage of an estoppel by judgment obtained by one co-tenant, suing alone, to set aside a deed executed by their common ancestor. *Allred v. Smith*, 47 S. E. 597, 599, 135 N. C. 443, 65 L. R. A. 924 (quoting *Bigelow, Estop.* 347; *Black, Judgm.* 549).

PRIZE.

See "Drawing a Prize."

PROBABLE.

Liable synonymous, see "Liable."

The word "probable" is defined as "having more evidence for than against; supported by evidence which inclines the mind

to believe, but leaves some room for doubt; likely;" and in common acceptance the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it, or, at the least, that the evidence preponderates in its favor. *Gallamore v. City of Omaha*, 75 Pac. 978, 980, 34 Wash. 379 (citing *Webst. Int. Dict.*).

PROBABLE CAUSE.

Probable cause in an action for malicious prosecution does not depend on the actual state of the case in point of fact, but upon the honesty and reasonable belief of the party commencing the prosecution. The want of probable cause is essential for every suit for malicious prosecution. *Richardson v. Dybedahl* (S. D.) 98 N. W. 164, 165.

Probable cause, in an action for malicious prosecution, does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence. *Mundal v. Minneapolis & St. L. R. Co.* (Minn.) 99 N. W. 273, 274.

Probable cause has been variously defined as "reasonable cause, such as would operate on the mind of a discreet man; probable cause, such as would operate on the mind of a reasonable man." There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty. *McMorris v. Howell*, 85 N. Y. Supp. 1018, 1019, 89 App. Div. 272.

Probable cause, unlike malice, is not determined by the standard of the particular defendant, but of the ordinarily prudent and cautious man, exercising conscience, impartiality, and reason, without prejudice, upon the facts; and an honest belief, unfounded upon reasonable grounds, is not sufficient. *Rawson v. Leggett*, 90 N. Y. Supp. 5, 7, 97 App. Div. 416 (citing *Heyne v. Blair*, 62 N. Y. 19).

Probable cause has reference to the common standard of human judgment and conduct, and malice refers to the mind and judgment of the defendant in the particular act charged as a malicious prosecution. *Griswold v. Griswold*, 77 Pac. 672, 673, 143 Cal. 617.

PROCEED TO ENFORCE.

The words "proceed to enforce," in a statute providing that creditors may proceed to enforce a judgment at any time within 10 years after the entry thereof, mean to

take steps to make it effectual by legal process. Issuing execution on a money judgment is such a step. "To proceed to enforce" and "to enforce" are materially different things. *Davidson v. Gaston*, 16 Minn. 230, 240 (Gil. 202, 212).

PROCEEDING.

See "Condemnation Proceeding"; "Contempt Proceeding"; "Criminal Proceeding"; "Equitable Proceeding"; "Special Proceeding."
Any proceeding, see "Any."

PROCEEDING IN REM.

See "In Rem."

PROCEEDING IN WHICH THE UNITED STATES IS INTERESTED.

See "Interested."

PROCEEDINGS.

The word "proceedings," in the recital of the case-made that it contains all the proceedings, includes the evidence. *John Deere Plow Co. v. Jones* (Kan.) 75 Pac. 1039; *Id.*, 76 Pac. 750.

In *Laws 1903*, p. 243, c. 122, § 200, the Legislature used the expression "proceedings of any kind commenced and now pending and not completed on behalf of any city" with reference to the subjects then under consideration, and did not refer to judicial proceedings, but to the organization, powers, and duties of cities of the first class, and particularly of issuing bonds and the erection of public improvements, and it was to protect such proceedings commenced under previously existing law that the saving clause was enacted. *State ex rel. Hungate v. City of Topeka* (Kan.) 74 Pac. 647, 650.

PROCEEDS.

The word "proceeds," as used in Const. art. 8, § 3, relating to the permanent school fund, and declaring that the proceeds of all lands that have been or may hereafter be granted to the state shall be a perpetual fund for common school purposes, implies a sale and conversion of the lands into money; and the statement in the section that the proceeds shall be a perpetual fund places it beyond question that the true meaning of the provision is that such lands might be sold and the proceeds invested. *McMurtry v. Engelhardt* (Neb.) 98 N. W. 40, 41.

The word "proceeds," as used in *Rev. Laws*, c. 98, § 2, relative to Sabbath breaking, but which permits the giving on Sunday of an entertainment by a religious or charitable society, the "proceeds" of which, if any,

are to be devoted exclusively to a charitable or religious purpose, means the net returns after the payment of necessary expenses incidental to the entertainment, taking into account not only that which is received but that which is incidentally and properly paid out. *Commonwealth v. Alexander*, 70 N. E. 1017, 1018, 185 Mass. 551.

The word "proceeds," as used in a contract whereby plaintiff was to receive all the proceeds of logs delivered by one defendant to another, after deducting advances made thereon by the other, means net proceeds after all charges for delivery, including raftage and boomage, have been paid. *Moss Point Lumber Co. v. Thompson*, 35 South. 823, 83 Miss. 409.

PROCESS.

See "Judicial Process."

The word "process," as used in Rev. St. § 911 [U. S. Comp. St. 1901, p. 683], providing that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, means an order of the court, although it may be issued by the clerk. The summons in a common law action is a "process," but the word does not apply to a notice given under Code Va. 1887, § 3211, authorizing a judgment on a contract to be obtained on motion after 15 days' notice to defendant; and under the Conformity Act, Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], an action may be instituted by such a notice in a federal court in Virginia in accordance with the state practice. *Leas & McVitty v. Merriman* (U. S.) 132 Fed. 510, 513.

Processes issue upon pleadings, orders, and judgments, and must be conformable to such judgments when issued on them. *Farmers' Banking & Loan Co. v. Mauck* (Neb.) 97 N. W. 835, 836.

PROCESS IN CIVIL ACTION.

See "Civil Action—Case—Suit—etc."

PROCHEIN AMI.

Guardian ad litem distinguished, see "Guardian Ad Litem."

PROFANE.

"As a general rule, words are profane or not, according to the sense in which they are used; and it is necessary to show by other words coupled with them the sense in which they are used, to make a valid charge of using profane language." *Roberts v. State*, 47 S. E. 511, 120 Ga. 177.

PROFESSION.

Preachers of the gospel are, in a popular, and also in a technical, sense, professional men, just as much as physicians, teachers, and lawyers. A minister of the gospel is therefore following a profession, within the law which makes a person liable, without proof of special damage, for words spoken of another, with reference to his profession, calculated to injure him therein; and it is not necessary that such a minister should, at the time the words are spoken, be receiving compensation for his services. *Flanders v. Daley*, 48 S. E. 327, 120 Ga. 885.

PROFESSIONAL CAPACITY.

A physician called to treat a patient against his will acts "in a professional capacity," within Code Civ. Proc. § 834, prohibiting the disclosure by a physician of professional information. *Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 178 N. Y. 63, 64 L. R. A. 839.

PROFIT.

See "Community of Profits"; "Net Profits"; "Surplus Profits."

The word "profits" is susceptible of the construction that it includes the difference between the actual cost and the selling prices. *Cooke v. Cain*, 77 Pac. 682, 683, 35 Wash. 353.

"While in some cases the profits to be accounted for are spoken of as damages, yet in no case that has been presented is it held that damages, as distinct from or additional to profits, can be decreed in equity in a copyright case, as in patent causes. While the word 'damages' is used in decrees, it is used synonymously with 'profits.' Confusion can be avoided by omitting the word 'damages,' since the word 'profits' is more accurate, and sufficient." *Social Register Ass'n v. Murphy* (U. S.) 129 Fed. 148.

PROFIT A PRENDRE.

The right to fish is in the ancient legal French called a right "profit a prendre"; a right so peculiarly for personal enjoyment that it is incapable of being acquired by the general public, either by custom or dedication. *Albright v. Sussex County Lake & Park Commission* (N. J.) 57 Atl. 398, 399.

"Strictly speaking, a right to cut and take ice is perhaps more in the nature of a profit a prendre than an easement, though it comes within the definition of an easement which was given by Chief Justice Shaw in *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744, and which was quoted with approval by the court in *Owen v. Field*, 102 Mass. 90." A lease, for a round sum, of

premises on the shores of a pond, to be used for a dwelling house and other buildings for the ice business, and providing that the lessor leases to the lessee the right to cut and take ice from the pond, and that the lessee, in addition to the rent, shall deliver to the lessor as much ice as shall be required for two families during the lease, annexes the right to take ice to the leased premises as an easement or a profit a prendre. *Walker Ice Co. v. American Steel & Wire Co.*, 70 N. E. 937, 939, 185 Mass. 463.

PROHIBITION.

"The office of a writ of prohibition is to restrain excess or improper assumption of jurisdiction." *Taylor v. Bliss* (R. I.) 57 Atl. 939 (citing 23 Am. & Eng. Enc. Law, 195).

Prohibition is a restraining, not a corrective, remedy. It "issues only to prevent the commission of a future act, and not to undo an act already performed." Prohibition lies "only to prevent the doing of an act, and can never be used as a remedy for acts already done." *Williamson v. Mingo County* (W. Va.) 48 S. E. 835, 836 (quoting High, Extr. Leg. Rem. [3d Ed.] § 766: *Haldeman v. Davis*, 28 W. Va. 324, 326).

At common law the writ of prohibition was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but the cognizance of some other court. "It was an original remedial writ, provided as a remedy for encroachment of jurisdiction. Its office was to restrain subordinate courts and inferior judicial tribunals from extending their jurisdiction." *Stein v. Morrison* (Idaho) 75 Pac. 246, 256.

PROMISSORY NOTE.

As property, see "Property."

A promissory note is a promise in writing to pay a specified sum at a time therein fixed. In re *McGuire & Hanlein* (U. S.) 132 Fed. 394, 395.

In order to constitute a promissory note, the instrument must be for a specified sum or certain sum of money. *Smith v. Myers* (Ill.) 69 N. E. 858, 860.

A promissory note is a written engagement by one person to pay another absolutely and unconditionally a certain sum of money at a time specified therein. *White v. Harris*, 48 S. E. 41, 43, 69 S. C. 65.

"Promissory notes, among our people, are regarded as securities for money, more or less valuable; indeed, in proportion as the pecuniary ability and credit of the makers of them are more or less reliable." *Wagner v. Scherer*, 85 N. Y. Supp. 894, 895, 89 App.

Div. 202 (citing *Jennings v. Davis*, 31 Conn. 134).

PROMISSORY WARRANTY.

Warranties in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done, or not done after the policy takes effect. *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021.

PROMOTION.

The term "promotion" is defined as an advancement, or the act of exalting in rank or honor (Webst. Dict.); and as advancement to a higher position, grade, class, or rank; preferment in honor or dignity (Standard Dict.). Const. art. 5, § 9, requires promotions in the civil service to be made according to the merits, to be ascertained, as far as practicable, by competitive examination; and Laws 1899, p. 795, c. 370, passed in pursuance thereof, provides that telegraph operators in the city of New York shall rank as sergeants of police, and that the selection of captains shall be made from the list of sergeants. Held, that the designation of a patrolman as telegraph operator by the chief of police, intended to be permanent, was a promotion, and, being made without an examination, was without effect. *People v. Partridge*, 85 N. Y. Supp. 853, 854, 89 App. Div. 497.

PROMPT.

By usage of the Boston grain trade, the phrase "to be shipped prompt" means to be shipped within 10 days. *Soper v. Tyler*, 58 Atl. 699, 700, 77 Conn. 104.

PROOF.

See "Burden of Proof"; "Indubitable Proof."

Evidence distinguished, see "Evidence."

PROPER CASH ITEM.

"Proper cash items" in a cashier's accounts ordinarily include not only money on hand, but everything for which he has paid out the association's cash during a particular day or business period. *United States v. Young* (U. S.) 128 Fed. 111, 114.

PROPER PARTY.

The meaning of the term "proper party," as used in the phrase "is not a proper or necessary party," is not so clear as the meaning

of the term "not a necessary party." The word "or" may be used in two forms. In one it corresponds to "either," and in that sense the term "proper or necessary" would mean either proper or necessary—that is, one or the other. In the other form it means to express the same thing alternatively in different words. In that sense the term "not proper or necessary" would imply that it was not proper—that is, not necessary. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 528.

PROPER PRECINCT.

"Proper precinct," as used in Rev. St. art. 1589, providing that, if there be no justice of the peace qualified to try the suit in the proper precinct, the suit may be commenced before the nearest justice of the peace of the county who is not disqualified to try the same, means that precinct in which the suit is required by the general rule to be commenced or may be commenced under some one of the thirteen exceptions of article 1585; and, if none of these exceptions are applicable, then the proper precinct is the one in the county where the defendant or one or more of the defendants resides, not a county in which one of the defendants resides. *Aspermont Drug Co. v. J. W. Crowds Drug Co. (Tex.)* 80 S. W. 258, 259.

PROPERLY.

The word "properly," as used in Code Civ. Proc. § 1739, requiring a certificate of the clerk attached to the transcript that the undertaking on appeal has been properly filed, has reference to the time of the filing of the undertaking; and if it appears by fair intendment from the wording of the certificate, or by a comparison of the date of its filing with that of the filing of the notice of appeal, that the undertaking has been filed in time, this is sufficient. *Davidson v. Wampler*, 74 Pac. 82, 83, 29 Mont. 61.

PROPERTY.

See "Community Property"; "Lost Property"; "Personal Property"; "Private Property"; "Public Property"; "Separate Property."

All my property, see "All."
Any property, see "Any."

The word "property" implies the exclusive right of possessing, enjoying and disposing of a thing; and, when used subjectively, it means that with respect to which this right exists, or that which is one's own. *Vann v. Edwards*, 47 S. E. 784, 787, 135 N. C. 661.

The word "property," within Rev. St. 1899, § 7979, declaring that no insurance company shall take a risk on any property in

this state greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceeding, embraces both real and personal property. *Howerton v. Iowa State Ins. Co.*, 80 S. W. 27, 29, 105 Mo. App. 575.

The direction in a will that the testator's business shall be carried on with his "estate and property" comprehends the use of all his real and personal property for that purpose. It would seem to be evident that to use, in carrying on the business, the testator's estate and property, is to apply thereto all income, however it may be produced, from either form of property. *Thorn v. De Breteuil*, 71 N. E. 470, 473, 179 N. Y. 64.

In Civ. Code, § 485, making railroads responsible for injury they may occasion to domestic animals on a line which passes through or along the property of the owner of the animals, "property" is interchangeable with "estate." That a tenant has a property in land may not be doubted. *Walther v. Sierra R. Co.*, 74 Pac. 840, 841, 141 Cal. 288.

The word "property," as used in fire policy providing that it shall become void if the property therein described shall be shut down or become inoperative, vacant, unoccupied, etc., refers to the entire plant, and not to any specific building. *Central Montana Mines Co. v. Fireman's Fund Ins. Co. (Minn.)* 100 N. W. 8.

A policy covering certain mining property, consisting of a quartzmill, hoist building, bunkhouse, assay office, and other buildings constituting a part of the entire system, contained the warranty that the assured should at all times, when the property therein described should be idle or inoperative, keep a constant day and night watchman on duty, provided that, if such property should be idle or shut down for more than 30 days at any one time, notice should be given to the company, and permission to remain idle should be indorsed on the policy. The property described in the policy referred to and included the entire system, and not any particular property specified as the mill, which was not shut down and idle, and hence the policy was valid. *Central Montana Mines Co. v. Fireman's Fund Ins. Co. (Minn.)* 99 N. W. 1120, 1123.

Under the word "property," as used in Bankr. Act July 1, 1898, c. 541, § 70, subd. 5, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], vesting in the trustee the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him, the intent was to vest the trustee with all rights and claims having a pecuniary value, and which could be transferred by the party or parties entitled. *In re Burnstine (U. S.)* 131 Fed. 828, 831.

The word "property," as used in Gen. St. 1902, §§ 2367-2377, imposing a succession tax on any property within the jurisdiction of the state which shall pass by will or inheritance, is used to indicate the whole or proportional shares of estates as made subject to the tax; and, as thus used, property in such estates is within the jurisdiction of the state for the purpose of regulating its descent and distribution, is within the jurisdiction of the court of probate whose administrator holds it for distribution. Hence the statute imposes a tax on the personal property of a decedent administered in Connecticut, though the property is situated in other states. *Appeal of Gallup*, 57 Atl. 699, 702, 76 Conn. 617.

The word "property," as used in Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, is held to incorporate not only the thing owned, but also every right which accompanies ownership and its incident. A property owner is entitled to recover from a railroad which constructs its yards so near plaintiff's residence as that the noise, smoke, cinders, and gas from the operation by defendant of its locomotives thereon injuriously affects plaintiff's property. *Missouri, K. & T. R. Co. of Texas v. Calkins* (Tex.) 79 S. W. 852, 853.

The terms "life, liberty, and property" are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law. *Coffeyville Vitrified Brick & Tile Co. v. Perry* (Kan.) 76 Pac. 848, 850, 66 L. R. A. 185 (citing *Gillespie v. People*, 188 Ill. 176, 58 N. E. 107, 52 L. R. A. 283, 80 Am. St. Rep. 176).

Business.

A person's business is property. *People v. McFarlin*, 89 N. Y. Supp. 527, 528, 43 Misc. Rep. 591.

Chose in action.

A cause of action is "property," which can only be taken from an individual or a town by due process of law. *Town of Walton v. Adair*, 89 N. Y. Supp. 230, 234, 96 App. Div. 75.

A right of action is "property," within Gen. St. 1902, § 237, providing that, when a person having property shall be found incapable of managing his affairs, the court

shall appoint a conservator for him. *Appeal of Wentz*, 56 Atl. 625, 627, 76 Conn. 405.

The word "property," in Const. art. 7, § 9, relating to taxation, includes money, credits, investments, and other choses in action. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

Credits.

The word "property," as used in Const. art. 8, § 1, declaring that taxes shall be levied on such property as the Legislature shall prescribe, includes credits, and hence *Rev. St. 1898, § 1036*, declaring that personal property, for purposes of taxation, shall be construed to include all debts due from solvent debtors, is valid. *Kingsley v. City of Merrill* (Wis.) 99 N. W. 1044, 1045.

Inchoate land title.

The term "property," as used in the Louisiana Purchase Treaty, "comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed; and no principle is better settled than that inchoate titles to land are property." *Corkran Oil & Development Co. v. Arnaudet*, 35 South. 747, 753, 111 La. 563 (citing *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; *Delassus v. United States*, 34 U. S. [9 Pet.] 117, 9 L. Ed. 71; *Smith v. United States*, 35 U. S. [10 Pet.] 326, 9 L. Ed. 442; *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. Ed. 321; *Williams v. Close*, 12 La. Ann. 873; *Sacket v. Hooper*, 3 La. 107).

Incorporeal interest of inventor.

The incorporeal interest of an inventor in an article conceived prior to the allowance of a patent cannot be treated as "property," within *Bankr. Act* July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], providing for the surrender of all property which prior to the filing of the petition the bankrupt could by any means have transferred. *In re Dann* (U. S.) 129 Fed. 495, 497.

Labor.

Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts. *Coffeyville Vitrified Brick & Tile Co. v. Perry* (Kan.) 76 Pac. 848, 850, 66 L. R. A. 185.

Mining claim.

Mining claims are "property," in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined Code or Codes of Law, and are recognized by the states and federal government. *O'Connell v. Pinnacle Gold Mines Co.* (U. S.)

181 Fed. 106, 109 (citing *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313).

Note.

A promissory note is something more than a mere written promise. It is a negotiable instrument. It is recognized by the law merchant as property. *Manning v. Berdan* (U. S.) 132 Fed. 382.

PROPERTY IN POSSESSION.

A remainder interest is not "property in possession," within the meaning of the term as used in a statute authorizing the sale of a vested estate for division, if the estate be in possession, etc. *Berry v. Lewis* (Ky.) 82 S. W. 252, 253.

PROPERTY NOT WITHIN THE STATE.

The expression "property not within the state" includes not only property not in fact within the state, but also property not within the state in contemplation of law. *Bates' Ann. St. Ohio*, § 2781, which provides for the listing for taxation by the county auditor for previous years of property which was omitted in such years, and the collection of taxes thereon by the treasurer, was intended to apply only to property which was properly taxable in such years, but which was not returned or properly returned for taxation. All property within the state and not exempt by law is taxed by section 2781, and it was not the purpose of section 2781 to tax exempted property or property not within the state. Section 2781a is therefore constitutional. *Western Assur. Co. of Toronto v. Halliday* (U. S.) 127 Fed. 830, 838.

PROPERTY OF THE COMMONWEALTH.

The words "the property of the commonwealth," as used in Rev. Laws, c. 12, § 5, subd. 2, providing that "the property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken," shall be exempt from taxation, "mean the same as 'all the property of the commonwealth'; and the fact that only one exception is made shows that no other exception could have been intended." Land held under a bond for a deed from the commonwealth, on which a private individual has erected buildings and engaged in manufacturing business thereon, is exempt. *Corcoran v. City of Boston*, 70 N. E. 197, 185 Mass. 325.

PROPERTY RIGHT.

A liquor tax certificate, if not "property" in the strict sense in which that word is used, constitutes a property right. In re *Cullinan*, 88 N. Y. Supp. 164, 166, 94 App. Div. 445 (citing *Niles v. Mathusa*, 47 N. Y. Supp. 38, 20

App. Div. 483; In re *Lyman*, 65 N. Y. Supp. 673, 53 App. Div. 330; *Id.*, 69 N. Y. Supp. 809, 59 App. Div. 217).

PROSECUTION.

Prosecution for violation of ordinance as civil suit, see "Civil Action—Case—Suit—etc."

A penal action, or action to recover a penalty, is not, in the language of a constitutional provision, a "prosecution by indictment or information," so as to entitle the party to a jury trial in the first instance. *Reagh v. Spann* (Ala.) 3 Stew. 100, 107.

As used in an act relating to the taking of testimony of witnesses in criminal cases, which provides that the testimony of witnesses taken in writing shall be sworn to and signed by the witness and attested by the officer taking the same, and returned by such officer without delay into court, together with the notice of the taking of the testimony, with such officer's return of service annexed and attached thereto in which the prosecution is pending, etc., the term "prosecution pending" means accusation or charge pending. *State v. Jackson*, 35 South. 593, 598, 111 La. 343.

PROTESTED.

See "Duly Protested."

PROVIDED.

The word "provided" in its ordinary use signifies a condition. *Shipley v. Jacob Tome Institute* (Md.) 58 Atl. 200, 203.

Where a devise is of all the rest, residue, and remainder of testatrix's property to a certain person and his heirs forever, provided he should take care of the testatrix and look after her while she lived, the word "provided" imports a conditional rather than an absolute estate, and the nature of the devise and the circumstances under which it was made manifest an intention on the part of the testatrix to make a conditional rather than an absolute gift; her object being to make provision for her own care and comfort during the remainder of her life. *Brennan v. Brennan*, 71 N. E. 80, 81, 185 Mass. 560.

PROVISIONS.

The word "provisions," in Gen. St. 1901, § 5364, requiring a railroad contractor to give bond to pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, includes corn, oats, and bran. *Kansas City, Ft. S. & M. R. Co. v. Graham*, 74 Pac. 232, 233, 67 Kan. 791.

PROXIMATE CAUSE.

"In discussing legal causation, the phrase 'proximate cause' does not necessarily mean that which is nearest, but refers rather to the efficient cause, and in this sense is sometimes referred to as the immediate and direct cause, as opposed to remote; and the words 'proximate,' 'immediate,' and 'direct' are frequently used as synonymous." *Godwin v. Atlantic Coast Line R. Co.*, 48 S. E. 139, 141, 120 Ga. 747.

"The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." *Alice, Wade City & C. C. Telephone Co. v. Billingsley (Tex.)* 77 S. W. 255, 257 (quoting *Shear. & Redf. Neg.* § 26).

The proximate cause is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result, although it may operate through one or more successive instruments. If the primary cause was so linked and bound to the events succeeding it that all together they create and become one continuous whole—the one event so operating upon the other as to tie the result to the primary cause—the latter will be the proximate cause of the injury. If there is some new and independent cause, disconnected from the first or original cause, operating in itself, which intervenes to produce the result, the chain of sequence will be broken, and the primary fault cannot be held to be the direct and proximate cause of the injury. *Shippers' Compress & Warehouse Co. v. Davidson (Tex.)* 80 S. W. 1032, 1033.

"Proximate cause" is well defined as that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred. In *Baltimore & O. R. Co. v. State*, 33 Md. 543, the Supreme Court, in defining "proximate cause," said: "By proximate cause is intended an act which directly produced, or concurred directly in producing, the injury." *Claypool v. Wigmore (Ind.)* 71 N. E. 509, 510.

"In determining the proximate cause we must look to the direct and efficient cause—that is, the thing amiss—and determine whether the injury resulted therefrom. An intervening human agency may break the connection between the negligent act and the subsequent injury, but that agency must act either independently of the preceding negligence, or the intervening action must have been negligent, so as to constitute an independent proximate cause, in order to break the connection between the wrong complained of and the injury." *Phinney v. Illinois*

Cent. R. Co., 98 N. W. 358, 361, 122 Iowa, 488.

Proximate cause, so far as applicable to personal injury cases, is defined as "the efficient cause; that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause as a person of ordinary intelligence and prudence ought reasonably to foresee that personal injury to another may probably follow from such person's conduct." *Feldschneider v. Chicago, M. & St. P. R. Co. (Wis.)* 99 N. W. 1034, 1037 (quoting *Deisenrieter v. Kraus-Merkel Malt-ing Co.*, 97 Wis. 279, 72 N. W. 735).

It is erroneous to define "proximate," in charging as to the proximate cause of the injury, as meaning efficient or material. *Boyce v. Wilbur Lumber Co.*, 97 N. W. 563, 566, 119 Wis. 642.

PROXY.

"The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation, or to sell the entire corporate business and property, or to vote upon other important business, unless such proxy itself in general or special terms gives the proxy the power to vote on such questions." A proxy given by a member of a savings company, appointing one to vote in the member's place in all matters coming before any meeting of the stockholders, contemplates action of the stockholders only with reference to matters which could be submitted to them under such articles and by-laws as existed at that time, and confers no authority on the person holding the proxies to vote on the question of going into voluntary liquidation. *McKee v. Home Savings & Trust Co.*, 98 N. W. 609, 611, 122 Iowa, 731 (quoting *2 Cook, Corp.* [4th Ed.] § 610).

PUBLIC CORPORATION.

See "Quasi Public Corporation."

Public corporations are created for public purposes, and the property controlled by them is devoted to the objects for which they are created. The corporators have no private beneficial interest either in the franchises granted or the property controlled. *Trustees of Carrick Academy v. Clark (Tenn.)* 80 S. W. 64, 67.

Civ. Code, § 2856, defines public corporations as those formed or organized for the government of a portion of the state. A corporation incorporated for the purpose of erecting an armory building is not a public corporation. *Arrison v. Company D, North Dakota National Guard*, 98 N. W. 83, 84, 12 N. D. 554.

PUBLIC DUTY.

The furnishing of electric light and energy to private consumers is not a "public duty or function," within the meaning of such term as used in a city ordinance prescribing the formalities for the adoption of ordinances providing for the lighting of streets or public places, etc., the construction and operation of street railroads, etc., or purporting to award a contract covering the performance or discharge of any public duty or function. Such a business may properly be called private as contradistinguished from a municipal or public duty or function, and also in the sense that it is conducted for private gain. *Strohmeyer v. Consumers' Electric Co.*, 35 South. 723, 724, 111 La. 506.

PUBLIC LAND.

The words "public lands" describe "such lands belonging to the United States as are subject to sale or disposal under general laws." Where an indictment for conspiracy to deprive the government of land by reason of a fraudulent homestead entry alleged that the lands sought to be acquired were public lands, and that defendants had conspired to defraud the United States out of a portion of such land, it was not demurrable for failure to allege other facts showing that the land was in fact public land or subject to homestead entry. *United States v. McKinley* (U. S.) 126 Fed. 242 (citing *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769).

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. *United States v. Blendaur* (U. S.) 128 Fed. 910, 913, 63 C. C. A. 636.

PUBLIC LETTING.

To constitute a public letting of a contract to do certain work, it is sufficient that it be open to all—notorious; that reasonable public notice be given; and that the public have the equal privilege of bidding and becoming contractors. It is not necessary that the publicity shall be of that nature which attends sales at public outcry. *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33, 61.

PUBLIC OFFICE.

As private property, see "Private Property."

A public office is a mere public agency created by the people for the purpose of the administration of the necessary functions of

organized society, and the agency may at any time be terminated by the power which created it. As between the office holder and individuals in their private capacity, and perhaps as against any authority except the sovereign power itself acting in pursuance of a power of removal expressly reserved or necessarily implied from the nature of office, the officer is entitled to the full protection of the law in his right to hold the office, practically to the same extent as if it were private property. *In re Carter*, 74 Pac. 997, 141 Cal. 316.

A public office is an agency of the state. *State v. Michel* (La.) 36 South. 869, 870.

PUBLIC OFFICER.

Where either the people or the Legislature create an office or designate a person to perform some function of government, the head of such an office would be a public officer. *People v. Hamilton*, 90 N. Y. Supp. 547, 549.

Comparison clerk.

A comparison clerk in the county clerk's office of the county of New York is a public officer in the civil service of the state. *People v. Hamilton*, 90 N. Y. Supp. 97, 44 Misc. Rep. 577.

County judge.

The term "public officers," as used in Const. art. 12, § 3, providing that the compensation of any public officer shall not be increased or diminished during his term of office, when construed in connection with the provisions that no money shall be paid out of the treasury except on appropriation by law, and on warrant drawn by the proper officer, and that the general appropriation bill shall embrace only appropriations for ordinary expenses of the executive, legislative, and judicial departments, etc., and with article 5, § 19, article 30, §§ 8, 15, and article 21, § 2, providing for the terms and salaries of county judges, and supreme and county judges, applies only to state officers who draw their salaries from the state treasury, and does not include the county judges. *Hauser v. Seeley* (S. D.) 100 N. W. 437, 438.

Insurance agent.

An insurance agent, as such, is not a public officer, nor is his character a matter of public interest; except as the public has an indirect interest in the private character and conduct of every member of society; but this interest is not sufficient to invoke the privilege in libel, granted in case where one holds or is a candidate for some position of public trust. *Morse v. Times-Republican Printing Co.* (Iowa) 100 N. W. 867, 873.

Police station janitor.

A janitor of a police station, appointed for a year, is not a public officer, but a

mere employé, whose contract gives him no estate for years in the station house, and no right of entry beyond a revocable license. *Wiggin v. City of Manchester*, 58 Atl. 522, 523, 72 N. H. 576.

Road overseer or supervisor.

"A road overseer is a public officer, and obstructing him in the performance of his duties as such public officer constitutes a public offense." *Richardson v. Dybedahl* (S. D.) 98 N. W. 164, 166.

A supervisor of public roads is a public officer. *Mial v. Ellington*, 46 S. E. 961, 962, 134 N. C. 131, 65 L. R. A. 697.

PUBLIC PIER.

A public pier is subject to the ordinary uses of a public way, which in populous towns is a street. *Borough of Seabright v. Allgor*, 56 Atl. 287, 288, 69 N. J. Law, 641.

PUBLIC PLACE.

Street corners are not necessarily "public places," within Rev. St. 1898, § 1130, which requires the county or city treasurer, four weeks prior to the sale of land for taxes, to post copies of a notice of sale and statement of the lands in at least four public places in such county. "It is a matter of common knowledge that a conspicuous place at many street corners in cities are comparatively obscure and secret places, and to post a notice of tax sale in a conspicuous place at such corners would most likely fail to attract observation and meet the public view." *Shepherd v. Kahle* (Wis.) 97 N. W. 506, 507.

PUBLIC POLICY.

The public policy of this state is necessarily confined to the regulation of its own affairs and transactions occurring within its sovereignty. No state can be said to have a public policy as to the administration of justice, or as to the service of quasi public agencies, or as to contracts made with respect thereto, transpiring wholly abroad. The public policy of a state can no more have extraterritorial effect than can a statute of the state. *Cleveland, C. C. & St. L. Ry. Co. v. Druien* (Ky.) 80 S. W. 778, 780, 66 L. R. A. 275.

PUBLIC PROPERTY.

Public property is what belongs to the government—federal, state, or municipal. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

The words "public property," as used in Pol. Code 1895, § 762, which exempts from taxation all public property, includes a build-

ing and a stock of liquors owned by a municipal corporation and operated by it as a dispensary; and this is so though the town had no legal authority to maintain and operate a dispensary. *Walden v. Town of Whigham*, 48 S. E. 159, 120 Ga. 646.

The phrase "public property used for public purposes," as used in a constitutional provision empowering the Legislature to exempt public property used for public purposes from taxation, authorizes the exemption of property owned by a city necessary to the exercise of governmental duties; but not property held and used by a city for mere money-making purposes, or for the comfort of its citizens. Bonds of a lighting company given to the city in consideration for the sale of its lighting plant to the company, the income of which is used by the city for the lighting of its streets, are not such public property. *City of Frankfort v. Commonwealth* (Ky.) 82 S. W. 1008, 1009.

PUBLIC PURPOSE.

The phrase "used for public purposes," in a constitutional provision empowering the Legislature to exempt public property used for public purposes from taxation, means the same as the words "used for governmental purposes." *City of Frankfort v. Commonwealth* (Ky.) 82 S. W. 1008, 1009.

PUBLIC RECORD.

A record of a hospital made by a junior assistant surgeon, connected with the hospital, showing that at a time specified therein a doctor removed to the hospital a person whose name and address were entered in the record, is not a "public record" kept by a public officer in the discharge of his duties. *Kemp v. Metropolitan St. R. Co.*, 88 N. Y. Supp. 1, 2, 94 App. Div. 322.

PUBLIC ROAD.

The test as to whether or not a road is a public road is not simply how many people actually use it, but how many may have a free and unrestricted right in common to use it. If it is free and common to all citizens, then, no matter whether it is or is not of great length, or whether it leads to or from a village, city, or hamlet, or whether it is much or little used, it is a public road. *Heninger v. Peery*, 47 S. E. 1013, 1014, 102 Va. 896 (quoting *Elliott, Roads & St.* §§ 11, 192).

PUBLIC SALE.

A public sale is a sale in pursuance of a notice, by auction or public outcry. *Robins v. Bellas* (Pa.) 4 Watts, 255, 258.

PUBLIC SPORT.

A public sport, game, show, or entertainment is one held out and given to the public. *People v. Poole*, 89 N. Y. Supp. 773, 774, 44 Misc. Rep. 118.

PUBLIC USE.

A public use must be either a use by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state. *Healy Lumber Co. v. Morris*, 74 Pac. 681, 685, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964.

Property is taken for "public use" when the taking is for use that will promote a public interest, and which use tends to develop the great natural resources of the commonwealth. The taking of property for the purpose of obtaining water for the irrigation of a farm and to render the same productive is a taking for a public use. *Nash v. Clark*, 75 Pac. 371, 373, 27 Utah, 158.

The term "public use," as employed in a constitutional provision that no person's property shall be taken, damaged or destroyed, or applied to public use without adequate compensation being made, etc., is not that use which either the Legislature or the courts may deem a public benefit or advantage, but means the same as "use by the public," and is synonymous with the employment or application by the public of the thing taken. It means that, though property is vested in private individuals or corporations, the public yet retains certain definite rights to the use or employment of the property. *Borden v. Trespalacios Rice & Irrigation Co.* (Tex.) 82 S. W. 461, 465.

"The reason of the case and the settled practice of free government must be our guides in determining what is or is not to be regarded as a public use, and that can only be considered such where the government is supplying its own needs or is furnishing facilities to its citizens in regard to those matters of public interest, convenience, and welfare which, on account of their peculiar character and the difficulty of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide." The right to fish in an inland lake in New Jersey cannot be separated from the ownership of the lake and taken under the power of eminent domain, because, first, the natural supply of fish therein is so small as to be incapable of meeting the public demand, and, second, the object of acquiring such a right is not use which implies utility, but mere sport or pastime. *Albright v. Sussex County Lake & Park Commission* (N. J.) 57 Atl. 398, 400 (quoting *Cooley*, Const. Lim. 553).

PUBLIC UTILITY.

A switch track which is part of a general railway system, and which may be used by any or all who have occasion to ship freight over it, and which is not designed for the exclusive use or convenience of any particular person or corporation, is, although from its location and surroundings only a limited number of persons will have occasion to use it, a public utility. *Stockdale v. Rio Grande Western Ry. Co.* (Utah) 77 Pac. 849.

PUBLIC WATER.

The term "public waters," as used in Sess. Laws 1903, p. 223, relating to the appropriation and division of the public waters, refers to all water running in natural channel streams, and the state may by proper application regulate the appropriation and use thereof. *Boise City Irrigation & Land Co. v. Stewart* (Idaho) 77 Pac. 25, 27.

A natural fresh-water pond containing 15 or more acres, though situated in the midst of and entirely surrounded by the land of a private owner, is "public water," and the ownership in the land ceases at the water's edge or at high-water mark. *Dolbeer v. Suncok Waterworks Co.*, 58 Atl. 504, 506, 72 N. H. 562.

PUBLIC WAY.

There are different kinds of public ways and different kinds of private ways, but all ways are included in the one or the other general classification, though some may partake of the nature of both, being maintained and operated for private gain and for use by the public. *Jones v. Venable*, 47 S. E. 549, 550, 120 Ga. 1.

A road or way established under a statute authorizing a mine owner to establish ways from a railroad to his coal mine is a public way in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and the mine owner who procured it to be established must use the special privileges which the act confers on him in such manner as not to destroy the right of the public or prevent its enjoyment. *Railroad Commission of Texas v. St. Louis Southwestern R. Co. of Texas* (Tex.) 80 S. W. 102, 104 (citing *Phillips v. Watson*, 63 Iowa, 23, 18 N. W. 659).

PUBLIC WORK.

The term "public work," as used in a provision of a city charter prohibiting the assembly from directly contracting for any public work, or improvement or repairs thereon, or fixing the price or rate therefor, and prescribing the method by which such work

or improvement, etc., shall be done, has no technical meaning, and includes every species and character of work done for the public and for which the taxpaying citizens are liable. It includes contracts for the removal and disposition of city garbage, which contract was let to a sanitary company, which disposed of the garbage by the method known as "reduction." *State v. Butler*, 77 S. W. 560, 568, 178 Mo. 272.

PUBLICATION.

See "Last Publication."

Anonymous publication, see "Anonymous."

PUNISHMENT.

See "Cruel Punishment"; "Infamous Punishment."

The detention of a female minor in the House of the Good Shepherd under an ordinance relating to juvenile vagrants, and authorizing the detention of such persons until they reach a certain age, is not a "punishment," being designed for her good and welfare, to protect her against herself and from evil-minded parties surrounding her. *State ex rel. Caillouet v. Marmouget*, 35 South. 529, 533, 111 La. 225.

PUNITIVE DAMAGES.

"Punitive damages have now come to be generally, though not universally, regarded, not only a punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state." *Beaudrot v. Southern R. Co.*, 48 S. E. 106, 107, 69 S. C. 160.

PURCHASE.

See "Indirect Purchase."

The word "purchase," as used in an affidavit of defense in an action based on a book account for goods sold, averring that defendant never purchased or authorized the purchase of the property mentioned in the book of entries attached to the affidavit of demand, under a reasonable construction covers defendant's liability as purchaser, either express or implied, upon a book account for goods sold and delivered. *A. H. Davenport Co. v. Addicks (Del.)* 57 Atl. 532, 533.

PURCHASED.

The word "purchased" may mean a completed transaction, or it may mean a transaction still incomplete. *State v. Ware (N. J.)* 38 Atl. 595, 596.

PURCHASER.

See "Bona Fide Purchaser."

A petitioner for condemnation is not in any sense a purchaser or creditor within the purview of the registration statutes. *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (U. S.)* 131 Fed. 657, 666.

The word "purchaser," as used in a statute declaring unrecorded chattel mortgages to be void as against creditors and bona fide purchasers for value, includes a mortgagee for value. *Eason v. Garrison & Kelly (Tex.)* 82 S. W. 800, 801.

PURCHASER FOR A VALUABLE CONSIDERATION.

A mortgage taken to secure a debt contemporaneously contracted constitutes the mortgagee a "purchaser for a valuable consideration," who will be protected in equity against outstanding claims or incumbrances of which he had no notice. *Atlanta Nat. Building & Loan Ass'n v. Gilmer (U. S.)* 128 Fed. 293, 296.

PURCHASER IN GOOD FAITH.

See, also, "Good Faith."

To constitute a "purchaser in good faith," it is essential that there be a valuable consideration, the absence of notice, and the presence of good faith. If the existence and concurrence of such requisites are shown, it is immaterial, so far as a third person is concerned, whether or not the deed of the purchaser was properly acknowledged. *Derrett v. Britton (Tex.)* 80 S. W. 562, 564.

One is not a "purchaser in good faith," so as to be protected against an outstanding contract, who has constructive notice of such contract; and this because the law itself imputes, in the case of constructive notice, knowledge to him. But one may honestly believe that he has good title when in fact he has not, and, while this belief will not avail him as against an outstanding contract or title of which he has constructive notice, he will nevertheless be entitled to be protected in his permanent improvements, for the test of good faith as to them is his honest belief that he has good title. *Hunter v. Coe*, 97 N. W. 869, 872, 12 N. D. 505.

A purchaser is not a "purchaser in good faith" of any part of the bankrupt's estate, if title or security was accepted "in contemplation of or in fraud upon" the bankrupt act, or if for any reason it would not have been valid against the claims of creditors of the bankrupt. *In re Pease (U. S.)* 129 Fed. 446, 448.

PURCHASER WITHOUT NOTICE.

Bona fide purchaser synonymous, see "Bona Fide Purchaser."

PURE.

The word "pure," in Agricultural Law, Laws 1893, p. 667, c. 338, § 5052, to prevent injury to health by penalizing the manufacture of vinegar which is not made from pure apple juice, means not only free from any foreign substance, but free from any defiling or objectionable mixture. *People v. J. Heinz Co.*, 86 N. Y. Supp. 141, 143, 90 App. Div. 408.

PURE ACCIDENT.

Where a thing happens so often as to become a well-known fact and a matter of common knowledge, it can hardly be called a "pure accident." Where a pedestrian on a sidewalk was injured by pieces of glass falling from the globe of an electric light which was struck and broken by the pole of an electric car slipping from the wire, the slipping of the pole was not a "pure accident," it appearing that the trolley poles jumped the wire from time to time from various causes. *Nelson v. Narragansett Electric Lighting Co.*, 58 Atl. 802, 803, 26 R. I. 258.

PURPOSE.

See "Charitable Purpose"; "Corporate Purpose"; "General Purpose"; "Legitimate Purpose"; "Manufacturing Purpose"; "Public Purpose."

PURPOSELY.

The word "purposely," in the statute making it murder in the first degree for any person to purposely and in his deliberate and premeditated malice kill another, means an act done with a purpose or intent of doing that act. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

The word "purposely," as used in Burns' Ann. St. 1901, § 2073, which provides that it shall be unlawful for any person over the age of 10 years, with or without malice, purposely to point or aim any pistol or other firearm, either empty or loaded, towards any other person, means "intentionally or designedly." An indictment charging involuntary manslaughter because of the killing of deceased by accused while he was violating the section by pointing and aiming a firearm at deceased is insufficient for failing to employ the word "purposely," or any other word of equivalent import, in describing the conduct of accused. *Eaton v. State*, 70 N. E. 814, 815, 162 Ind. 554.

PURPRESTURE.

Every building or wharf erected upon lands without license, below high-water mark, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if not a nuisance to navigation. *San Francisco Sav.*

Union v. R. G. R. Petroleum & Mining Co., 77 Pac. 823, 144 Cal. 134, 66 L. R. A. 242.

PUT.

"A 'put' is a privilege to deliver or not deliver grain or other commodity." Where plaintiff purchased from defendants certain puts, or an option to sell to defendants a certain quantity of grain at a fixed price within a limited time, and the evidence established that such contracts were merely speculative, and that the parties did not intend that any grain should be delivered or received, but that settlement should be made by payment of differences in the market price, the contract was in violation of Rev. St. 1899, § 2337, prohibiting all contracts for the sale of grain for future delivery where the intention was to settle by payment of differences, and section 2342, declaring that such contracts shall be considered gambling. *Lane v. Logan Grain Co.*, 79 S. W. 722, 724, 105 Mo. App. 215.

PUT THROUGH.

"He has sworn to a damned lie, and I will put him through for it," implies a threatened legal prosecution for perjury, and is actionable. *Crone v. Angell*, 14 Mich. 340, 345.

QUALIFIED.

Hill's Code, § 1084, provides that, when a will is proven, letters testamentary shall be issued to the persons named therein as executors, or to such of them as give notice of their trust and are qualified. Section 1108 prescribes that "the following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers other than justices of the peace; persons of unsound mind or who have been convicted of a felony or a misdemeanor involving moral turpitude; or a married woman." It was held that all persons who are qualified and competent to serve were not disqualified, and, when nominated in the will, were entitled to have the letters testamentary issued to them. One who is not disqualified, or does not fall within one or the other exception of the statute, must then be qualified and entitled to the letters. *Holladay v. Holladay*, 19 Pac. 81, 83, 16 Or. 147.

In Gen. Laws, c. 243, § 2, providing that either party in a civil action may, before the opening of the action to the jury, challenge any qualified jurors called for a trial of such cause, the word "qualified" refers only to those jurors who are not subject to challenge for cause in the case then for trial. *Stevens v. Union R. Co.*, 58 Atl. 492, 494, 26 R. I. 90.

QUALITY GUARANTIED.

Where a contract for the sale of binder twine contained the words "quality guaran-

ties," such words should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed. *Union Selling Co. v. Jones* (U. S.) 128 Fed. 672, 677, 63 C. C. A. 224.

QUANTITY.

See "Reasonable Quantities."

QUASI CORPORATION.

"The counties of this state, like townships, are quasi corporations, created solely for governmental purposes, and hold their property, not as private owners, but for the performance of their duties as public agencies." *State v. Gunn* (Minn.) 100 N. W. 97, 99.

A road district is not a quasi corporation. *Custer County Bank v. Custer County* (S. D.) 100 N. W. 424, 426.

QUASI IN REM.

A suit quasi in rem arises where the suit is against the person in respect of the res, where, for example, it has for its object partition or the sale or other disposition of defendant's property within the jurisdiction to satisfy plaintiff's demand by enforcing a lien upon it. In such a suit personal service within the jurisdiction or appearance is not necessary. The decree can, however, extend only to the property in controversy. Defendant's interest is alone sought to be effected, and he must be cited to appear, and the judgment is conclusive only between the parties. *Hill v. Henry* (N. J.) 57 Atl. 554, 555.

QUASI JUDICIAL FUNCTION.

Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial. *Bair v. Struck*, 74 Pac. 69, 71, 29 Mont. 45, 63 L. R. A. 481 (citing *Mechem, Public Officers*, § 637; *Bish. Noncontract Law*, §§ 785, 786).

QUASI PUBLIC CORPORATION.

A waterworks company is a quasi public corporation. It must supply water to all who apply therefor and offer to pay the rates. Waterworks companies are required to supply water impartially to all consumers, and they cannot act capriciously, or discriminate against any one who is able to pay for

the water supplied. *Wiemer v. Louisville Water Co.* (U. S.) 130 Fed. 251, 252 (quoting *3 Cook, Corp.* § 931).

A corporation organized for the purpose of establishing and maintaining a public telephone system, for the purpose of furnishing telephone connection between its subscribers, is a quasi public corporation. Its business is of a public character. It depends upon the public for its support, and the public depends upon it for its accommodations. Such a corporation has such powers only as are expressly or impliedly granted by the statute under which it is organized. A quasi public corporation cannot disable itself for the performance of its functions by the sale and transfer of its property without legislative authority. *Cumberland Telephone & Telegraph Co. v. City of Evansville* (U. S.) 127 Fed. 187, 190.

QUIRT.

A quirt is a rawhide whip plated with two thongs of buffalo hide. *Miller v. Meche*, 35 South. 491, 492, 111 La. 143 (quoting *Webster, Dict.*).

QUO WARRANTO.

Quo warranto is in the nature of a direct proceeding, in which the title to an office, as evidenced by the record, is assailed. *Daniels v. Newbold* (Iowa) 100 N. W. 1119, 1120.

RAFTAGE.

Raftage is the expense of floating and running logs. *Moss Point Lumber Co. v. Thompson*, 35 South. 828, 83 Miss. 499.

RAGS.

Clippings of woolen material, produced in the process of making up garments, are "rags," within both the popular and the commercial signification of the term. *United States v. Pearson & Emmott* (U. S.) 131 Fed. 571, 572.

RAILROAD.

See "Trunk Railway."

The law treats a railroad and its appurtenances as one entire thing. *St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 78 S. W. 777, 779.

The word "railroad," as used in law, is broad enough to include street railroads, and many cases have arisen where the courts have held that the word does in its signification include such. Each case is to be determined upon its own facts, having in view the circumstances, the context, the presumed intention of the lawmakers, and the general policy of the state in regard to the particular

matter. *San Francisco & S. M. Electric R. Co. v. Scott*, 75 Pac. 575, 576, 142 Cal. 222 (citing *Ferguson v. Sherman*, 116 Cal. 169, 176, 47 Pac. 1023, 37 L. R. A. 622).

"The Constitution, statutes, and decisions of this state recognize that the word 'railroad' is generic, and includes street railroads, narrow gauge roads, horse car companies, dummy lines, and street railroads operated by electricity. Whether a particular statute applies to any one of these various forms of railroads is to be determined from the language of the statute, from the context, or from the intent of the lawmakers." Civ. Code 1895, § 2234, providing that "all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within 50 feet of the place of crossing," where the tracks of separate and independent railroads cross each other, does not apply to a street railway, so as to compel it to stop its cars before crossing a steam railroad track. *Georgia Ry. & Electric Co. v. Joiner*, 48 S. E. 336, 337, 120 Ga. 905 (quoting *Savannah T. & I. of H. Ry. v. Williams*, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249).

A street railroad is not a "railroad," within Gen. St. 1901, § 2098, making it an offense to willfully injure any locomotive, car, or other machinery in use upon any railroad within the state. *State v. Cain* (Kan.) 76 Pac. 443, 444.

RAILROAD CORPORATION.

Railroad Law, Laws 1892, p. 1390, c. 676, § 32, providing that every railroad corporation shall maintain cattle guards at road crossings, applies to a street surface railroad company incorporated under article 1 of the act (page 1382). *Evans v. Utica & Mohawk Valley Ry. Co.*, 89 N. Y. Supp. 1089, 44 Misc. Rep. 345.

RANGE.

The word "range," as used by ranchmen, signifies sparsely populated and unclosed prairie, over which stock growers have been allowed to let cattle, horses, and other animals owned by them or in their charge roam and feed without restraint. By common consent, persons residing in such country have usually claimed as their range certain portions of this prairie lying contiguous to the home ranch. *Miller v. Lewis* (S. D.) 97 N. W. 364, 365.

RAPE.

See "Assault with Intent to Commit Rape."

Rape is the carnal knowledge of a female forcibly and against her will. Pen. Code 1895, § 93. It is the act of having car-

nal knowledge by a man of a woman forcibly and against her will, or without her conscious permission, or where permission has been extorted by force or fear of immediate bodily harm. 13 Cr. Law Mag. 503. A man, having sexual intercourse with an imbecile female, mentally incapable of intelligently expressing any assent or dissent, or of exercising any judgment in the matter, is guilty of rape, although he uses no more force than is necessary to accomplish the carnal act, and although the woman offers no resistance. *Gore v. State*, 46 S. E. 671, 672, 674, 119 Ga. 418, 100 Am. St. Rep. 182.

RATE.

In U. S. Comp. St. 1901, § 5219, providing that the taxation of national bank stock shall not be at a greater rate than shall be assessed on other moneyed capital in the hands of individual citizens, etc., the term "rate" has relation to the assessment as a whole, and does not signify the mere percentage or levy upon any valuation adopted. *Ankeny v. Blakley*, 74 Pac. 485, 488, 44 Or. 78.

RATIFICATION.

"The gist of a ratification is the deliberate admission by the proper authority of a liability to pay for that for which it may lawfully contract." If one says, 'I will pay A. or B., to one or the other of whom I admit I am liable, as the court may adjudge,' this is as much a ratification, a formal acknowledgment, of a liability to pay as if he said, 'I promise to pay A.,' or 'I promise to pay B.'" *Borough of East Newark v. New York & N. J. Water Supply Co.* (N. J.) 57 Atl. 1051, 1055.

READY FOR OCCUPANCY.

Premises leased consisted of a store, basement, and conservatory, to be used for selling flowers, and were part of the lessor's building; and the lease recited that the building was in process of construction, and intended to be of the general character shown in certain plans, and provided that, in case the premises should be "ready for occupancy" at the beginning of the term, possession should be delivered as soon as completed, and that rent should be computed only from the time the premises should be ready for occupancy. Held, that the phrase "ready for occupancy" did not mean fitted by the lessor with fixtures, rendering it ready for the lessee's business. *Gerry v. Siebrecht*, 88 N. Y. Supp. 1034, 1035.

REAL ESTATE.

It has been uniformly held that the words "real estate" in a tax act will not be

construed to include land necessary to the franchises of a public corporation. Under Act April 2, 1858 (P. L. 385), providing that real property of corporations—the superstructure of the road and water stations alone excepted—shall be subject to taxation for city purposes, a power house for the manufacture of electricity, owned and used by a traction motor company operating street railways, is exempt from taxation. *City of Philadelphia v. Electric Traction Co. (Pa.)* 57 Atl. 354, 355.

The equitable interest vested in a testatrix by virtue of her possession as mortgagee and purchaser under the execution sale before the time for redemption expired was “real estate,” so as to pass under a devise of such. *Morgan v. Joslyn (Minn.)* 97 N. W. 449, 450, 91 Minn. 60.

REAL PARTY IN INTEREST.

The test of whether one is the real party in suit is, does he satisfy the call for the person who has the right to control and receive the fruits of the litigation? The rule is stated in a recent ably written work thus: “The real party in interest, within the meaning of this provision of the Code, is the person who will be entitled to the benefits of the action if successful; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in or connection with it.” *Gross v. Heckert (Wis.)* 97 N. W. 952, 954.

REASONABLE CARE.

“Reasonable care” is a relative term. What constitutes its exercise in the middle of a block may be entirely inadequate at a street intersection. The necessity for its exercise by the motorman, however, is present over his entire route, but in varying degree, depending upon circumstances, and the absence or presence of peril to travelers in the street. *Solomon v. Buffalo R. Co.*, 89 N. Y. Supp. 99, 101, 96 App. Div. 487.

The term “ordinary or reasonable care,” applied to the conduct of a child, means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. *Rohloff v. Fair Haven & W. R. Co.*, 58 Atl. 5, 7, 76 Conn. 689.

REASONABLE CAUSE.

Other reasonable cause, see “Other.”

REASONABLE DOUBT.

See, also, “Well Founded.”

A reasonable doubt is a doubt derived from the evidence or lack of evidence in the

case. *United States v. Post (U. S.)* 128 Fed. 950, 957.

Reasonable doubt is an honest, substantial doubt, actually existing in the minds of the jury, and arising either from the evidence favorable to the defendant or from a want of evidence on behalf of the government. It is not merely such a doubt as may be conjured up in the mind of one desirous of escaping the responsibility of decision, or such as may be engendered by pity or sympathy for the accused. *United States v. Breese (U. S.)* 131 Fed. 915, 917.

A reasonable doubt is not a whimsical, imaginary, or possible doubt, but a substantial doubt, such as intelligent men may reasonably entertain upon a careful and conscientious consideration of all the evidence. *State v. Emory (Del.)* 58 Atl. 1036, 1039.

The term “reasonable doubt,” as defined by text writers and decisions of courts of last resort, is a fair doubt growing out of the testimony in the case. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense. 3 Rice, Ev. § 268. It would be possible to raise an imaginary or captious doubt in any case, no matter how strong, direct, and positive the evidence might be. For instance, a jury might imagine, in a case where two uncontradicted eyewitnesses to a crime testified to its commission, that such witnesses might be mistaken, and thus entertain a captious or imaginary doubt. But such a doubt is not a “reasonable doubt,” within the legal definition of that phrase. *State v. Levy (Idaho)* 75 Pac. 227, 230.

An instruction that a reasonable doubt is one that is based upon some ground in the testimony or the want of testimony in the case, and that, if a juror has not a doubt of that gravity, he ought to convict, is proper. *O'Dell v. State*, 47 S. E. 577, 578, 120 Ga. 152.

An instruction defining the term “reasonable doubt” in the language of the instruction given in *Barney v. State*, 49 Neb. 515, 68 N. W. 636, together with the additional sentence, “You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men,” is not erroneous, though the instruction is not to be commended. *Lillie v. State (Neb.)* 100 N. W. 316, 322.

REASONABLE QUANTITIES.

The expression “reasonable quantities,” in an instruction in a prosecution for violating the local option law, to the effect that, if the beverage sold was not intoxicating liquor “if drunk in reasonable quantities,” defendant should be acquitted, is not equivalent to saying “when drunk in such quantities as may practically be drunk.” Hence the instruction was erroneous, because intoxicating liquor is defined to be any liquor

intended for use as a beverage, or capable of being so used, which contains alcohol in such a proportion that it will produce intoxication when taken in such quantities as may be practically drunk as an intoxicant. *Murray v. State (Tex.)* 79 S. W. 568, 570.

REASONABLE TIME.

"The law has not defined reasonable time. It cannot be defined by any prescribed rule. What is reasonable in one case may be unreasonable in another case. What is reasonable in any case must be ascertained by the application of reason to the facts which characterize the particular case. Delay for one week after full discovery may be unreasonable in some cases. A much longer delay may in other cases be reasonable. The injured party should observe ordinary vigilance and good faith. He should not, by culpable negligence or by design, subject the other party to unnecessary inconvenience, loss, or hazard; and, whenever he offers to return the property, it should be in as good condition as it was when he might have first returned it after full discovery of its defectiveness, so as to place both parties as nearly as possible in statu quo. All this may appear in a supposable or possible case, even though months may have interlapsed. It may not appear in another possible case in which one week had evolved. Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injuries or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong to the vendor; and the main question in every such case should be: Has he any just cause to object to the rescission of the contract? Has he been trifled with? Will he have suffered by unnecessary and improper delay?" *Hogan v. Tucker (Ky.)* 77 S. W. 197, 199 (quoting *Hoggins v. Becraft*, 81 Ky. [1 Dana] 28, 31).

The term "reasonable time" is a relative one, and its meaning depends entirely upon the attendant circumstances. It has been held in one case to mean as soon as convenient; in another, the least possible time after an event; and in many others it was held that such time must be determined according to the circumstances of the case, and with particular reference to the means and ability of the person by whom the contract is to be performed. *Neilsen v. Mayer*, 85 N. Y. Supp. 1069, 1070.

What is a reasonable time, when the facts are undisputed, is a question of law for the court. Where it is undisputed that a claim was presented to the executrix by April 1st, and was in her possession six months later, when the action was commenced, it was clearly a reasonable length of time in which to determine whether she would allow or reject it. *Goltra v. Penland (Or.)* 77 Pac. 129, 132.

REASONABLY.

The adverb "reasonably" is a qualifying word, and modifies the adjective "safe." It is defined by Webster as meaning moderately or tolerably, and that is its commonly understood meaning. *Tompkins v. Commonwealth (Ky.)* 77 S. W. 712, 713. The use of the word in an instruction in a prosecution for homicide that accused had the right to kill, if there was, as it then appeared to him, no reasonably safe means of averting the danger of losing his life or suffering great bodily harm at the hands of decedent, is erroneous, since by such instruction accused would not be compelled to choose an alternative method of escaping danger, unless it promised absolute safety. *Tompkins v. Commonwealth (Ky.)* 77 S. W. 712, 713.

REASONABLY SATISFIES.

The expression "reasonably satisfies," as used in an instruction defining the term "preponderance of the evidence" as meaning that greater and superior weight of the testimony as reasonably satisfies the minds of the jury, must have been understood by the jury to mean that a preponderance of the evidence was established if, upon consideration of the evidence, the result was to reasonably satisfy their minds that the greater weight of the evidence was with plaintiff, and the use of the words did not, therefore, render the instruction erroneous, as being too great a burden on the party having the burden of proof. *Ball v. Marquie*, 98 N. W. 496, 497, 122 Iowa, 605.

REBELLION.

See "Actual Rebellion."

RECEIPTS.

See "Gross Receipts."

RECEIVER.

See "Statutory Receiver"; "Temporary Receiver."

A receiver is but an officer of the court, whose tenure of office is indeterminate. *National Exchange Bank v. Woodside (Mo.)* 80 S. W. 715, 716.

A receiver is "the officer of the court, appointed on behalf of all parties, to take the possession and hold [the property] for the benefit of the party ultimately entitled." *Town of Vandalia v. St. Louis, V. & T. H. R. Co.*, 70 N. E. 662, 664, 209 Ill. 73 (citing *Coates v. Cunningham*, 80 Ill. 467).

"The conception of a receiver is some one to take manual possession, for the court, of property, to take it out from the posses-

sion of others, and hold it for the better security of those who may be ultimately entitled thereto." *Harrigan v. Gilbert*, 99 N. W. 909, 951, 121 Wis. 127.

A receiver is only an officer of the court. Where a receiver appointed by a state court was authorized to demand and receive any and all sums which may have been or might thereafter be collected or received on account of a certain police board tax for certain years, and thereafter the authority was enlarged so as to include all the assets, claims, and taxes owned and collected by and due to such board prior to 1879, such authority was not sufficient to give the receiver the right to sue to recover such assets or claims. *Hubert v. City of New Orleans* (U. S.) 130 Fed. 21, 24 (quoting *Screven v. Clark*, 48 Ga. 41).

RECKLESSLY.

The term "recklessly," in an allegation that a certain thing was done "carelessly, negligently, and recklessly," is tantamount to the allegation that it was a wanton disregard of all consequences. *Gustafson v. Chicago, R. I. & P. Ry. Co.* (U. S.) 128 Fed. 85, 96.

In an action for death, an instruction directing a verdict for defendant, unless the jury found that the motorman in charge of the defendant's car, after perceiving the dangerous situation then and there existing, did "recklessly and wantonly" send his car forward, the terms "recklessly" and "wantonly" are synonymous. *Harrington v. Los Angeles Ry. Co.*, 74 Pac. 15, 20, 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85.

RECLAMATION.

Drainage of land distinguished, see "Drainage of Land."

RECOGNIZANCE.

When it is said by the court, in *State v. Mills*, 19 N. C. 552, that a "recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture," it was not intended that a denial of the truth of the record could be thus set up by way of plea or answer to a *scire facias*. The entry of the forfeiture of a recognizance in a criminal case cannot be contradicted by an answer or a plea to a *scire facias* issued to enforce the forfeiture. *State v. Morgan* (N. C.) 48 S. E. 604, 606.

RECOMMENDATION.

Reference synonymous, see "Reference."

RECORD.

See "Complete Record"; "Public Record."

The original files in a prosecution before a justice of the peace for assault and theft, together with the mittimus addressed to the officer on conviction and sentence, do not constitute a "record." *McVeigh v. Ripley*, 58 Atl. 701, 702, 77 Conn. 136.

The indictments against a person are "records or documents filed in a public office under authority of law." Code Cr. Proc. § 272; Code Civ. Proc. § 866. They are the property of the state, and a willful and unlawful removal of them constitutes a crime under Pen. Code, § 94. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274.

REDEMPTION.

See "Equity of Redemption."

RE-ENTER.

In a lease requiring a deposit to secure the performance of the covenants, declaring that if any rent shall be due or unpaid, or any default shall be suffered, the landlord or her representative might lawfully re-enter, by force or otherwise, the word "re-enter" is not restricted to a re-entry by a common-law action of ejectment. *Anzolone v. Paskusz*, 89 N. Y. Supp. 203, 205, 96 App. Div. 183.

REFERENCE.

According to Webster's International Dictionary a reference is "one who or that which is referred to specifically; one of whom inquiries can be made as to the integrity, capability, and the like of another." On cross-examination, one seeking to establish a claim against the estate of decedent was asked concerning a conversation with one of the executors, and on the redirect he testified that at one time he was requested to bring references. He was asked to give the number of "recommendations" of men of business. The word "recommendations," as used, was synonymous with the word "references." *Kinney v. McFaul*, 98 N. W. 276, 277, 122 Iowa, 452.

REGISTERED TONNAGE.

The phrase "registered tonnage" is applied indiscriminately to the three classes of registered vessels, enrolled vessels, and licensed vessels, and means merely the capacity that has been ascertained and registered as provided by law, no matter what the size or business of the ship may be. "Registered tonnage" is the language that is always used, whether the ship is engaged in foreign trade, or in domestic trade, or in the coasting trade

or fisheries. *Wheaton v. Weston & Co.* (U. S.) 128 Fed. 151, 153.

REGISTRATION.

Registration is the method of proof prescribed for ascertaining the electors who are qualified to cast votes. It is a part of the machinery of elections, and is a reasonable regulation, which conduces to their orderly conduct and fairness. *People ex rel Maher v. Carleton*, 85 N. Y. Supp. 22, 23, 41 Misc. Rep. 523.

REGISTRATION CERTIFICATE.

The "registration certificate" provided for by an act requiring a voter, as a condition of voting, to produce to election officers a certificate of registration, or, in case of its loss, a duplicate certificate from the county clerk, is not conclusive of the holder's right to vote, although it is conclusive as to the fact that the person named therein has been registered. *Yates v. Collins* (Ky.) 82 S. W. 282, 284.

REGULATE.

"To regulate" means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions, or governing principles. *Standard Dict.* An ordinance making it unlawful to keep open a pawnshop after 6 o'clock p. m. is not a prohibition of the business, but a regulation of it. *City of Butte v. Paltrovich* (Mont.) 75 Pac. 521.

The word "regulate," as used in a constitutional provision conferring on a railroad commission authority to make reasonable and just regulations to govern and regulate railroad traffic, has a broad meaning, and includes the power to see to the maintenance of the main track and all its switches and spurs. The commission may order that a spur or switch be not removed, subject to review by the court. *Railroad Commission of Louisiana v. Kansas City Southern Ry. Co.*, 85 South. 487, 488, 111 La. 133.

In Const. art. 2, § 18, granting all power over divorces in the district court, subject to regulation by law, the word "regulation" is of broad signification, and, in the absence of restrictive words, the power granted must be regarded as plenary over the entire subject. *Durland v. Durland*, 74 Pac. 274, 275, 67 Kan. 734, 63 L. R. A. 959.

The words "regulate tolls," as used in the charter of a railroad, providing that, when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per cent., the Legislature may so regulate the tolls and freights that not more than 15 per cent. per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and re-

serving such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of the State for the use of the common schools, do not refer solely to fixing the amount to be charged by the railroad, but the words embrace, not only fixing the amount to be charged to the public, but an order for the division of earnings between the railroad and the schools. The surrender by a railway company of its special charter, to accept a general railroad law, before the state had made any attempt to regulate its tolls, freed the company from all liability to the state under a charter provision that, when declared dividends shall aggregate a specified amount, the Legislature may so regulate the tolls that not more than a fixed percentage shall be divided annually on the capital employed, and the surplus profits shall be paid over to the State Treasurer, and that, "if required," the corporation shall furnish the Legislature a statement of expenditures; and such liability, therefore, cannot be enforced by virtue of subsequent legislation without impairing the rights of the railroad company under the federal Constitution. *Terre Haute & I. R. Co. v. Indiana*, 24 Sup. Ct. 767, 769, 194 U. S. 579, 48 L. Ed. 1124.

REGULATE COMMERCE.

"No fixed rule can be prescribed or defined that will amount to a regulation of commerce, within the meaning of the constitutional provision conferring on Congress the power to regulate commerce among the several states." The power of Congress is plenary and exclusive. Chief Justice Waite, in the case of *Hall v. De Cuir*, 95 U. S. 485, 488, 24 L. Ed. 547, said: "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved. * * * If the statutes of the state are for the purpose of facilitating the safe transportation of goods, without undertaking to regulate commerce or interfere in any manner with the rights of the parties to fix their liability by contract, they will be upheld, notwithstanding they may have an indirect or remote effect upon commerce." A provision that when there are several connecting railroads under different companies, and goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to its connecting railroad, that the last company which has received the goods as in good order shall be

responsible to the consignee for any damages, open or concealed, done to the goods, and that such companies shall settle among themselves the question of ultimate liability, is not a regulation of commerce. *Kavanaugh v. Southern R. Co.*, 47 S. E. 528, 527, 120 Ga. 62.

REINSURANCE.

"Reinsurance," as used in Laws 1896, c. 908, § 187, as amended by Laws 1901, c. 118, § 1, imposing on domestic insurance companies an annual state tax, and providing that the term "gross premiums" shall include such premiums as are collected from policies subsequently canceled and from reinsurance, means premiums collected by the insurance company from reinsuring the risks of other companies. Reinsurance is a contract by which one insurer insures the risks of another insurer. The statute is dealing with the gross premiums collected by an insurance company for business done; that is, for the insurance furnished. It has to do with receipts, not with disbursements. *People ex rel. Continental Ins. Co. v. Miller*, 70 N. E. 10, 12, 177 N. Y. 515.

RELATION.

By the fiction of relation, a legal title is held to relate back to the initiatory step for the acquisition of the land. The doctrine of relation precludes the United States from retaining, as against its grantees of lands within the indemnity limits of the grant made by Act June 3, 1856, c. 41, 11 Stat. 17, in aid of railway construction, a sum which it collected from trespassers thereon for the removal of iron and stone from the land during the period between the selection of such lands to supply in part a large deficiency in the place limits and the approval of such selection by the Secretary of the Interior. *United States v. Anderson*, 24 Sup. Ct. 716, 718, 194 U. S. 394, 48 L. Ed. 1035.

While the doctrine of relation is of equitable origin, it has a well-recognized application to proceedings at law. By it is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding, which consummates the conveyance, is held for certain purposes to take effect by relation as of the day when the first proceeding was had. *Peyton v. Desmond* (U. S.) 129 Fed. 1, 11, 63 C. C. A. 651.

RELEASE.

See "Deed of Release."

"A release is a discharge of a debt by act of the party. A release is a voluntary

relinquishment of a lien and right of action or an obligation." *Woodrough v. Douglas County* (Neb.) 98 N. W. 1092, 1095.

RELEASE OF A RIGHT OF WAY.

The phrase "release of a right of way," in an instrument in writing by which the absolute owner of a tract of land released to a steam railroad company a right of way 100 feet in width and passing through the land, leaving a portion thereof on each side of the right of way, conveys an easement in the land for railroad purposes, leaving the fee subject to such servitude in the general owner. *Cincinnati, H. & D. Ry. Co. v. Wachter* (Ohio) 70 N. E. 974, 975, 70 Ohio St. 113.

RELEASED.

The word "released," as used "in contracts of shipment, has from usage acquired a well-defined meaning. * * * In this state * * * the word must be held to mean only that the shipper agrees to relieve from all liability as against which the law allows the carrier to exempt itself by contract." Therefore the contract to ship goods "released" must be construed to mean that the carrier is only relieved from losses occasioned without his negligence. *Georgia Southern & F. R. Co. v. Johnson, King & Co.* (Ga.) 48 S. E. 807.

RELIGIOUS USE.

A bequest to a priest or his successor, for the purpose of saying masses for testator and his wife, is a "religious use," within Act 1855 (P. L. 328). In re *O'Donnell's Estate*, 58 Atl. 120, 209 Pa. 63.

RELY.

Believe synonymous, see "Believe."

REM.

See "In Rem."

REMAIN.

The word "remain" is defined as "to stay behind after others have withdrawn; to continue unchanged in place; to abide; to stay; to endure; to last." Its synonyms are "to continue; to stay; wait; tarry; rest; sojourn; dwell; abide; last; endure" (Webster). A statute which requires a liquor dealer's bond to be conditioned that he will not sell liquor to a minor, or permit a minor to enter and remain in his saloon, provided that, where the sale was made in good faith and on reasonable belief that the person was of full age, there can be no recovery, was passed for the purpose of repressing two

evils—one the purchase of liquors by minors, and the other the immoral influence resulting to them from loitering in saloons; and it follows that where the entering and remaining in a saloon were merely for a time sufficient to get a drink, and the sale was made in good faith on reasonable grounds of belief that the person was of full age, there can be no recovery on a liquor dealer's bond in the terms of the statute, although such person was a minor. *Tinkle v. Sweeney* (Tex.) 77 S. W. 609, 610; *Ghio v. Stephens* (Tex.) 78 S. W. 1084.

REMAINDER.

See "Contingent Remainder"; "Limitation of a Remainder"; "Vested Remainder."

All the rest, residue, and remainder, see "All."

The word "remainder," as applied to estates and under the restrictive meaning, is a remnant of an estate in lands and tenements, expectant upon and part of the estate created together with the same at one time; and to be strictly a remainder it must be created not only at the same time, but by the same instrument, as the particular estate. *Biggerstaff v. Van Pelt*, 69 N. E. 804, 806, 207 Ill. 611.

The word "remainder" includes executory devises. *Gannon v. Albright*, 81 S. W. 1162, 1168, 183 Mo. 238.

REMEDY.

See "Appropriate Remedy."

The term "remedy," within Rev. St. § 79, providing that, when the repeal or amendment relates to the remedy, it shall not affect pending actions, unless so expressed, is the means employed to enforce a right or redress an injury; that is, the legal mode for enforcing a right or redressing or preventing a wrong. To illustrate: We speak of the remedy for nonfulfillment of contract as an action, under the old practice, in assumpsit, covenant, debt, or detinue, or in tort, if the injury is to the individual, and the like, and under the Code, the civil action, embracing all of these, while in criminal prosecutions the remedy is by indictment or information, or in some minor offenses by complaint before a magistrate. *State v. Barlow*, 71 N. E. 726, 728, 70 Ohio St. 363.

REMOTE CAUSE.

By "remote cause" is intended that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Claypool v. Wigmore* (Ind.) 71 N. E. 509, 510 (citing *Baltimore & O. R. Co. v. Trainor*, 33 Md. 542).

REMOVAL.

An assignment to a lower position in the same service under the classified service and at a lower rate of compensation is a "removal" from the position formerly held. *Waters v. City of New York*, 88 N. Y. Supp. 238, 241, 43 Misc. Rep. 154 (citing *People ex rel. Callahan v. Board of Education*, 79 N. Y. Supp. 624, 78 App. Div. 501, affirmed in 174 N. Y. 169, 66 N. E. 674).

The word "removal," as used in an order of court removing a defendant from office on the filing of an indictment against him under an act according to which, and a constitutional provision, he should then only be suspended, removal following on conviction should be construed as one of suspension; defendant not being prejudiced, he being thereafter convicted. *Howard v. State* (Ark.) 82 S. W. 202.

The words "removal" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office without exonerating them from liability to account. Code Civ. Proc. § 1805, requiring action on a guardian's bond to be commenced within three years from the "discharge or removal" of the guardian, applies to an action after a final order of the court removing or discharging the guardian, and does not include termination of the guardianship by the ward attaining majority. *Cook v. Ceas*, 77 Pac. 65, 143 Cal. 221.

REMOVE AT PLEASURE.

The right to "remove at pleasure," within Ky. St. 1903, § 3619, providing that certain officers named may be removed at the pleasure of the city council, has a well-defined legal meaning, and is an entirely different thing from the right to remove for cause; and to hold that the statute only authorizes the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning. *London v. City of Franklin* (Ky.) 80 S. W. 514.

RENDITION OF JUDGMENT.

See "Time of Rendition of Judgment."

RENEWAL PREMIUM.

Where an insurance contract provides that premiums must be paid in advance as a condition of continuing the policy in force for another year, or for the period for which they are paid, such premiums are known as "renewal premiums," because they renew and continue the policy in force for another year, or another period. *People ex rel. Provident Sav. Life Assur. Soc. v. Miller*, 71 N. E. 930, 932, 179 N. Y. 227.

RENT.

See "Ground Rent."

REPAIR.

See "Ordinary Repairs."

The word "repair" contemplates an existing structure, which has become imperfect by reason of the action of elements or otherwise. In the case of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common-law and maritime courts. *Gagnon v. United States*, 24 Sup. Ct. 510, 512, 193 U. S. 451, 48 L. Ed. 745.

REPARTIAMENTO.

"Repartimento" is a proceeding in its nature judicial—a partition of common property. *Steinbach v. Moore*, 30 Cal. 498, 505.

REPLEVIN.

The primary purpose of replevin is to recover the property in specie, not its value. A text-writer, in distinguishing between the compensation to be awarded to the injured party in certain cases, says: "The essential distinction between trover and replevin, as regards the rule of damages, aside from the element of willfulness in the taking or detention, is briefly this: In trover the title to the property is regarded as having passed to the defendant, who is therefore liable for its value, simply, with interest. In replevin the title is treated as still in the plaintiff, who is therefore to recover, not only the chattel itself, or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit." *La Vie v. Crosby*, 74 Pac. 220, 222, 43 Or. 612 (citing Sedg. Dam. [8th Ed.] § 528).

Replevin is a mere possessory action. It is said in *Shinn*, Repl. § 164, that it is a universal principle of the law of replevin that the action will only lie against the party in possession of the property at the time the action is instituted. *Jenkins v. City of Ontario*, 74 Pac. 466, 467, 44 Or. 72.

Replevin is a possessory remedy. *Mattison v. Hooberry*, 78 S. W. 642, 643, 104 Mo. App. 287.

REPORT.

See "Department Report"; "Inquire and Report."

REPRESENTATION.

See "By Right of Representation"; "False Representation."

REPRESENTATIONS CONCERNING CHARACTER, ETC.

In Rev. Laws, c. 74, § 4, providing that no action shall be brought to charge a person on or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation is made in writing and signed by the party to be charged thereby, the phrase "concerning the character, conduct, credit, ability, trade, or dealings of any other person," should be construed as limited to representations made to induce the plaintiff to enter into a transaction which will result in a debt due to him from a third person, and did not include representations as to the financial credit of a corporation, made to induce plaintiff to subscribe to shares thereof to be paid for in cash. *Walker v. Russell*, 71 N. E. 86, 88, 186 Mass. 69.

REPRESENTATIVE.

See "Legal Representative"; "Personal Representative."

"The word 'representative' has been held to include any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law." In a proceeding for the distribution of the estate of an intestate, in a contest between parties, each claiming as next of kin and heir at law, the administrator is a representative of his intestate. *Sorensen v. Sorensen* (Neb.) 98 N. W. 837, 840 (quoting *Kroh v. Helms*, 48 Neb. 691, 67 N. W. 771; *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68).

The word "representatives," as used in a will whereby testator devised land and personalty to his wife, and then made to each of his children certain devises and bequests, and then declared that at the expiration of the life of the wife that which was given to her for life should be equally divided between all his children, share and share alike, "the representatives of such as may have died to stand in the place of their ancestors," means the persons who are appointed, not by the deviser in a will, but by the law, to represent him, and upon whom the law would have cast the inheritance. *Bowen v. Hackney* (N. C.) 48 S. E. 633, 635.

REPUBLICAN FORM OF GOVERNMENT.

"A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding

their offices during pleasure, for a limited period, or during good behavior.' " *Kaddery v. City of Portland*, 74 Pac. 710, 719, 44 Or. 118.

REPUGNANCY.

"Repugnancy consists in two inconsistent allegations, which destroy the effect of each other." An indictment for conspiracy to defraud by the use of the mails, in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3698], as amended, is not bad for repugnancy because it charges in the same count that defendant conspired to defraud by dealing or pretending to deal in what are commonly called "green articles" and spurious treasury notes. *Lehman v. United States* (U. S.) 127 Fed. 41, 45, 61 C. C. A. 577 (citing 10 Ency. Law, 565).

REQUEST.

To "request" is not to empower, but to recognize that power to do the thing requested already resides of right in the one of whom the request is made. A devise of the residue of testator's property to his widow, to have the use and control of the same, with the right to use as much as she pleased for her comfort and pleasure, and, if there were anything left at her death, "it is my request that she give" to a church a parsonage, "and one-half of the residue to my heirs," gave the widow an estate in fee in the whole property, with the right to dispose of the same by will, subject only to the request above recited. *Brown v. Eastman*, 57 Atl. 96, 97, 72 N. H. 356.

The words "desire" and "request" do not import a trust, where testatrix devised certain real estate to her husband, and stated that it was her desire and request that he should convey the same to a lodge, so as to impose on it the duty to properly care for the cemetery lot in which she might be buried. They should be understood in their usual sense, in the absence of anything in the will to indicate that they were used in any other than their ordinary sense. *Kauffman v. Gries*, 74 Pac. 846, 848, 141 Cal. 295.

"The mere use in a will of the precatory words 'desire' and 'request' will not be sufficient to create an enforceable trust, or a power in the nature of a trust, when the context clearly shows that the testator's intention was contrary." A testator made a devise to an educational institution, and provided that, in case the devise should fail for any cause, the same should go to the children of his two brothers. In a codicil he authorized, empowered, and requested his daughter, his only lineal descendant, to ratify and confirm the devise to the institution, declaring that, in case she complied with the request, the gifts over should be revoked.

The daughter executed the power by a deed to the institution, and the gift over was thereby revoked. *Thomas v. Board of Trustees of Ohio State University*, 70 N. E. 896, 899, 70 Ohio St. 92.

Where the witnesses to a will go to testatrix's house for the purpose of attesting her will, which was drawn up and executed by testatrix in their presence, and one of the witnesses heard her say that she wanted the will written, and testified that it was written and read to her, and the other witness held her up in bed for the purpose of having her affix her signature, and both witnesses testified that the will was executed in their presence and that they attested it at her request, it is sufficient to show a proper execution of the will, although both witnesses denied that testatrix requested them to sign. *Hughes v. Rader* (Mo.) 82 S. W. 32, 51 (citing *Schlerbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604).

REQUISITE BOND.

The "requisite bond," named in Rev. St. c. 6, § 125, is not such a bond as the assessors may require, but is such as is required by section 128, providing that the assessor shall require the constable or collector to give bond for the faithful discharge of his duty to the residents of the town, with such sureties as the municipal officers approve. *Smith v. Randlette*, 56 Atl. 199, 200, 98 Me. 86.

REQUISITE MAJORITY.

As used in a constitutional provision that, whenever the requisite majority of the judges of the Supreme Court of Appeals sitting are unable to agree upon a decision, the case shall be reheard by a full bench, the words "requisite majority" means that the assent of at least three of the judges shall be required to determine that any law is or is not repugnant to the Constitution. *Funkhouser v. Spahr*, 46 S. E. 378, 379, 102 Va. 306.

REQUISITE NOTICE.

The term "requisite notice," in a statute authorizing a notary to give requisite notice or notices on protest of notes, means that he should give such notice or notices as are necessary to charge all the parties who are sought to be made liable on the paper and whose liability is dependent upon notice. *Bowling v. Arthur*, 34 Miss. 41, 54.

RES ADJUDICATA.

See, also, "Estoppel by Judgment."

"In order to make a matter *res judicata*, there must be the concurrence of the four

conditions following: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and the parties to the action; (4) identity of the quality in the person for or against whom the claim is made." *Turner Tp. v. Williams* (S. D.) 97 N. W. 842, 843 (quoting *Bouvier*, Dict.).

"The plea of *res judicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *W. C. Belcher Land Mortg. Co. v. Norris* (Tex.) 78 S. W. 390, 391.

The principle of "*res judicata*" embraces not only what was actually determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it. In *re Assessment of Property of Northwestern University*, 69 N. E. 75, 76, 206 Ill. 64 (citing *Rogers v. Higgins*, 57 Ill. 244).

To constitute a former judgment a bar or estoppel in a pending action, there must exist in the two cases identity of subject-matter, of cause of action, of persons and parties, and of the quality in the persons for or against whom the claim is made. *Vincent v. Mutual Reserve Fund Life Ass'n*, 58 Atl. 963, 964, 77 Conn. 281.

RES GESTÆ.

The phrase "*res gestæ*" implies a substantial coincidence in time; but, if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. *Burns v. Borden's Condensed Milk Co.*, 87 N. Y. Supp. 883, 884, 93 App. Div. 566.

In *Leahy v. Cass Ave. & F. G. Ry. Co.*, 97 Mo. 105, 10 S. W. 58, 10 Am. St. Rep. 300, it was said that a declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so nearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is, then, a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends on the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance. *Gotwald v.*

St. Louis Transit Co., 77 S. W. 125, 126, 102 Mo. App. 492.

RES INTER ALIOS ACTA.

The acts and declarations either of strangers or of one of the parties to the action in his dealings with strangers are designated "*res inter alios actæ*." *Chicago & E. I. R. Co. v. Schmitz*, 71 N. E. 1050, 1054, 211 Ill. 446.

RES IPSA LOQUITUR.

"The meaning of the maxim '*res ipsa loquitur*' is that, while negligence is not as a general rule to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. * * * Where negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury." *Chicago City R. Co. v. Barker*, 70 N. E. 624, 626, 209 Ill. 321.

RES JUDICATA.

See "*Res Adjudicata*."

RESERVATION.

Exception distinguished, see "*Exception*."

Where A. owns ten acres of land, and conveys it to B., reserving to himself a life estate therein, that is a "*reservation*." *Dozier v. Toalson* (Mo.) 79 S. W. 421, 422.

RESIDE.

The word "*reside*," in its ordinary sense, carries with it the idea of permanence, as well as continuity. It does not mean living in one place and claiming a home in another; and, in an action requiring plaintiff to reside in a county in the state before bringing suit for divorce, it does not mean a constructive or imaginary residence in Texas, while actually living in Illinois. It was intended, not only to compel an actual good-faith inhabitancy of the state, but an actual residence in the county where the suit for divorce is instituted, on the part of the person seeking the divorce. *Michael v. Michael* (Tex.) 79 S. W. 74, 75.

The word "*resides*," in Gen. Laws 1896, c. 45, § 12, providing that all personal property held in trust by an executor for another person shall be assessed against the executor where such other person resides, means resides for the purpose of taxation, as de-

fixed in section 9, directing that personal property shall be taxed to the owner in the town in which the owner shall have his actual place of abode for a larger portion of the year. *Clarke v. Addeman*, 58 Atl. 623, 26 R. I. 168.

RESIDENCE.

See "Principal Place of Residence"; "Usual Residence."

Citizenship distinguished, see "Citizenship."

Domicile distinguished, see "Domicile."

Habitation synonymous, see "Habitation."

"Residence indicates permanency of occupation, as distinguished from temporary occupation, but does not include so much as 'domicile,' which requires an intention continued with residence. 'Residence' has been defined to be a place where a person's habitation is fixed, without any present intention of removing therefrom. It is lost by leaving the place where one had acquired a permanent home and removed to another place *animo non revertendi*, and is gained, by remaining in such new place *animo manendi*." Residence within the district, to give the court jurisdiction of proceedings in bankruptcy, must be *bona fide*, and the removal of a person from one district to another, for the express purpose of filing a petition in bankruptcy therein, and with the intent of leaving the district as soon as he obtained a discharge, does not make him a resident, so as to confer jurisdiction on the court. *In re Garneau* (U. S.) 127 Fed. 677, 678, 62 O. C. A. 403.

The word "residence," like the word "homestead," is not confined merely to the dwelling house, but it may also include everything connected therewith, used to make the home more comfortable and enjoyable. But the words "homestead" and "residence" cannot be intended to include some other and independent family's home and residence. *Linn v. Ziegler* (Kan.) 75 Pac. 489, 490 (citing *Ashton v. Ingle*, 20 Kan. 670, 681, 27 Am. Rep. 197).

That an employé had worked for several weeks in a county, where he was injured while at such work, does not establish his "residence" in such county, under a statute relating to venue in actions for injuries to servants. *Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex.) 78 S. W. 43, 44.

The word "residence," as used in an information under Comp. Laws, § 11,551, prohibiting larceny from any building on fire, which charged defendant with the larceny of goods "from the residence of * * *, the same being then and there on fire," means building. *People v. Klammer* (Mich.) 100 N. W. 600.

RESIDENT.

See "Actual Resident"; "Nonresident." Inhabitants synonymous, see "Inhabitant."

An averment in a complaint that plaintiff is "a resident of the state of Delaware" must be intended to mean as averring that the plaintiff is a citizen of that state. *Sun Printing & Publishing Ass'n v. Edwards*, 24 Sup. Ct. 696, 698, 194 U. S. 877, 48 L. Ed. 1027 (citing *Jones v. Andrews*, 77 U. S. [10 Wall.] 331, 19 L. Ed. 935; *United States Express Co. v. Kountze*, 75 U. S. [8 Wall.] 342, 19 L. Ed. 457).

A foreign corporation, being a nonresident in fact, becomes, for the purpose of conferring jurisdiction, by fiction of law a "resident" of the city, if it has a place therein for the regular transaction of business. *Goldzler v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 214, 215, 43 Misc. Rep. 667.

RESIDENT FREEHOLDER.

The term "resident freeholder," as used in *Cobbe's Ann. St.* § 7175, providing that village authorities may grant a license to sell intoxicating liquors when a petition therefor shall be signed by a designated number of resident freeholders, is used in its ordinary and commonly understood meaning, and a wife, living with her husband on land the title to which is in the latter, and which is occupied by them jointly as family homestead, is not a freeholder; and the same is true as to a husband living with his wife on land occupied by them jointly as a homestead, the legal title to which is in her. *Campbell v. Moran* (Neb.) 99 N. W. 498, 499.

RESIDUARY CLAUSE.

"The purpose of a residuary clause in a will is to make a complete testamentary disposition of the estate of the testator, so that no part of it may be left to pass under the intestate laws. It is a gift of all that is left after the gifts specified or designated have been paid or satisfied, and it carries with it, and is presumed to have been so intended, not only all personal estate which remains not specifically disposed of at the time the will is executed, but all that for any reason is illy disposed of, or falls as to the legatees originally intended." *In re Wood's Estate*, 57 Atl. 1103, 209 Pa. 16 (citing *Cambridge v. Rous*, 8 Ves. 12).

RESIDUARY LEGATEE.

"A 'residuary legatee' is one who takes what remains, or a portion of what remains, after satisfying all other gifts, charges, losses, and expenses." *In re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

RESIDUE.

All the rest, residue, and remainder, see "All."

"Residue" is defined by Webster as that which remains after a part is taken, separated, removed, or designated. While the word "residue," applied to estate or property generally, as in the usual residuary clause of a will, may include all the remaining estate, whether in possession, remainder, or reversion, when applied only to a given parcel of land, its popular meaning is simply the remaining acres of that parcel, and not the remaining estate in the parcel. *Young v. Quimby*, 56 Atl. 656, 657, 98 Me. 167.

RESISTED.

See "Unreasonably Resisted."

RESPECTIVELY.

While the word "respectively" is not given precisely the same meaning by lexicographers as the word "alternately," it is used in Act 1901 (P. L. 629), allowing challenges to be made by the state and defendant, "respectively," in the same sense as the word "alternately," used in Act 1860 (P. L. 440, § 88), providing that the commonwealth shall challenge one person and the defendant one person, and so "alternately" until all the challenges shall be made. *Commonwealth v. Conroy*, 56 Atl. 427, 428, 207 Pa. 212.

RESPONSIBLE.

See, also, "Be Responsible For."

Plaintiff and defendant entered into a contract by which defendant, the lessee of a coal dock, was to act as bailee and agent in receiving, storing, reshipping, and selling coal produced by plaintiff. The contract provided that plaintiff should remain the owner of the coal until it was sold, and fix the selling price, defendant to receive a commission on the sales and to guaranty the accounts; that plaintiff should insure all coal consigned and deliver the same safely alongside defendant's dock, which should thereupon be "responsible" to plaintiff for all coal after such delivery alongside its dock, and insure the same, and pay taxes thereon, and guaranty weights as per bills of lading, being compensated therefor and for dock rents by the payment by plaintiff of a stated price per ton for loading and reloading. It is held that the provision that defendant should be "responsible" for the coal after its delivery was not intended to enlarge its common-law liability as bailee by making it an insurer against all possible contingencies, but to mark the time when such liability should commence, and that it was not liable

for a loss of coal through a collapse of its dock, occurring without any fault or negligence on its part. *Fairmont Coal Co. v. Jones & Adams Co.* (U. S.) 184 Fed. 711, 714.

REST.

All the rest, residue and remainder, see "All."

RESTAURANT.

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and saloons" cannot be lawfully granted permits for the sale of liquor. *In re Henry* (Iowa) 100 N. W. 43, 44.

RESTRAINT OF COMMERCE.

See "Combination in Restraint of Commerce."

RESULTING.

See "Death Resulting from the Wound."

RETAIL.

Selling and delivering oil from a tank wagon to merchants in quantities of not less than 25 gallons for resale to customers is a sale by retail, within an act requiring retail sellers to first procure a license. *Standard Oil Co. v. Commonwealth* (Ky.) 82 S. W. 970, 971.

RETRAXIT.

"In those jurisdictions where the rule indicated by the word 'retraxit' has been recognized, the substance of the matter seems to be that a dismissal by agreement of the parties is equivalent to and is treated as a public renunciation on the part of the complainant of the claim asserted by him in his pleadings against the defendant, and he is thereafter estopped to bring it forward again." *Lindsay v. Allen* (Tenn.) 82 S. W. 171, 174.

Retraxit differs from a nonsuit in that, when once entered by a plaintiff on the record, it forever puts an end to the pending suit, as well as the cause of action involved. *Waldron v. Angleman* (N. J.) 58 Atl. 568, 571.

REVENUE.

See "Estimated Revenue."

The word "revenue," in *Sess. Laws* 1902, c. 3, relating to public revenue, is sufficiently broad to include all provisions having that general object in view, not only provisions

for securing revenue as the result of a direct tax upon property, but revenue derived from the imposition of licenses, duties, excises, and a tax on occupations or on successions. In *re Magnes' Estate* (Colo.) 77 Pac. 853, 856; *Brown v. Elder*, Id.

The word "revenue," as used in Const. art. 6, § 2, giving the Supreme Court original jurisdiction of cases relating to the revenue, civil cases in which the state shall be a party, quo warranto, and habeas corpus, has no reference to the revenues of municipal corporations, but to those only which are required for the purposes of general state administration. *Aachen & M. Fire Ins. Co. v. City of Omaha* (Neb.) 100 N. W. 137.

The title, "An act to provide a system of revenue," is broad enough to include provisions for special assessments. *City of Omaha v. Hodskins* (Neb.) 97 N. W. 346, 347.

REVIEW.

See "Writ of Review."

REVISE.

Power given to code commissioners to "revise, simplify, arrange, and consolidate" public statutes of the state did not invest them of themselves with power to enact any new statutory law, or to revive any statute or statutes not in force at the time of the revision. *Mathis v. State*, 12 South. 681, 683, 31 Fla. 291.

The act to provide for the revision and consolidation of the statute laws of the United States, approved June 27, 1886 (14 Stat. 74), authorizes the appointment of three persons as commissioners to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, in force at the time the commissioners may make the final report of their doings. The report was made and acted on, and was entitled "An act to revise and consolidate the laws of the United States," etc. This act was approved, and the result was a book, which Congress declared "shall be designated and cited as the Revised Statutes of the United States." It is held that the enactment of the Revised Statutes by act of Congress was not the enactment of a body of laws as original legislation, but was simply the enactment of a more convenient expression of the law as it existed on December 1, 1873. It did not enact or re-enact anything as law which was not the law on that date. *United States v. Moore* (U. S.) 26 Fed. Cas. 1305, 1306, 1307.

REVOLVER.

The furnishing of a Stevens 32-caliber rifle by a father to his minor son was not

an offense, within Rev. St. 1898, § 4397, prohibiting any person from giving any "pistol or revolver" to a minor. *Taylor v. Sell* (Wis.) 97 N. W. 498.

RIGHT.

See "Civil Right"; "Legal Right"; "Material Right"; "Political Right"; "Property Right"; "Substantial Right"; "Terms and Conditions, Rights, and Privileges"; "Vested Right."

The word "rights," as used in Borough Act, § 96 (P. L. 1897, p. 329), providing that boroughs shall retain and enjoy all the rights and property heretofore possessed by them, refers to rights in the nature of property rights, and contemplates the retention of property rights, and not powers, such as a power to license inns and taverns, and which, not having been given by the act, must be deemed to have been withheld, though formerly enjoyed by certain special charter boroughs, in view of the provision of the same section that boroughs should have all the powers conferred by the act, thus excluding by implication powers not conferred. *Smith v. Borough of Hightstown* (N. J.) 57 Atl. 901, 903.

RIGHT OF EMINENT DOMAIN.

See "Eminent Domain."

RIGHT OF REPRESENTATION.

See "By Right of Representation."

RIGHT OF WAY.

The term "right of way" should not be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turnout is built, and in actual use by the company in the business for which it was organized, for all practical purposes is as much held a right of way as the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and innumerable other instances that might be named in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. Land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. *Chicago & A. R. Co. v. People*, 98 Ill. 350, 356.

The term "right of way" has a twofold signification. It sometimes is used to de-

scribe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. In a contract between railroad companies, providing that one party shall permit other railroads to use its right of way, the term is used in the latter sense. *Central Trust Co. v. Wabash, St. L. & P. Ry.*, 29 Fed. 546, 555.

Constructive notice that a railroad owns a "right of way" in certain premises means the free use of so much ground upon both sides of the tracks as is required for the convenient and customary use and maintenance of the railroad. *Day, Williams & Co. v. Atlantic & G. W. R. Co.*, 41 Ohio St. 392, 398.

The term "right of way," as used in a statute providing that a railroad company shall be responsible to any person for damages to property by fire communicated by its locomotives or originating within its right of way, has no reference to the title of the railroad company, whether having a mere easement or a greater estate, but is intended to designate the locality within which the railroad would be liable under the statute. *Brown v. Carolina Midland Ry. Co.*, 46 S. E. 283, 286, 67 S. O. 481, 100 Am. St. Rep. 756.

RING.

As chattel, see "Chattel."

RIP'IN R'G'T.

An owner of lands adjoining a lake conveyed to plaintiff the portion of the land that was covered by water; the deeds reciting that it was the intention of the grantor to convey all his rights to the water and the soil under water in a lake belonging and appurtenant to the described premises. After the conveyance the lots were assessed by number, with the addition "excp't rip'in r'g't." The part conveyed to plaintiff was assessed as unplatted lands. The abbreviation "rip'in r'g't," in the assessment, clearly meant the riparian rights of the parties. *Newaygo Portland Cement Co. v. Sheridan Tp.* (Mich.) 100 N. W. 747, 748.

RIPARIAN.

Lands which do not in any way border upon the water of a stream are not riparian to it. The word "ripa," from which the term "riparian" is derived, means, literally, a river bank, and therefore, in the broadest sense, all lands touching the stream are riparian, in the sense that they relate to the bank. But of necessity there must be some limitation. The extent back from the stream must be determined. The holdings of an owner, before they can be said to be riparian to a

stream, must be not only within the limits of the original survey or grant by the government, but must also be within the watershed of such stream, and actually touch its waters. *Clements v. Watkins Land Co.* (Tex.) 82 S. W. 665, 668.

RIPARIAN OWNER.

The expression "riparian owner," in its ordinary and popular signification, carries with it the title to the center of the nonnavigable stream upon which his land abuts. In re *Wilder*, 85 N. Y. Supp. 741, 743, 90 App. Div. 262.

RISK.

See "Assumption of Risk"; "At Owner's Risk."

RIVER.

See "Mississippi River"; "North River."

"A river is a running stream of water, pent in on either side by banks, shores, or walls. * * * A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877 (quoting Gould, Waters)

ROAD.

See "Law of the Road"; "Legal County Road"; "Private Road"; "Public Road"; "Summer Road."
Other roads, see "Other."

ROAD CROSSING.

Any road crossing, see "Any."

ROAD DISTRICT.

As corporation, see "Corporation."
As quasi corporation, see "Quasi Corporation."

ROADBED AND TRACK.

The term "roadbed and track," as used in a statute establishing a drainage and levy district in portions of certain counties lying east of a certain railway, including the track and roadbed of said railway, includes the right of way. *St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 78 S. W. 777, 778.

ROBBERY.

The felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear, is robbery, irrespective of the value of the property so taken. *People v. Stevens*, 75 Pac. 62, 63, 141 Cal. 488.

Robbery is stealing property with violence from the person or personal custody of another person. It is necessary, in order to constitute that crime, that the goods shall be on the person of the owner, or the owner's agent, or shall be in his presence and in his custody. *State v. Lyons* (N. J.) 58 Atl. 398, 401.

ROLL.

See "Judgment Roll."

ROTARY.

In Webster's Dictionary "rotary" is defined as "turning, as a wheel on its axis;" in the Century Dictionary, as "turning round and round, as a wheel on its axis." The word "rotary," used in a claim of a patent to describe an element of a combination, does not necessarily imply a continuous rotation of the part, so as to make it necessary to limit the claim by reading into it as an additional element mechanism for such rotation, but is properly descriptive, if the part is capable of being rotated by hand or otherwise. *Klipp-Armstrong Co. v. King Philip Mills* (U. S.) 130 Fed. 28, 29.

RUBBLE STONE.

Dimension and footing stone distinguished, see "Dimension Stone."

SAFE.

In an action by a servant for personal injuries, alleged to have been caused by a defective fastening in a handhold on a freight car, the trial court charged the jury that, while plaintiff assumed all the risks ordinarily incident to his employment, such assumption of risk did not begin until defendant had used ordinary care to securely fasten and maintain in safe condition the handholds on its cars. The defendant objected to this instruction, on the ground that it imposed on it the duty to exercise ordinary care to securely fasten and maintain in safe condition the appliance in question. The appellate court, in passing on the correctness of the instruction, said: "As a matter of strict law the charge is not accurate. From the inception of his employment the plaintiff assumed the risks ordinarily incident to the service. The risk superadded by the negli-

gence of the master did not form a part of these, unless brought to his knowledge. Applying this principle to the issue in this case, we have this result. The risks ordinarily incident to the use of the lag screw fastening plaintiff assumed, for he knew that many cars thus equipped were handled by appellant. He also assumed the risk of such defects in the appliances as would not have been disclosed to the company by an inspection conducted with ordinary care. This latter risk he assumed in any event; for, if the company had not inspected the car at all, yet, if the defect which caused the accident would not have been discovered by a proper inspection, it fell in the category of assumed risks." The court said, further, in regard to the safety of the appliance used, that it seemed to appear beyond controversy that the lag screw fastening was a safe appliance, when properly attached to sound wood, and that it might be that the ideal is absolute safety, and that ordinary care should be exercised to its attainment, but that, if an ordinarily prudent person should assume the task of exercising ordinary care to furnish a safe appliance for the use of his employes, construing the word "safe" in its absolute sense, he would direct his efforts toward the production of such an appliance as would be safe, however carelessly or unskillfully used, a standard which has nowhere been set for the master; but there was much force in the suggestion of the appellee that the words were not to be taken in their absolute sense, unless attended by a word which carries that meaning. *Galveston, H. & S. A. Ry. Co. v. Perry* (Tex.) 82 S. W. 343, 345.

SALARIED OFFICER.

Under Laws 1902, p. 972, c. 380, providing that the sheriff of Ontario county shall receive as compensation for all his services and his duties appertaining thereto, which are a county charge on the county or any town therein, an annual salary, and also certain fees, such sheriff is not a "salaried officer," within Code Civ. Proc. § 3307, subd. 4, entitling sheriffs to a fee for each cause placed on the calendar for trial by jury, but declaring that it does not apply to counties wherein the sheriff is a salaried officer. *People ex rel. Flynn v. Leech*, 89 N. Y. Supp. 178, 179, 43 Misc. Rep. 435.

SALARY.

Broadly, the word "salary" means a recompense or consideration made to a person for his pains or industry in another man's business. Whether it be derived from "salarium," or more fancifully from "sal," the pay of the Roman soldier, it carries with it the fundamental idea of compensation for services rendered. Indeed, there is eminent

authority for holding that the words "wages" and "salary" are in essence synonymous. *Hopkins v. Cromwell*, 85 N. Y. Supp. 839, 841, 89 App. Div. 481.

Salary is an "annual compensation for services rendered; a fixed sum to be paid by the year for services." *Burrill*, Law Dict. The per annum compensation of men in official and in some other positions. *Anderson*, Law Dict. Where the word "salary" is found in a legislative act, as applied to an officer's compensation for official work done or required, it is generally understood to apply to the officer's per annum allowance, when not otherwise qualified. *State ex rel. Atty. Gen. v. Speed*, 81 S. W. 1260, 1263, 183 Mo. 186.

The salary of a public officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office. *Ruperich v. Baehr*, 75 Pac. 782, 783, 142 Cal. 190 (citing *Lewis v. City of Denver*, 48 Pac. 317, 9 Colo. App. 328).

"Where a person is employed at a salary, the term itself imports permanency of employment." *White v. Koehler* (N. J.) 57 Atl. 124.

SALE.

See "Contract of Sale"; "Kept for Sale"; "Public Sale."

"To constitute a valid sale there must be competent parties, mutual assent, a thing, the absolute or general property in which is transferred from the seller to the buyer, and a price in money paid or promised." *Logan v. Stephens County* (Tex.) 81 S. W. 109, 110 (quoting *Anderson*, Law Dict.).

"It has been a question of more or less trouble, under the local option laws in the different appellate courts of the federal Union, as to what the term 'sale' imports. In some it is held that it imports only a money consideration; in others, that the exchange of intoxicating liquors for some other commodity is a sale; and, under peculiar circumstances, that the loan of intoxicating liquors to be returned in kind is a sale. It has also been held that intoxicants delivered in the payment of a debt, or for services performed, is a sale. In Texas the broader signification of sale has been held to be correct; and if the exchange, or even the loan, of whisky was intended to cover up a sale, that would constitute a violation of our local option statute. But none of the decisions to which our attention has been called in this state has ever held that the mere loaning of a bottle of intoxicants, to be returned in kind, as an accommodation, constitutes a sale. Under the facts of the *Bruce Case*, 36 Tex. Cr. R.

53, 39 S. W. 683, and *Keaton's Case*, 36 Tex. Cr. R. 259, 38 S. W. 522, the loan or exchange was done simply to cover up a sale, and these parties were carrying on a liquor traffic in the local option territory, and the loans were simply evasions of the law, and really were sales. But it was not intended by those decisions, nor is it the meaning of the law, and the Legislature certainly did not intend to hold as a sale the mere loan by one neighbor to another of intoxicants until that neighbor could secure and return the same amount of intoxicants. That in no sense would constitute a sale under our law. It would seem that, if a mere accommodation loan would constitute a sale, there would be two sellers and no purchaser, or there would be two sales; that is, the man who loaned the whisky and the man who returned the whisky would each be a seller. Our law is not intended to cover this character of transaction. The Constitution and the law both limit the transaction to a sale. If appellant simply loaned *Riggins* a bottle of whisky, to be returned when *Riggins'* whisky came by express, and it was not intended as a subterfuge to cover a sale, he would not be guilty; and this phase of the law should have been presented to the jury." *Ray v. State* (Tex.) 79 S. W. 535, 536.

A conviction for selling intoxicating liquors without a license is not justified on a showing that defendant purchased whisky for others at their request and with their money. "If one, seeing his neighbor on his way to town, requests him to purchase for him a bottle of whisky, promising to return the purchase money when he sees him, and the neighbor does so, and leaves the bottle at the house of the one for whom he purchased, this does not render the party purchasing the whisky guilty of making a sale." *Whitmore v. State* (Ark.) 77 S. W. 598, 599.

SALE BY RETAIL.

See "Retail."

SALE IN BULK.

See "In Bulk."

SALE OF TINWARE.

A sale of the exclusive right to sell a patented article in a certain territory is not a sale of tinware, within a statute exempting from statutory provisions as to peddlers one who sells tinware, although the article, the right to sell which is sold, is of tinware. *Burns v. Sparks* (Ky.) 82 S. W. 425, 426.

SALESMAN.

See "Traveling Salesman."

A "salesman" is defined in the *Standard Dictionary* as a man who sells goods in a

shop or store by canvassing. The word is generally accepted to mean a person who sells goods for a merchant, and not to mean the merchant himself. *United States v. Gin Hing* (Ariz.) 78 Pac. 639, 640.

SALOON.

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and saloons" cannot be lawfully granted permits for the sale of liquor. *In re Henery* (Iowa) 100 N. W. 43, 44.

SALVAGE.

Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea, or her cargo, or both, have been saved, in whole or in part, from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture. *Central Stockyard & Transit Co. v. Mears*, 85 N. Y. Supp. 795, 796, 89 App. Div. 452.

SALVOR.

A salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel. *The Dumper No. 8* (U. S.) 129 Fed. 98, 99, 63 C. C. A. 600 (citing *New York Harbor Protection Co. v. The Clara*, 90 U. S. [23 Wall.] 1-16, 23 L. Ed. 150).

A salvor is a person who renders voluntary service to rescue a vessel or property from marine peril, and who is successful in whole or in part. He has a claim which may be enforced by a suit against the ship, or its cargo, or both; and, more than that, he is entitled to the possession of the property saved, provided it is such personalty as may be reduced to possession, and has a lien for the salvage compensation until his claim is satisfied. *Central Stockyard & Transit Co. v. Mears*, 85 N. Y. Supp. 795, 796, 89 App. Div. 452.

SAME CAUSE.

See "Neither Party, Etc."

SAME OFFENSE.

The term "same offense," as used in a statute providing for an increase in punishment where a defendant had previously been convicted of the same offense, means an offense of the same character, and not the

same identical transaction. *Kinney v. State* (Tex.) 78 S. W. 225, 226.

SAN DOMINGO MAHOGANY.

The term "San Domingo mahogany," as used in a building contract requiring such mahogany to be used in a portion of the building, is to be interpreted in the trade sense, and not in the ordinary sense of the term; and the contract is complied with by the use of mahogany having the same color and texture as the genuine San Domingo mahogany, although grown elsewhere. *Snoqualmi Realty Co. v. Moynihan*, 78 S. W. 1014, 1018, 179 Mo. 629.

SANCTION.

"Every law must have its sanction; that is to say, its means of enforcement. Without such it can hardly be deemed a law. Sanctions are of two kinds—those which redress civil injuries, called 'civil sanctions,' and those which punish crimes, called 'penal sanctions.'" *Commissioners' Court of Nolan County v. Beall* (Tex.) 81 S. W. 526, 528 (quoting *Bouv. Law Dict.*).

SAND.

As mineral, see "Mineral."

SANITY.

Sanity is not an ingredient of crime. It is a condition precedent to all intelligent action, as well benevolent as nefarious. It is a pre-existing fact, which may be taken for granted as implied by law and general experience. We do not infer sanity from the criminal act, as we do malice and premeditation. Sanity is a premise, not a conclusion. *State v. Quigley* (R. I.) 53 Atl. 905, 908.

SATISFACTION.

See "Accord and Satisfaction"; "Full Satisfaction"; "Reasonably Satisfies."

"Where a contractor agrees to furnish the material and to erect on the land of a municipal corporation a garbage furnace according to the plans and specifications, which are a part of the contract, and warrants its capacity to consume a named quantity of garbage, without emitting offensive odors, to be paid for when completed and tested according to the satisfaction of the committee of the town council, and the contractor performs the contract according to plans and specifications, and, the test being made, the furnace is shown to have the capacity warranted and in all things to comply with the contract, the committee cannot defeat the contractor's right of recovery by capriciously and unreasonably refusing its satisfaction

with the work." A declaration in a suit for the contract price, which shows these facts and alleges that the committee, without just cause or reason and moved by caprice and prejudice, has refused to declare satisfaction with such tests, although the work and tests should have fully satisfied the committee and the defendant, and would have satisfied persons of ordinary care, caution, prudence, and fairness, is not subject to demurrer, as showing no cause of action, nor to special demurrer, because it has not alleged that the furnace was tested to the satisfaction of the committee. *Parlin & Orendorff Co. v. City of Greenville* (U. S.) 127 Fed. 55, 62, 61 C. C. A. 591.

SATISFACTORY PRICE.

The words "satisfactory price," as used in a contract whereby defendant contracted to furnish logs to plaintiff's sawmill and sell the lumber, agreeing to log the mill to its capacity, limited only to the amount of lumber defendant should be able to sell at satisfactory prices, should receive a reasonable construction. A price should be construed satisfactory which would yield the defendant a reasonable profit over and above the gross cost of the lumber to it, plus the reasonable value of the timber and the cost of making sales of lumber. A fair construction of the contract would require the defendant to furnish timber from which could be manufactured salable lumber and to make reasonable efforts to put sound and salable lumber on the market; and if, by such effort, sales at reasonable profits could be made, to keep plaintiff's mill continuously running, defendant was obliged to furnish sufficient saw logs to keep it going. *Rhodes v. Holladay-Klotz Land & Lumber Co.*, 79 S. W. 1145, 1154, 105 Mo. App. 279.

SAWMILL.

As manufacturing establishment, see "Manufacturing Establishment."

SCAFFOLD.

Perpendicular columns having been set up in the erection of a steel building, a beam was hung from one column to another, and lashed to them by ropes, for the purpose of holding the iron girders until the wall was erected between the beams, and also to furnish a place for the employes to walk in spacing the girders. Held, that such timber was a "scaffold," within Labor Law, Laws 1897, p. 467, c. 415, § 18, providing that an employer shall not furnish or erect, or cause to be furnished or erected, for the performance of labor in the erection of a house, scaffolding which is unsafe or improper to give proper protection to the life and limbs of

employes. *Welk v. Jackson Architectural Ironworks*, 90 N. Y. Supp. 541, 542.

SCANDAL.

"Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear." *McNulty v. Wiesen* (U. S.) 130 Fed. 1012, 1013.

SCHOOL.

A "school," in the ordinary acceptance of its meaning, is a place where instruction is imparted to the young. If a parent employs and brings into his residence a teacher for the purpose of instructing his child or children, and such instruction is given as the law contemplates, the meaning and spirit of the law have been fully complied with. This would be the school of a child or children so educated, and would be as much a private school as if advertised and conducted as such. A parent in good faith employed a teacher formerly employed in the public schools to teach his child. It was arranged that the child should be taught in all the branches taught in the public schools. The child attended the teacher's home regularly every school day, and received instruction equal to that which could have been received at the public schools. The teacher did not advertise herself as keeping a private school, and had no regular tuition fixed nor any school equipments, and made no arrangement to take other pupils. This was a school, within *Burns' Ann. St.* 1901, § 6033a, providing that every parent shall be required to send his child to a public, private, or parochial school each year. *State v. Peterman*, 70 N. E. 550, 551, 32 Ind. App. 665.

SCHOOL DISTRICT.

As political subdivision, see "Political Subdivision."

A school district is composed of certain contiguous territory, governed by one school board, authorized to select one school site, secure one schoolhouse, and conduct one school, except where separate schools are required for colored pupils. *Kellogg v. School Dist. No. 10 of Comanche County*, 74 Pac. 110, 117, 13 Okl. 285.

SCHOOLHOUSE.

A high school is fairly included in the terms "for school purposes" and "schoolhouse or schoolhouses," in the statute declaring that the board shall decide that it is necessary to raise money for purchasing or taking and condemning lands for school purposes or

for erecting a schoolhouse or schoolhouses. *Carling v. Jersey City* (N. J.) 58 Atl. 395, 397.

SCHOOL PURPOSE.

See "Schoolhouse."

SCHOOL TRUSTEE.

As officer, see "Officer."

SCIRE FACIAS.

As action, see "Action."

The scire facias is a common-law writ, and not a statutory remedy to obtain a personal judgment, and based upon the particular proceeding to which it is applicable. *Kirk v. United States* (U. S.) 131 Fed. 331, 335.

SCRAP.

See "Busheling Scrap."

SCULPTURE.

See "Casts of Sculpture."

SEABOARD.

See "Atlantic Seaboard."

SEAM.

In geology, a thin layer or stratum of rock is called a "seam." The same term is applied to coal. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193.

SEARCH.

In Rev. St. 1892, § 1394, allowing the clerk certain compensation for making "searches" for unpaid taxes and tax certificates, the searches, for which the Legislature fixes the compensation at 15 cents each, mean the examination each year for the purpose of ascertaining if a tax sale was made that year, whether the search resulted in the finding of such sale or not. *Edwards v. Law* (Fla.) 38 South. 569, 570.

SEAWORTHY.

Seaworthiness is defined to be, "in maritime law, the sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit for the trade or service in which it is employed." The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of

dressed beef, which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as therein provided. *The Southwark*, 24 Sup. Ct. 1, 3, 191 U. S. 1, 48 L. Ed. 65 (quoting *Bouv. Law Dict.*).

Where a vessel was bored through her waterways, through the ends of the beams and at some point into the timbers from the mainmast to the foremast, and no sound wood was found, such a frame as exhibited by such borings cannot be regarded as "seaworthy." *Morse v. St. Paul Fire & Marine Ins. Co.* (U. S.) 129 Fed. 233, 235.

SECOND OFFENSE.

The words "second offense," as used in Rev. St. § 4364—20b, which declares that whoever shall sell liquors where sales are prohibited shall be guilty of a misdemeanor, and which prescribes the punishment for the first offense and for a second offense, mean a second conviction. Hence an affidavit which charges three separate sales to different persons on the same day, but does not allege a previous conviction, is in legal effect a charge of a first offense only. *Carey v. State*, 70 N. E. 955, 70 Ohio St. 121.

SECURED.

"Secured" is not a word of description; it implies an act. A creditor who takes a note for his debt is never understood to be a preferred creditor. A bond which carries nothing more than a promise to pay is no more a security than a promissory note. When a bond or note is "secured," it must mean that there is something behind it not common to other creditors, or it means nothing. A recital in a corporate bond that it is secured by all the property and assets of the company imports that the bonds are secured by some particular lien. *Stickel v. Atwood*, 58 Atl. 687, 689, 25 R. I. 456.

SECURITY.

The term "securities" embraces promissory notes, not only in a popular sense, but in a legal sense as well. *Wagner v. Scherer*, 85 N. Y. Supp. 894, 895, 89 App. Div. 202.

The word "securities," as used in a will whereby the testator devised property to his executor in trust to collect the rents, issues, and profits of the same, giving full power to the executors to sell or dispose of any of the securities that the testator might hold at the time of his death, does not include land. Hence the power to sell securities did

not authorize the executors to sell lands, and the executors' attempted conveyance thereof was consequently void. *Pratt v. Worrell* (N. J.) 57 Atl. 450, 453.

SEED.

See "Grass Seed."

SEEMING DANGER.

Appearances calculated to produce in a reasonable mind, and really producing, conviction of impending peril to life or limb, is what is meant by "seeming danger." *Rogers v. State*, 62 Ala. 170, 174.

SEISED.

An allegation that a person was "seised and possessed" of land, prima facie imports seisin in fact, not mere seisin in law. *Bragg v. Wiseman* (W. Va.) 47 S. E. 90, 91.

SEISIN.

In the common law "seisin" signifies possession. *Bragg v. Wiseman* (W. Va.) 47 S. E. 90, 91, (quoting Coke, Inst.).

SELECTION.

A mortgage of a specified number of cattle on a certain farm is good, to the number specified, against a purchaser from the mortgagor, although there are more cattle of the same description on the farm, which fact is not disclosed by the mortgage, since the mortgagee is permitted, by what is called the doctrine of selection or election, to select the specified number from the whole number. *Sparks v. Deposit Bank* (Ky.) 78 S. W. 171.

SELF-DEFENSE.

To maintain a plea of self-defense, there must be an actual physical attack or hostile demonstration of such a nature as to afford reasonable ground to believe that the design is to destroy life or inflict great bodily harm. *State v. Halliday*, 36 South. 753, 112 La. 846.

A person's right of self-defense does not depend on his belief, in the exercise of reasonable judgment, that it is necessary to use the force that he does. It is enough that it is in fact necessary, or that in the exercise of a reasonable judgment it appears to him to be necessary, though, as a matter of fact, it is not necessary. *McKinney v. Commonwealth* (Ky.) 82 S. W. 263, 264.

SELF-DESTRUCTION.

The phrase "self-destruction or suicide," as used in a certificate of membership in a

benefit association declaring that the contract for benefits does not include assurance against self-destruction or suicide, whether the member be sane or insane, does not prevent a recovery on the certificate where the member's death was due to his voluntary taking of carbolic acid, not with intent to cause death, but to frighten his wife into giving him money. *Courtemanche v. Supreme Court I. O. F.* (Mich.) 98 N. W. 749, 750, 64 L. R. A. 668.

SELL AND CONVEY.

The words "sell and convey," in a deed of real estate, mean, in the absence of appropriate expressions in the instrument itself limiting and restricting such general acceptance of the meaning of the words, a conveyance in fee. *St. Louis Land & Building Ass'n v. Fueller*, 81 S. W. 414, 417, 182 Mo. 93.

SEPARATE LABOR.

"Separate labor," as used in Rev. St 1899, § 4340, entitling a wife to the wages of her separate labor as her sole and separate property, is not the labor expended by her for the performance of her household duties, but labor entirely disconnected with those duties, and performed for the purpose of earning money wages. *Kroner v. St. Louis Transit Co.* (Mo.) 80 S. W. 915, 916.

SEPARATE PROPERTY.

The term "separate property of a married woman," at the time of the adoption of Pub. Acts 1880, p. 525, c. 57, providing that the taxable estate of married women other than separate property shall be set in the lists of their husbands, had an established meaning, and was such estate only, whether real or personal, as was settled on her for her separate use, without any control over it on the part of her husband. *Union School Dist. of Gullford v. Bishop*, 58 Atl. 13, 14, 70 Conn. 695, 66 L. R. A. 989.

SEPARATE PUBLIC EMOLUMENTS.

Separate public emoluments or privileges which the Legislature is forbidden by the Constitution to bestow on any man or set of men, refer mainly to political privileges, and were intended to prevent any infringement of the great principle of equality of political rights. The section may likewise be extended to prohibit the granting of any privileges to any set of men, to which all others in the same circumstances would not be entitled. A statute giving the remedy of attachment to particular classes of creditors is not within the prohibition. *Peck v. Critchlow*, 8 Miss. (7 How.) 243, 247.

SERVANT.

See "Fellow Servant."

One employed by a refining company to sell and distribute oil to customers, being paid by a commission on the amount of sales, is an agent or servant of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him. *Riggs v. Standard Oil Co.* (U. S.) 130 Fed. 199, 201.

SERVICE PIPE.

The term "service pipe" or wires, as used in Laws 1890, c. 566, p. 1148, § 65, providing that no corporation shall be compelled to lay service pipes or wires through frozen ground, or such as shall otherwise present serious obstacles to laying the same, means the connection from the street main or wire to the house, and usually the expense of laying that is borne by both the company and the owner in proportions agreed upon by them. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

SERVITUDE.

See "Additional Servitude"; "Personal Servitude."
Easement distinguished, see "Easement."

SESSION.

See "Last Session."

"The term 'session,' when applied to courts, means the whole term. In legal construction, the whole term is construed as but one day, and that day is always referred to the first day or commencement of the term." *Cresap v. Cresap*, 46 S. E. 582, 583, 54 W. Va. 581 (quoting *Dew v. Judges* [Va.] 3 Hen. & M. 27, 3 Am. Dec. 639).

The word "session" does not have a single, fixed, and definite meaning, but is variously used in statutes and constitutions. In Rev. St. § 1038 [U. S. Comp. St. 1901, p. 723], providing that any District Court may, by order entered on its minutes, remit any indictment pending thereon "to the next session of the Circuit Court for the same district," and thereon the proceedings in such case shall be the same in the Circuit Court as if such indictment had been originally found and presented therein, the word "session" is used as meaning an actual sitting of the court for transaction of business, and not in the sense of "term," and the Circuit Court has jurisdiction to proceed with a case so remitted at the then current term. *United States v. Dietrich* (U. S.) 126 Fed. 659, 360.

SET-OFF.

Set-offs must be mutual demands, and one partner cannot make use of a partnership demand as a set-off against a demand against himself individually. *Western Coal & Min. Co. v. Hollenbeck* (Ark.) 80 S. W. 145, 146.

A set-off obtains between persons occupying the relation of debtor and creditor and between whom there exist mutual demands. Mutuality is essential to the validity of a set-off, and, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. *O'Grady v. Stotts City Bank* (Mo.) 80 S. W. 696, 697.

"The right of set-off does not attach to the debt itself, nor depend upon the mutuality of the debts in their origin as an inherent quality belonging to such debts, but upon the situation and rights of the parties between whom it is sought to be enforced. It is a privilege attaching to the remedy only." *Wabash R. Co. v. Bowering*, 77 S. W. 106, 108, 103 Mo. App. 158 (citing *Greene v. Darling* [U. S.] 10 Fed. Cas. 1144; *Waterman, Set-Off*, § 17). "The right of set-off is not an equity which the original debtor may, at all events, assert against the assignor or assignee of the debt, whether he has or has not notice of its existence. There is no such equity to have debts set off against each other which attaches to the debts themselves and travels with them into whatsoever hands they may come, though it is doubtless true that where there are mutual subsisting debts, and either an express or implied agreement of stoppage pro tanto or mutual credit, the court of equity will enforce it against his assignee with notice." *Wolcott v. Sullivan* [N. Y.] 1 Edw. Ch. 399. A plaintiff's right to have his judgment against defendant set off against defendant's judgment against plaintiff is not affected by defendant's equitable assignment of half of his judgment, plaintiff not assenting thereto, or by the assignment of all of it, the assignee taking with knowledge of plaintiff's prior judgment. *Wabash R. Co. v. Bowering*, 77 S. W. 106, 108, 103 Mo. App. 158.

In an action in the nature of express assumpsit, the claim of the holder of the legal title of land against the holder of the equitable title for taxes paid, being purely a statutory claim, is not a proper subject of set-off, under a statute defining a "set-off"

as a cause of action arising upon a contract, judgment, or award in favor of a defendant against a plaintiff. *Montgomery v. Montgomery* (Ky.) 78 S. W. 465.

A set-off may be pleaded in an action founded on a contract, and must be, as declared by Code Civ. Proc. § 104, a cause of action arising upon contract, or ascertained by the decision of the court. In an action to recover a sum subscribed by defendant to aid plaintiff in holding a street fair in a city, defendant answered, and alleged that he paid to plaintiff a certain sum for the privilege of operating his usual place of business in the city, and for the purpose of feet frontage, which plaintiff unlawfully forced him to pay under threats of prosecution; that, when defendant paid said amount to plaintiff, plaintiff expressly agreed that no further saloons or other places for the sale of intoxicating liquors, other than those established, would be allowed to do business in such neighborhood; that the midway of said street fair was situated near the place of business of defendant, which fact was held out as an inducement for him to pay said amount to the plaintiff, as plaintiff then told him no intoxicating liquors would be sold therein; that plaintiff breached his agreement, thereby damaging defendant in a specified sum, for which amount he asked judgment. The contract or transaction set forth in the answer was wholly different from that set forth in the petition, and was in no way connected therewith, but the cause of action which defendant pleaded was one arising upon contract, and, though for unliquidated damages, was a proper subject of set-off. *Mullins v. South Omaha Street Fair Ass'n* (Neb.) 99 N. W. 521, 522.

SETTLED.

The marking of a cause "settled" is equivalent to a discontinuance of the action. *Pomeranz v. Marcus*, 87 N. Y. Supp. 941, 93 App. Div. 552.

SETTLEMENT.

The varied meaning of the word "settlement" has doubtless created some confusion in the minds of many in construing the word as employed in a statute regulating and fixing fees of county clerks for making settlement of each account with the county. Among other meanings, the word "settlement" means an adjustment of accounts, and also the payment of a debt. As here used, it means an adjustment of accounts, the meaning of which presupposes some work or labor of the clerk made a duty by law for him to perform. *Greene County v. Light* (Ark.) 77 S. W. 915, 916.

SEVERABLE CONTRACT.

See "Entire Contract."

SHALL

The word "shall" should be construed to mean "may" in Comp. Laws, § 479, as amended by St. 1895, p. 35, c. 37, providing that the commissioners, on the presentation of a petition for the vacation of a public road, shall within 30 days thereafter vacate the road. *State ex rel. Dangberg v. Douglas County Com'rs* (Nev.) 77 Pac. 984, 986.

SHALL BE CONTRACTED.

The words "shall be contracted," in the charter of Sacramento, providing that no debt shall be contracted or created against the city, do not have any greater prohibitive force than the words "create, audit, allow, or permit to accrue," as used in the Fresno city charter, or the words "incur indebtedness," as used in the Constitution. *Doland v. Clark*, 76 Pac. 958, 961, 143 Cal. 176.

SHALL BE LAWFUL.

The words "it shall be lawful" import a discretion. It is only where the subject-matter imperatively requires it that they can receive a different construction. *People v. City of Syracuse*, 12 N. Y. Supp. 890, 894, 59 Hun, 258 (citing *Reg. v. Bishop of Oxford*, 4 Q. B. Div. 245).

SHARE OF STOCK.

As personal property, see "Personal Property."

SHERIFF.

The words "the sheriff," in Code Civ. Proc. § 1362, directing that execution must be directed to the sheriff, means the sheriff of the county to which the execution is issued. *Fisher v. Young*, 85 N. Y. Supp. 115, 117, 41 Misc. Rep. 552.

SHIPSIDE.

A railroad company issued to plaintiff a bill of lading for shipment of cotton to plaintiff at a certain point "shipside." The ordinary signification of the word "shipside" in such a contract is a direction to deliver the cotton at some wharf accessible to the railroad's track. *R. A. Lee & Co. v. St. Louis, I. M. & S. Ry. Co.* (N. O.) 48 S. E. 809, 810.

SHOOTING WITH INTENT TO KILL.

"Maiming is not a necessary element of the crime of shooting with intent to kill. In stating the facts constituting the last-mentioned crime, it is in no case necessary to show maiming. Maiming may, and often

does, result from shooting, but it is a distinct offense, under no circumstances forming part of the consummated crime of shooting with intent to kill." *State v. Mattison* (N. D.) 100 N. W. 1091, 1093.

SHOULD.

The words "there should be," as used in a rule providing that there should be at least one telegraph office between those at which opposing trains received meeting orders, do not mean that "there must be." It is a reasonable inference from the adoption of the phrase "there should be" that while, under ordinary circumstances, there should be an intervening office, yet the circumstances may be such at times as to justify the sending of a meeting order to stations between which there is no telegraph office. *Wallace v. Boston & M. R. R.*, 57 Atl. 913, 917, 72 N. H. 504.

SHOW.

The language of the rule that an applicant for the issuance of a subpoena for production of books and papers must "show" that they are material implies something more than the mere allegation of affiant's belief that the books contain material entries, as facts must be shown on which the court can see, at least presumptively, that the books and papers contain material entries. *In re Lee*, 85 N. Y. Supp. 224, 227, 41 Misc. Rep. 642.

SHOWN.

See "Good Cause Shown."

SIDEWALK.

While the word "sidewalk" is often used in a context which imports a paved way, a footway does not necessarily have to be entirely improved to be a sidewalk, which is the space left on the side of a street, and usually along its borders and inside of the curbing, for foot passengers. *Asphalt & Granitoid Const. Co. v. Haeussler* (Mo.) 80 S. W. 5, 7 (citing *Knapp, Stout & Co. v. St. Louis Transfer Ry. Co.*, 126 Mo. 26, 28 S. W. 627; *Challiss v. Parker*, 11 Kan. 384).

SIGN.

See "About to Sign."

Execution distinguished from signing, see "Execution."

SIGN OFF.

T. & T. agree to pay all the indebtedness of T. & R. when R. "signs off" all his rights and title, and all property that has been made in said business lands, etc. The condition to "sign off" would, as to all tangible personal property and negotiable paper pay-

able to bearer, be satisfied by a delivery of the same to T. & T. so as to place the same in their full possession and control, and an acceptance of the same, unless written evidence of the transfer was specially requested; but, if demanded, T. & T. had a right to written evidence of the transfer. As to contracts, accounts, choses in action, etc., there must be a written assignment and a delivery. As to lands, there must be a deed of conveyance properly executed, acknowledged, and delivered. *Thompson v. Richards*, 14 Mich. 172, 186.

SILK TRIMMINGS.

Silk ribbons, of which some were, and others were not, in the nature of trimmings, but which, however used for trimmings, are required to be further fashioned for such use, and which are not in fact or commercially within the class of goods known as "trimmings," are not dutiable as "silk trimmings," under paragraph 390, Tariff Act 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], but as manufactures of silk not specially provided for, under paragraph 391 of said act (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]). *Gartner & Friedenheim v. United States* (U. S.) 131 Fed. 574, 575.

SIMULATION.

Where a petition shows that a judgment debtor bought immovable property through an interposed person, in whose name title was taken in order to screen and cover it from the pursuit of his creditors, and that the vendor of the property was not a party to the scheme to defraud, and sold in good faith, believing the interposed person the real purchaser, the sale itself not being attacked, and the only object of the suit to have it decreed that the judgment debtor is the true owner, and not the interposed person, the action is one in declaration of simulation, not to annul the sale, but to expose the real vendee. *Hoffmann v. Ackermann*, 35 South. 293, 294, 110 La. 1070.

SINGLE TRANSACTION.

See "Jeopardy."

SITTING.

The word "sitting," as used in *Hurd's Rev. St.* 1901, c. 38, § 132, which provides that any person who shall at any time or "sitting," by playing at cards lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit, is construed to include "all that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion, no matter how

many hands are played." *Zellers v. White*, 70 N. E. 689, 208 Ill. 518, 100 Am. St. Rep. 243.

SITUATED.

A domestic life insurance corporation is "situated," within Code Civ. Proc. § 55, authorizing such a corporation to be sued in the county in which it is situated, in any county in which it maintains an agent or servant engaged in transacting the business for which it exists. *Bankers' Life Ins. Co. v. Robbins*, 73 N. W. 269, 270, 53 Neb. 44; *Id.*, 75 N. W. 585, 586, 55 Neb. 117. See, also, *Western Travelers' Acc. Ass'n v. Taylor*, 87 N. W. 950, 62 Neb. 783.

The word "situated," in Laws 1851, c. 95, § 9, providing that penalties imposed on an insurance company for doing business in the state without a certificate may be recovered by the district attorney of the county in which the company or agent is situated, refers to the place where the agent is when he does the business or act complained of—the place which he makes his office for that business. *People v. Imlay* (N. Y.) 20 Barb. 68, 78.

SITUS.

The situs of personal property of every description is the domicile of the owner. *Commonwealth v. Union Refrigerator Transit Co. (Ky.)* 80 S. W. 490, 491.

SIX SUCCESSIVE WEEKS.

See "Successive Weeks."

SKILL.

See "Utmost Care and Skill."

SKINNED.

See "Fish Skinned or Boned."

SLANDER PER SE.

Words, to be a slander per se, must charge a criminal offense, or, falling of that, must be spoken of a person in reference to his business, and be of such character that they must necessarily injure him in his business, as that a tailor was a botch, or his clothes were misfit, or that he was insolvent, and the like. *Hume v. Kusche*, 87 N. Y. Supp. 109, 42 Misc. Rep. 414.

SLAVEHOLDER.

A person whose only interest in slaves consists of an undistributed share of an estate composed of slaves is not a slaveholder within the terms of a statute requiring a certain proportion of the jurors to be slaveholders in certain cases. *Spence v. State*, 17 Ala. 192, 193.

SMELTER RETURNS.

The phrase "smelter returns," in a deed reciting that certain royalties on smelter returns of all ores removed should be paid to the owners, means returns from the ore, less the smelting charges, without deducting the charges for hauling, freight, and switching. *Frank v. Bauer* (Colo.) 75 Pac. 930, 932.

SMOKERS' ARTICLES.

Articles used chiefly for the convenience of smokers, consisting of tables on the top of which are affixed smokers' accessories, and of an ornamental miniature automobile for the use of smokers, are dutiable as "smokers' articles" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 459, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], and not as "house or cabinet furniture of wood," under paragraph 208, Schedule D, of said act, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]. *A. Steinhardt & Bro. v. United States* (U. S.) 126 Fed. 443, 444.

SNATCH BLOCK.

A "snatch block" was described as a heavy block of wood attached to an upright or stanchion by a line used to draw the grain into the leg extending from the hold of the boat to the elevator, and up which the grain was drawn. *Connors v. Great Northern Elevator Co.*, 85 N. Y. Supp. 644, 645, 90 App. Div. 811.

SOCIETY.

See "Benevolent Society."

SOLD.

The word "sold" imports not a mere proposition to sell, but a consummated contract of sale. Where a contract recited, "We have sold to a certain person certain land," describing it, the vendors by such words declared and acknowledged that they had sold the premises, and such declaration or acknowledgment was binding on them. *Forthman v. Deters*, 69 N. E. 97, 100, 206 Ill. 159, 99 Am. St. Rep. 145.

SOLDIERS' HOME.

As asylum, see "Asylum."

SOLE AND UNCONDITIONAL OWNERSHIP.

A clause in a policy making it void if the insured is not the "sole and unconditional owner" relates to ownership when the policy was issued. A vendor in a written land contract who has admitted the vendee into possession and received from him large payments on the purchase money is not a sole

and unconditional owner, although he retains the legal title. *Rosenstock v. Mississippi Home Ins. Co.*, 35 South. 809, 813, 82 Miss. 674.

The insured was the unconditional and sole owner in fee simple within a policy containing a stipulation that it was to be void if the interest of the insured be other than unconditional and sole ownership, where the interest of the insured was a life estate in property or its proceeds, united with the absolute right as a testamentary trustee to dispose of the same as she saw fit for the purposes of the trust. *Security Ins. Co. v. Kuhn*, 69 N. E. 822, 823, 207 Ill. 160.

SOLE LEGATEE.

"A 'sole legatee' takes all that remains after satisfying all charges, losses, and expenses." In *re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

SOLICIT.

An act prohibiting any person or corporation from soliciting orders for the sale of intoxicating liquors in any place in the state where the sale of such liquors is forbidden by law is not violated by a showing that orders have been taken in such a place. "Taking" and "soliciting" do not mean the same thing, and are not convertible terms. *Sanderfur-Julian Co. v. State (Ark.)* 77 S. W. 596.

SOLVENCY.

There is a marked distinction between the solvency of an individual and his ability to make a purchase. "Solvency" means his ability to discharge his legal obligations, while his "ability to purchase property" means, as the authorities say, that he is "ready" to do so, which, according to Webster, is "equipped or supplied with what is needed for some act or event." *Colburn v. Seymour (Colo.)* 76 Pac. 1058, 1060.

SOLVENT DEBTOR.

Where a person, although indebted to others, has business or income and pays his debts, or has property out of which collection can be made, then he may fairly be regarded as a "solvent debtor," within Rev. St. 1898, § 1036, making debts due from solvent debtors subject to taxation. *Kingsley v. City of Merrill (Wis.)* 99 N. W. 1044, 1046.

SOUND HEALTH.

"Sound health means a state of health free from disease or ailment that affects the general soundness and healthfulness of the system seriously." *Atlantic & B. R. Co. v. Douglas*, 46 S. E. 867, 868, 119 Ga. 658.

SOUND MIND AND MEMORY.

See "Unsound Mind."

"Sound mind and memory" is equivalent to sanity, and one who is rational and acting rationally is, in the common understanding, sane and sound of mind. In *re Arrow-smith's Estate*, 69 N. E. 77, 79, 206 Ill. 352 (citing *Yoe v. McCord*, 74 Ill. 33; *Campbell v. Campbell*, 180 Ill. 466, 22 N. E. 620, 6 L. R. A. 167).

SPECIAL DAMAGES.

"Special damages," in reference to publication of libelous matter, was such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in Gen. St. 1901, c. 57b, § 2, providing that the words "actual damages" shall be construed to include all damages which the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation. *Hanson v. Krehbiel (Kan.)* 75 Pac. 1041, 1042, 64 L. R. A. 790.

SPECIAL DEPOSIT.

A special deposit is a bailment, and implies the setting apart of the specific money or chattel deposited by its return on demand. *Schofield Mfg. Co. v. Cochran (Ga.)* 47 S. E. 208, 209, 119 Ga. 901 (citing *Morse, Banks*, §§ 191, 193).

SPECIAL LAW.

General law distinguished, see "General Law."

A law is special, in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such separation, it would operate. *Van Cleve v. Passaic Valley Sewerage Com'rs (N. J.)* 58 Atl. 571, 572.

SPECIAL PROCEEDING.

An appeal from a city auditing board to the county board of supervisors by a constable for the adjustment of his claim for services is a special proceeding. *Perry v. Myer*, 89 N. Y. Supp. 347, 348.

A proceeding instituted by the freeholders of a town for an investigation into its financial affairs, under General Municipal Law, § 3, Laws 1892, p. 1733, c. 683, is a special proceeding. In *re Town of Hadley*, 89 N. Y. Supp. 910, 911, 44 Misc. Rep. 265.

An order of the superior court pending an appeal from a justice, there triable de novo, vacating the justice's judgment, is not an order preventing a judgment in the action from which appeal might be taken, or one after judgment; but though entitled, like the papers on which the motion was founded,

in the action, is one in a "special proceeding," within Rev. St. 1898, § 8069, enumerating appealable orders. *Deuster v. Zillmer*, 97 N. W. 31, 33, 119 Wis. 402.

The application for a writ of mandate is a special proceeding of a civil nature. *Jones v. Board of Police Com'rs*, 74 Pac. 696, 697, 141 Cal. 96.

SPECIALTY.

Bills and notes are not simple contracts, but specialties, and one of the characteristics of a specialty is that none but the parties thereto can be parties to an action thereon. In re *L. B. Weisenberg & Co.* (U. S.) 131 Fed. 517, 522.

SPECIFIC DEVISE.

At common law all devises of real estate are specific. Every devise of land is specific. Every legacy of personal estate is not, because personal estate fluctuates and varies. Land does not, for no more passes by a will than the testator had at the time of making his will. *Forrester v. Lord Leigh*, 1 Amb. 173; *Clifton v. Burt*, 1 P. Wms. 679; *Howe v. Earl of Dartmouth*, 7 Ves. Jr. 147; *Milnes v. Slater*, 8 Ves. Jr. 305; *Redf. Wills*, pt. 2, 471; *Mirehouse v. Scaife*, 2 Mylne & C. 695; *Masters v. Masters*, 1 P. Wms. 424. In this country no devise of real estate will be regarded as specific unless it contains a description of the estate sufficient to enable the devisee to indemnify the same. In re *Woodworth's Estate*, 31 Cal. 595, 610, 614 (citing *Redf. Wills*, pt. 2, 870).

SPECIFIC LEGACY.

A specific legacy is a bequest of a specified part of a testator's personal estate, distinguished from all others of the same kind. In re *Fisher*, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing *Crawford v. McCarthy*, 159 N. Y. 514, 54 N. E. 277).

"A specific legacy or devise is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other parts of the same kind, and which may be satisfied only by the delivery of the particular thing." A testator bequeathed 60 shares of stock in a certain bank, which was all the stock he owned in that corporation. The legacy was specific. *Waters v. Hatch*, 79 S. W. 916, 922, 181 Mo. 262.

Where a legacy of bonds or securities is intended to be a gift of the bonds and securities specified, and such bonds and securities are the only source for the payment of the legacy, the legacy is a specific legacy of the bonds or securities, and not of the money in them or secured by them, and, if the specific

security is disposed of or extinguished, the rule of ademption applies, and the legacy is gone. *Blair v. Scribner*, 57 Atl. 318, 326, 65 N. J. Eq. 498.

SPECIFIC LEGATEE.

"A 'specific legatee' is one who has a bequest of a particular thing, distinguished from all others of the same kind." In re *Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

SPECIFICATIONS.

Plans distinguished, see "Plans."

SPEEDY TRIAL.

A "speedy trial" means a trial regulated and conducted by fixed rules of law, and any delay created by the operation of those rules does not work prejudice to any constitutional right of the defendant. *Sample v. State*, 86 South. 367, 368, 138 Ala. 259.

SPIRITS.

Cordials are "spirits manufactured or distilled from grain or other materials," as that phrase is used in section 3, Tariff Act July 24, 1897, c. 11, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], and, when imported from France, are subject to the reduced rate of duty provided for such spirits in the reciprocal commercial agreement with that country (30 Stat. 1774) negotiated under the authority of said section. *United States v. Julius Wille Bro. & Co.* (U. S.) 180 Fed. 331.

SPLITTER.

A "splitter" in a packing plant is a person who splits recently slaughtered hogs with a cleaver. *Rendlich v. Hammond Packing Co.*, 80 S. W. 683, 106 Mo. App. 717.

SPORT.

See "Public Sport."

SPOUSE.

See "Former Spouse."

SPREADER.

A "spreader," used in connection with a rip saw, is a piece of iron or steel slightly thicker than and set about two inches behind the saw it is to be used with, so as to spread the seam in the wood, and thereby hinder the clamping of the saw. *Dean v. St. Louis Woodenware Works* (Mo.) 80 S. W. 292, 294.

STAGNUM.

The word "stagnum" comprehends both land and water. *Conover v. Atlantic City Sewerage Co.* (N. J.) 57 Atl. 897, 898.

STATE.

As citizen, see "Citizen."

The word "state" in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, includes its officers, its courts, and other governmental agencies. All of them are included in the prohibitions. *Ex parte Powers* (U. S.) 129 Fed. 985, 988.

STATE INSTITUTION.

Under the Military Code, a national guard armory is a "state institution," within Labor Law (Laws 1897, p. 462, c. 415) § 3, declaring that the provision that eight hours shall constitute a day's work does not apply to employes of state institutions. *Burns v. Fox*, 90 N. Y. Supp. 254, 255.

STATE OFFICER.

The chief of police of a city of the first class is not a "state officer" within the meaning of Const. art. 19, § 6, providing that no person shall hold or perform the duties of more than one office in the same department of the government at the same time, which provision refers to state offices only. *Peterson v. Culpepper* (Ark.) 79 S. W. 783, 785.

STATE PRISON.

A sentence to imprisonment in the state reformatory is not a sentence to a term of imprisonment in the state prison, within Gen. St. 1894, § 4790, providing that a divorce may be decreed when either party, subsequent to the marriage, has been sentenced to imprisonment in the state prison. *Dion v. Dion* (Minn.) 100 N. W. 4, 5.

STATUTORY RECEIVER.

The man who is appointed receiver upon the return day of the order to show cause, or upon the appearance of the corporation upon the filing of the bill, is the "statutory receiver." He is appointed after the summary final hearing prescribed by the statute has been held. *Gallagher v. Asphalt Co. of America* (N. J.) 58 Atl. 403, 408.

STEADYING BOARD.

The office of a "steading board" in a packing plant is to hold the hog in position while the splitter cleaves it in two. *Rendlich v. Hammond Packing Co.*, 80 S. W. 683, 106 Mo. App. 717.

STEAL.

Webster defines "steal" as "to take and carry away feloniously; to take without right or leave, and with intent to keep wrongfully; as to steal the personal goods of another." *Baldwin v. State* (Fla.) 35 South. 220, 221.

The word "steal," as used in an indictment for abstracting mail matter from the mails, in violation of Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], alleging that defendant did "steal" and take from out of the mail the package described, is not used to designate technical larceny, but means simply to take without right or leave, and the use of that word sufficiently charges wrongful intent. *United States v. Trosper* (U. S.) 127 Fed. 476, 477.

STEAM FARM ENGINE.

A "steam farm engine" consists of a horizontal boiler with a drop-fire box, and a horizontal engine attached to the top of the boiler, mounted on four wheels for convenience of transportation, and having the smokestack hinged so that it can be lowered when the machine is being moved. *Wilson v. Union Mut. Fire Ins. Co.* (Vt.) 58 Atl. 799, 800.

STOCK.

See "Capital Stock."

As chose in action, see "Chose in Action."

The "stock" of corporations is "the capital of corporations." The word "stock," as used in Laws Ga. 1833, p. 264, relating to the charter of the Georgia Railroad Company, and providing that the stock of the company and its branches shall be exempt from taxation for and during the term of seven years, and after that shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments, means the capital of the corporation, and not the shares of stock in the hands of the individual owners, and the provision establishes the limit of taxation of the corporation upon its capital stock. *Georgia R. & Banking Co. v. Wright* (U. S.) 132 Fed. 912, 914 (quoting Bouv. Law Dict.).

STOCKHOLDER.

The holder of a contract purporting to be for the purchase and sale of a diamond issued by what is commonly called a "tontine company" is not a "stockholder" in such company, and cannot secure the appointment of a receiver for such company because of the mismanagement of its affairs by its officers. *Mann v. German-American Inv. Co.* (Neb.) 97 N. W. 600.

STORE.

While a storehouse may under some circumstances come within the meaning of the word "store" as used in Rev. St. 1883, c. 6, § 14, providing that all personal property employed in trade, etc., shall be taxed in the town where so employed on the 1st day of April of each year, provided that the owner so employing it occupies any store, shop, mill, etc., for the purpose of such employment, the word "storehouse" does not come within the meaning of the word "store," where a finished manufactured product is placed in a storehouse for the purpose of storage, and not for the purpose of trade. *Inhabitants of New Limerick v. Watson*, 57 Atl. 79, 81, 98 Me. 379.

STOREHOUSE.

As store, see "Store."

A storehouse "is a building for keeping goods of any kind, especially provisions; a magazine; * * * a warehouse." The word "storehouse," as used in Comp. St. 1899, c. 77, art. 1. § 39, relating to railway taxation, and providing that all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of the right of way and depot grounds, shall be listed for purposes of taxation by the officers of the companies with the precinct assessors where the property may be situated, includes an elevator. *Adams County v. Kansas City & O. Ry. Co.* (Neb.) 99 N. W. 245, 247 (quoting Webst. Dict.).

STRANGER.

In a complaint against the collector of internal revenue, to recover the amount of taxes exacted by him from plaintiffs, who are shipping agents, as due under the revenue act on copies of charter parties in their possession, and alleged by them to have been obtained for the information of themselves and their customers, an allegation that plaintiffs, such firm, were "strangers to said charter parties and the matter to which the same related," is not sufficient to show that plaintiffs were not the agents or representatives of one or the other of the parties to such instruments, and properly chargeable with the tax; the word "strangers" meaning that plaintiffs were not parties to the charter parties. *Simpson v. Treat* (U. S.) 126 Fed. 1003, 1006.

STREAM.

The word "stream," as used in Comp. St. 1901, c. 78, § 87, declaring that bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built at the equal expense of

such counties, is used in a general sense, and includes rivers and smaller courses of water. In this statute the Legislature used the word in the sense of a course of running water, a river, rivulet, or brook. *Dodge County v. Saunders County* (Neb.) 100 N. W. 934, 935.

STREET.

The word "street," as used in Code, §§ 917, 919, relating to the platting of land, and declaring that when a plat has been acknowledged and recorded the acknowledgment and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets and other public purposes, is used to designate the spaces left between the lots for public travel. The title thereto does not vest in the city or town prior to its acceptance, and until then it is not deemed a road or public thoroughfare. *Chrisman v. Omaha & C. B. R. & Bridge Co.* (Iowa) 100 N. W. 63, 65.

The word "street," as used in a city charter providing that the assessment districts for street improvements should be established by drawing a line midway between the street to be improved and the next parallel or converging street on each side thereof, means a public street, and does not include a private way, which had remained open and unobstructed for more than 10 years, during which time it had been used as a street by the public, when the title to it was vested in trustees for the exclusive use of certain property owners, and expressly reserved by an indorsement in a plat for the exclusive use of the property owners. *Collier's Estate v. Western Paving & Supply Co.*, 79 S. W. 947, 954, 180 Mo. 362.

An alley is not necessarily a street, and the public have not necessarily a right to its use. *Milliken v. Denny*, 47 S. E. 132, 133, 135 N. C. 19.

The word "street" has been defined as "a public way or road, whether paved or unpaved, in a village, town, or city, ordinarily including a sidewalk or sidewalks, and a roadway having a house or town lots on one or both sides; a main way in distinction from a lane or alley." Cent. Dict. A paved alley 16 feet wide, passing through the middle of a block, is not a "street," within *Burns' Ann. St. 1901, § 7283d*, prohibiting the sale of intoxicating liquors by virtue of a license in any room unless it is arranged either with window or glass door, or so that the whole of it may be in view of the street. *State v. Harrison*, 70 N. E. 877, 162 Ind. 542.

"Rural highways may * * * be appropriately and conveniently denominated 'roads,' and the public ways of a town or city may properly and conveniently be called 'streets.'" Pub. Laws 1903 p. 621, c. 375,

authorizing the commissioners of Haywood county, under specified conditions, to sell bonds of Waynesville township for improving the roads of that township, does not by construction repeal Priv. Laws 1885, c. 127, § 16 (Waynesville Town Charter), or confer on such commissioners power to change or control the streets of the town of Waynesville. *Town of Waynesville v. Satterthwait* (N. C.) 48 S. E. 661, 664 (quoting Elliott on Streets, § 7).

STREET CAR.

Ordinances making it unlawful to operate or run any "street car" unprovided with a car fender of the most improved design and construction, and providing that no "electric car" shall be propelled or operated without having one conductor and one motorman thereon, require a fender, conductor, and motorman only on motor cars, and not on trailers. *Von Diest v. San Antonio Traction Co.* (Tex.) 77 S. W. 632, 633.

STREET RAILROAD.

As common carrier, see "Common Carrier."

As railroad, see "Railroad."

STREET RAILWAY COMPANY.

As railroad corporation, see "Railroad Corporation."

STREET WORK.

"Street work" is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street—work in repairing or making a street. *Town of Mill Valley v. House*, 76 Pac. 658, 659, 142 Cal. 698.

STRICTLY CONSTRUED.

The rule that a criminal provision must be strictly construed means only that the court must not bring cases within the provision of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the court is to give effect to that intention as disclosed by the words used. Guided by such a rule of construction, a combination by stockholders in two competing interstate railway companies, to form a stockholding corporation which should acquire a controlling interest in the capital stock of each of such railway companies, violates the anti-trust act of July 2, 1890. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 465, 193 U. S. 197, 48 L. Ed. 679.

STRUCTURE.

See "New Structure."

Any other structure, see "Any Other."

Other structure, see "Other."

A "structure" is defined to be "a building of any kind, but chiefly a building of some size and magnificence; an edifice." While the word "structure" may cover a great variety of form and construction, yet when used in connection with the words "house" and "building," it is evidently intended to simply describe a variety of building. The word "structure," as used in Labor Law, Laws 1897, p. 467, c. 415, § 18, which provides that a person employing another to perform labor of any kind in the erection or alteration of a house, building, or structure shall not furnish for the performance of such labor any scaffolding which is unsafe or improper, does not include a boiler which is portable and may be readily moved from place to place, such a boiler rather being an appliance in the business for which it is used. *Conley v. Lackawanna Iron & Steel Co.*, 88 N. Y. Supp. 123, 125, 94 App. Div. 149.

STUMPS.

See "Drawing the Stumps."

SUBCONTRACTOR.

A "subcontract" is defined to be "a contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service." The term "subcontractor," therefore, is not inappropriate to designate one who has contracted with the principal contractor to perform the whole as well as a part of the service which the latter has undertaken to perform. *Smith v. Wilcox*, 74 Pac. 708, 709, 44 Or. 323; *Same v. Turple*, Id. (citing Bouv. Law Dict.).

SUBDIVISION.

See "Political Subdivision."

The word "subdivision," as used in the amendment adopted in 1891 to Const. 1876, art. 16, § 20, providing that the Legislature shall enact a law whereby the voters of "any county, justice precinct, town or city by a majority vote from time to time may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits," by inserting after the word "city" the parenthetical clause "or such subdivision of a county as may be designated by the commissioners' court," does not refer to the county, justice precinct, city, or town. The amendment simply contemplated authority to hold local option elections in subdivisions not previously mentioned, and it was not in-

tended, by using the word "subdivision," to give a different meaning or standing to those already enumerated, or in any manner to qualify them. The commissioners' court has no authority to combine subdivisions of a county for the purpose of a local option election. *Ex parte Mills* (Tex.) 79 S. W. 555, 556.

SUBJECT.

The word "subject" is broader than the word "object," and one subject may contain many objects. *Ex parte Herman* (Tex.) 77 S. W. 225, 226.

SUBJECT OF ACTION.

The words "subject of action," in Code Civ. Proc. § 691, relating to counterclaims connected with the subject, should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and grounds of the plaintiff's right to recover or obtain the relief asked. *Potter v. Lohse* (Mont.) 77 Pac. 419, 420 (citing *Collier v. Ervin*, 8 Mont. 142).

"The subject of an action is the thing; the wrongful act for which damages are sought; the contract which is broken; the act which is sought to be restrained; the property of which recovery is asked." *Lasiter v. Norfolk & C. R. Co.* (N. C.) 48 S. E. 642, 643.

The phrase "subject of the action" is different from "cause of action," and signifies the ultimate or primary title, right, or interest which a plaintiff seeks to enforce or protect; not merely the wrong to be redressed in the particular case. This is the meaning of the words "subject of action," as used in the statute relating to counterclaims, and declaring that counterclaims are claims connected with the subject of the action. In replevin for chattels mortgaged to secure payment for a binder which plaintiff sold defendant, but afterwards took from him with his consent, the subject of the action is neither the chattels mentioned in the complaint nor their unlawful detention by defendant, but plaintiff's claim against the defendant on the notes and chattel mortgage. Plaintiff's right to the property depends entirely on whether the notes have been paid and the lien of the mortgage thereby destroyed. The indebtedness was therefore the subject of the action, and its existence the fact in dispute. Therefore a counterclaim on a money demand may be set up for affirmative relief as well as to defeat the plaintiff's claim, and a counterclaim alleging that plaintiff's claim to the chattels arose from a chattel mortgage given to secure payment for the binder, and that he had already been overpaid, and demanding judgment for the amount overpaid, was proper, being connected with the subject of

the action. *McCormick Harvesting Mach. Co. v. Hill*, 79 S. W. 745, 750, 104 Mo. App. 544.

SUBJECT TO.

The phrase "subject to legal investigation," in a sale of real estate at auction subject to legal investigation, means that the purchaser would buy with the privilege reserved on his part to decline the bargain if he discovered on examination of the abstract that the title of the vendor of the property was defective. *Middleton v. Findla*, 25 Cal. 76, 81.

Where the present landlords and their predecessors in title accepted deeds "subject to existing tenancies," and found tenants in actual possession, they must be presumed to have ascertained and know the nature, extent, and terms of these tenancies, and of the leases under which they were held; for the fact of an existing tenancy necessarily presupposes a lease of some kind. *Anderson v. Conner*, 87 N. Y. Supp. 449, 451, 43 Misc. Rep. 884.

SUBLETTING.

The employment by a farm tenant of a third person to work thereon, to whom is given possession of a house on the premises, does not constitute a subletting of any part of the premises, within the provision of the lease prohibiting a subletting without the written consent of the landlord. *Vincent v. Crane* (Mich.) 97 N. W. 34, 35.

SUBROGATION.

"Subrogation is a remedy made use of by courts of equity as an efficient aid to justice, and, in the main, does not depend on a contractual obligation, though a man may acquire the right to a conventional subrogation by contract. This happens when one liquidates a demand secured by lien or guaranty, and takes an assignment of it, or agrees with the creditor that any security held by the latter shall continue available for the collection of the demand." *Crane v. Noel*, 78 S. W. 826, 828, 103 Mo. App. 122.

SUBSEQUENT.

See "Condition Subsequent."

SUBSTANCE.

See "Noxious Potion or Substance."

SUBSTANTIAL INCLOSURE.

Where plaintiff, claiming title to a lot, incloses it on three sides with a fence, so that it makes a complete inclosure in connection

with an adjoining lot, the owner of which makes no claim to the first lot, but has given his individual covenant of quiet enjoyment in an executor's deed thereof, there is a "substantial inclosure" of the lot, within Code Civ. Proc. §§ 370, 372, providing that such an inclosure constitutes adverse possession. *Brown v. Doherty*, 87 N. Y. Supp. 563, 566, 93 App. Div. 190.

SUBSTANTIAL RIGHT.

An order of the superior court made in a special proceeding pending an appeal from a justice, vacating the justice's judgment, is final in a proceeding, and, because preventing docketing of the judgment pending the appeal, affects a "substantial right," within Rev. St. 1898, § 3069, making such order appealable. *Deuster v. Zillmer*, 97 N. W. 31, 34, 119 Wis. 402.

A judgment vacating a town plat is appealable as a final order affecting a "substantial right," within Gen. St. 1894, § 6140, subd. 6, providing for an appeal from a final order affecting a substantial right. *Koochling v. Franson*, 98 N. W. 98, 99, 91 Minn. 404.

The right of a prisoner to earn a diminution of his term by his own act is a "substantial one," of which, by law passed subsequent to the commission of the offense, he cannot be deprived. *People v. Johnson*, 90 N. Y. Supp. 134, 136, 44 Misc. Rep. 550.

SUBSTITUTED TRUSTEE.

On the death of a trustee, whereby the trust devolves on the court, it appoints, not a "substituted trustee," but some one as its representative to execute the trust under its direction. There is no authority in the statute for appointing a substituted trustee by that name. *In re Gueutal*, 90 N. Y. Supp. 138, 139, 97 App. Div. 530.

SUCCESSIVE WEEKS.

Code Civ. Proc. § 639, relating to foreclosure of mortgages by advertisement, provides that notice that a mortgage will be foreclosed by sale must be given by publication for six successive weeks. Civ. Code, § 2445, provides that the phrase "successive weeks" shall be construed to mean calendar weeks, and publication on any day in such weeks shall be sufficient for that week. A notice of foreclosure by advertisement which is published for six successive weeks, once in each week, is a sufficient publication, though but 37 days intervened between the first publication and the day of sale. *Thomson v. Issenhuth* (S. D.) 100 N. W. 438, 437.

SUCCESSIVELY.

"Successively," in Civ. Code, art. 145, providing that the notices of judgment are to

be given from month to month for three times successively, means by succession; in a series; one after another; consecutively. *Derby v. Dancy*, 36 South. 795, 796, 112 La. 891.

SUCCESSORS.

The word "successors," as used in a lease providing for a forfeiture of the term if the lessee, his successors or assigns, should fail in the performance of any covenant, condition, or proviso contained in the lease, which, on the part of the lessee, his executors, administrators, or assigns, was to be observed, includes the executors of the lessee. *West Shore R. Co. v. Wenner* (N. J.) 57 Atl. 408, 410.

SUCH.

The word "such," as used in a constitutional provision directing the Legislature to enact a law whereby any county, justice precinct, town, city, or such subdivisions of the county as may be designated by the commissioners' court of the county, may determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits, means subdivisions of like character—political subdivisions of the county—and empowers the Legislature to authorize the commissioners' court to designate some other existing subdivision of the county than one of those enumerated, but does not sanction a law which authorizes the commissioners' court to combine two or more political subdivisions of a county into a local option district, thus, in effect, creating a new subdivision. *Ex parte Heyman* (Tex.) 78 S. W. 349, 353.

SUCH ACCIDENT.

The words "such accident," in an instruction in an action against a carrier for injuries to a passenger, to the effect that if the jury found that plaintiff was not guilty of contributory negligence, and was thrown from the car as claimed, and that such accident would not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence against defendant was raised, have reference to somewhat more than the mere fact that plaintiff was injured, and they at least referred back to his being thrown from the car through some neglect of defendant, and, when so construed, the instruction was not erroneous on the ground that it justified the jury in presuming negligence from the mere fact that plaintiff was injured while a passenger. *Fitch v. Mason City & C. L. Traction Co.* (Iowa) 100 N. W. 618, 620.

SUCH PERIOD.

The words "such period," in Laws 1894, p. 910, c. 447, § 27, providing that Sunday

must be excluded from reckoning if it is the last day of any such period, refer to the preceding sentence in the statute, which relates to a number of days specified as a period from a certain day within which, or after or before which, an act was authorized or required to be done. *Benoit v. New York Cent. & H. R. R. Co.*, 87 N. Y. Supp. 951, 953, 94 App. Div. 24.

SUE TO INSOLVENCY.

"Sue to insolvency" means that the party shall exhaust the ordinary legal remedies provided for the collection of debts. *Pollard v. Murrell*, 6 Ala. 661, 662.

SUFFER.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference, through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, cl. a, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]. *Bogen & Trummel v. Protter* (U. S.) 129 Fed. 533.

SUFFICIENT EVIDENCE.

See "Sustained by Sufficient Evidence."

SUFFICIENT FENCE.

See "Legal and Sufficient Fence."

SUICIDE.

The word "suicide," as used in a mutual benefit certificate declaring that no benefit shall be paid on the death of a member who shall commit suicide within five years from and including the date of his initiation, means voluntary, intentional self-destruction, and does not bar a recovery if, when the deceased took his life, he was so affected with insanity as to be unconscious of the act or of the physical effect thereof, or was driven to the commission of the fatal act by an insane impulse which he had not the power to resist. *Supreme Council of Royal Arcanum v. Pels*, 70 N. E. 697, 209 Ill. 33.

The phrase "self-destruction or suicide," as used in a certificate of membership in a benefit association, declaring that the contract for benefits does not include assurance against self-destruction or suicide, whether the member be sane or insane, does not prevent a recovery on the certificate where the member's death was due to his voluntary taking of carbolic acid, not with intent to cause death, but to frighten his wife into giving him money. *Courtemanche v. Supreme Court I. O. F.* (Mich.) 98 N. W. 749, 750, 64 L. R. A. 668.

SUIT.

See "Civil Action—Case—Suit—etc."

The word "suits" is a very comprehensive term, and includes all actions at law, *ex contractu* and *ex delicto*, and all actions in equity. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (U. S.) 128 Fed. 332, 340, 63 C. C. A. 62.

Strictly speaking, under the code practice, "we have no such thing as 'suits,' although we commonly use that term. We have only actions and special proceedings. What were formerly denominated 'suits in equity' and 'actions at law' are now denominated 'civil actions.'" *State v. Policemen's Pension Fund Trustees*, 98 N. W. 954, 959, 121 Wis. 44.

SUIT AGAINST THE STATE.

In equity the money in the state treasury is the money of the people of the state, and suits by a taxpayer to restrain the misappropriation by public officers of such money to an unauthorized purpose are not "suits against the state," within the prohibition of Const. 1870, art. 4, § 26, declaring that the state shall not be made a party to any action at law or suit in chancery. A bill in equity seeking to restrain the commissioners of the Illinois & Michigan Canal and certain public officials from applying certain sums of money appropriated to the maintenance of the canal by Laws 1903, p. 45, on the ground that the act was illegal and that the appropriation was not warranted by the law, was not a suit against the state. *Burke v. Snively*, 70 N. E. 827, 208 Ill. 828.

SUIT IN REM.

See "In Rem"; "Quasi in Rem."

SUIT IN WHICH THE UNITED STATES ARE PLAINTIFFS.

Under Act Aug. 13, 1894, c. 290, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], requiring contractors for government work to give bonds conditioned (1) for the performance of the contract; (2) for the prompt payment of all persons supplying labor or materials in the prosecution of the work—and authorizing such persons, in case of nonpayment, to bring suit in the name of the United States for his or their use and benefit against such contractor and sureties, such a suit is one in which the United States are plaintiffs, within the meaning of section 1 of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. *United States v. Churchyard* (U. S.) 132 Fed. 82, 83.

SUIT OF A CIVIL NATURE.

A proceeding for mandamus, under 2 Ballinger's Ann. Codes & St. § 5765, authorizing

such proceedings to be commenced by the filing of a motion supported by affidavits, and authorizing the assessment of damages and costs when a judgment is given in favor of the applicant, together with the issuance of a peremptory writ, is a special proceeding, and not a suit "of a civil nature at common law or in equity." *Kelly v. Grand Circle Women of Woodcraft* (U. S.) 129 Fed. 830, 831.

"The writ of mandamus is not a suit of a civil nature at law or in equity, within the meaning of the acts of Congress creating the circuit courts of the United States and defining their jurisdiction." *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.* (U. S.) 182 Fed. 289, 291.

SUIT PENDING.

A proceeding for the discovery of assets belonging to a decedent's estate is a "suit pending," within the meaning of a statute providing for the taking of depositions in a suit pending, even though the person from whom discovery is sought is charged with embezzlement of the assets. *Ex parte Gfeller*, 77 S. W. 552, 556, 178 Mo. 248.

SUMMER ROAD.

On each side of a paved strip of a road was a smooth surface of sod or earth at the same level, but inclining gradually to the sides and apparently intended for the same use. Such smooth surface is what is known as a "summer road," used by many travelers in good weather in preference to the macadamized stone. Recovery may be had against a city for the death of one killed by coming in contact with a heavily charged and exposed electric wire used by the police department of the city, and lying so near the highway as to endanger a traveler deviating a few feet from the beaten path, and the city cannot avoid liability for the death of a person coming in contact with the wire by the fact that the accident occurred on the side of a road, of which 16 feet was macadamized in the middle, and that, if deceased had kept to the macadamized portion, he would not have lost his life. *Emery v. City of Philadelphia*, 57 Atl. 977, 978, 208 Pa. 492.

SUMMONS.

The return being a part of the summons, it is sufficiently described by the word "summons." *Casety v. Jamison*, 77 Pac. 800, 801, 35 Wash. 478.

SUMS COLLECTED.

The term "sums collected," in a statute allowing a commission in tax suits on sums collected, means sums collected for taxes. On sums collected for costs in the action no

commission is chargeable. *State v. Smith*, 13 Mo. App. 421, 423.

SUMS DUE.

All sums due, see "All."

SUNDAY.

Playing baseball on Sunday as crime, see "Crime."

SUPERSEDEAS.

"A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual." *Hey v. Harding* (Ky.) 78 S. W. 136 (quoting *Runyon v. Bennett*, 84 Ky. [4 Dana] 598, 29 Am. Dec. 431).

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard." *Whitaker v. McBride* (Neb.) 98 N. W. 877, 878 (quoting *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933).

SUPERVISORS.

See "Board of Supervisors."

SUPPOSED.

The word "supposed," as used in a plea in trespass for killing a dog, alleging that on the date of "the said supposed killing of said dog" it was found by defendant hunting wild deer, is equivalent to "alleged," and is a sufficient admission of a cause of action. *Mossman v. Bostridge* (Vt.) 57 Atl. 995.

SURCHARGE.

To surcharge or falsify is to allege an omission in an account or deny the correctness of some or all of the items rendered. One who objects to a stated account must surcharge or falsify it; and an account rendered by an administrator is a stated account. *Tate v. Gairdner*, 46 S. E. 73, 74, 116 Ga. 133.

SURETY.

As creditor, see "Creditor."

A surety "is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be

Indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so." *McGraw v. Union Trust Co. (Mich.)* 99 N. W. 758 (quoting *Smith v. Shelden*, 35 Mich. 48, 24 Am. Rep. 529).

"A surety is one who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it; or, as it has otherwise been expressed, a surety is a person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was himself compelled to do so." *Wm. Deering & Co. v. Veal (Ky.)* 78 S. W. 886, 887 (quoting *Brandt, Sureties*, § 1).

SURPLUS.

The term "surplus," as used in the nomenclature of bankers, does not include undivided profits. Such profits may be surplus in the sense that they are a constituent of capital, but they are not surplus in the commonly accepted sense. It is quite usual, upon the organization of financial corporations, for the stockholders to contribute, besides the share capital, a fund which is known as "surplus." It is also quite usual for the directors or managers of these institutions to set apart and to add to this fund from time to time some part of the accumulated profits of the business in excess of dividend requirements. The fund produced in either of these ways is what is known as "surplus." The term is not used to designate the accumulated profits of ordinary banking firms or individual bankers; and, when the statute uses it, it does so with reference to the particular class of bankers to which alone it is applicable, and means the fund created by corporate or quasi public institutions as an addition to or re-enforcement of the share capital. *Leather Mfrs.' Nat. Bank v. Treat (U. S.)* 128 Fed. 262, 263, 62 O. C. A. 644.

SURPLUS PROFITS.

Under Laws 1890, p. 1071, c. 564, as amended by Laws 1892, p. 1829, c. 688, providing that the directors of a stock corporation shall not make dividends except from the "surplus profits" arising from the business of the corporation, where the stockholders paid into the treasury \$500,000 for which no additional stock was issued, and the company thereafter entered into a merger agreement with another corporation, and for the purpose of equalizing the capital and surplus of the merging companies \$200,000 was returned to the former stockholders, the sum so returned was not surplus profits of the company, for it did not in any sense arise from its profits or earnings in the course of its business, but was contributed

solely for the purpose of strengthening the company and adding to its working capital. *People v. Knight*, 89 N. Y. Supp. 72, 74, 96 App. Div. 120.

SURPRISE.

Under Rev. St. 1899, § 800, providing that a new trial may be granted for mistake or surprise, the granting of a new trial on a showing by defendant in an action on account, after verdict for plaintiff, that when he heard a witness testify on the trial concerning two payments by defendant to the plaintiff's decedent, and that the account in suit had been paid to decedent, he was at first surprised, but gradually the facts came to him, especially when it was found the draft by which payment of the account in suit was made verified the statement of the witness, is not an abuse of discretion of the trial court. *Connally v. Pehle*, 79 S. W. 1006, 1009, 105 Mo. App. 407.

SURROGATE.

In Code Civ. Proc. § 2747, providing that the surrogate or Supreme Court may by reference ascertain the rights of the parties interested in the legacy, and grant an order for the payment of the money due, the words "the surrogate" must be deemed to refer to the judicial officer who has or had general jurisdiction over the estate, its representatives, and its management and disposition. *Kinneally v. People*, 90 N. Y. Supp. 587, 589.

SURVEY.

See "Official Survey."

SURVIVING CHILDREN.

The words "surviving children," in a will providing that in the event of the death of any of the children his share in the trust fund should go to his lawful issue upon their arriving at full age, or, if there should be no lawful issue who should arrive at full age, such child's share in the trust fund shall go to the surviving children and their heirs and assigns forever, refer to those surviving at the death of one of the children. *Lawrence v. Phillips*, 71 N. E. 541, 542, 186 Mass. 320.

SURVIVOR.

The term "survivors," as used in the code of a mutual benefit insurance association, providing that the purpose of a fund is to pay a sum to survivors of a member at his death; that, if a member shall die whose survivors possess no benefit certificate, the money shall not be paid without the order of court; and that, if a member die whose survivors produce a death certificate, the re-

cient of the money shall give a receipt—does not include a person who is neither a relative nor member of the household of, nor connected by marriage with, the member of the association. *Koerts v. Grand Lodge of Wisconsin, Order of Hermann's Sons*, 97 N. W. 163, 164, 119 Wis. 520.

SUSPICIOUS PLACE.

What constitutes a "suspicious place," within a police regulation requiring a report as to all suspicious places, is to be determined by the exercise of good judgment and discretion on the part of the captain of the precinct, as he is required to make the report; but such judgment and discretion are not a mere whim or caprice on his part, but must have for their foundation some evidence. *People v. Greene*, 87 N. Y. Supp. 172, 175, 92 App. Div. 243.

SUSTAINED BY SUFFICIENT EVIDENCE.

A case where the verdict is under the evidence, inadequate, is a case "not sustained by sufficient evidence," within Code, § 3755, authorizing the trial court to grant a new trial where the verdict is not sustained by sufficient evidence, etc. *Tathwell v. City of Cedar Rapids*, 97 N. W. 98, 122 Iowa, 50.

SWITCH.

See "Derail Switch."

SWORE.

The word "swore" does not technically and necessarily imply a judicial administration of an oath. Any utterance or an affirmation with an appeal to God is to swear an oath, no matter how or before whom the utterance is made. That is its common import. In law it has a more technical meaning, and implies that the swearing has been officially done, but not necessarily judicially done. It is not sufficient, in an indictment for subornation of perjury, to charge that defendant procured the witness falsely and upon oath to depose, etc., since such averment relates to the acts of defendant and not the witness; nor is the defect cured by further expressions which assume, without stating that the witness was sworn, such as that when he was so sworn, or when he swore, he did not believe the things which he testified to be true. *United States v. Howard* (U. S.) 132 Fed. 325, 338.

SWORN COMPLAINT.

It is sufficient compliance with the requirement of an act relating to the disposing of an intruder on Indian lands that a "sworn complaint" shall be filed, if the com-

plaint is verified by the authorized attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge. *Brought v. Cherokee Nation* (U. S.) 129 Fed. 192, 195, 63 C. C. A. 350.

SYRUP.

"Syrup" as defined by the United States Department of Agriculture, is the product obtained by purifying and evaporating the juice of a sugar-producing plant without removing any of the sugar. Syrup thus obtained from cane is cane syrup, syrup so obtained from sorghum is sorghum syrup, and syrup so obtained from corn is corn syrup. *People v. Harris* (Mich.) 97 N. W. 402, 403.

SYSTEM.

See "High Tension System."

TABLE.

See "Gaming Table."

TAIL.

See "Estate Tail."

TAKE.

Solicit distinguished, see "Solicit."

To "take," in the active sense, means to lay hold of, to seize with hands or otherwise. The word "take," as used in the statute providing that if any person take any woman unlawfully and against her will, to marry him or any other person, he shall be fined, means to obtain possession by force or artifice; to get the custody or control of; to reduce to one's power of will. Under the statute, such taking is an essential to constitute the crime. *State v. Hromadko*, 99 N. W. 560, 561, 123 Iowa, 665.

TAKE EFFECT.

A policy of life insurance and the application on which the same was issued provided that it should not "take effect or be in force" until delivered to the applicant in person during his lifetime and while in good health. The expression "take effect or be in force" merely intended to distinguish between policies which have not been delivered and those which have been delivered. *Austin v. Mutual Reserve Fund Life Ass'n* (U. S.) 132 Fed. 555, 559.

The phrase "to take effect from and after the death of the husband," in an antenuptial agreement providing for the annual payment of a certain sum to the wife in lieu of dower, the same to take effect from and after the death of the husband, does not de-

scribe the time of the payment, but the event which brings the annuity into existence—the time from which it begins to run. *Mower v. Sanford*, 57 Atl. 119, 120, 76 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1008.

TAKE ENTIRE CHARGE.

Where real estate agents agreed with the owner of premises to take entire charge of the premises for a specified time, the term "take entire charge" imports a promise to act as the owner's agent for such time in the care and management of the property. *Seymour v. Warren*, 71 N. E. 260, 261, 179 N. Y. L.

TAKING.

Proceedings by the United States to condemn land for a public building or other governmental purpose may be dismissed at any time before the actual acceptance of the property and payment therefor, until which time there is no taking of the property, and the United States is not subject to the payment of costs or damages to the landowners on such dismissal. *United States v. Dickson* (U. S.) 127 Fed. 774, 775; *Same v. English*, Id.; *Same v. Glenn*, Id.; *Same v. Koch*, Id.

Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a "taking," within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without just compensation. *Stockdale v. Rio Grande Western Ry. Co.* (Utah) 77 Pac. 849.

In Laws 1897, p. 887, c. 27, relative to an addition to a certain park, and providing that the provisions of law relating to the "taking of private property" for public streets and places shall be applicable so far as the same shall be necessary for the acquiring of the land, the terms "taking of private property" and "acquiring all land," require not only the vesting of title, but payment for the property. In re *City of New York*, 89 N. Y. Supp. 6, 8, 95 App. Div. 552.

TAKING ORDERS.

The phrase "taking orders," as used in Laws March 16, 1901 (6th Sess.) p. 155, § 8, declaring that the act shall not apply to runners traveling for wholesale houses and taking orders, does not contemplate that the runner shall have the goods with him at the time of the sale and deliver them, but in the common acceptation of the phrase the agent or runner sells the goods by sample, taking orders therefor, and thereafter delivers the goods. In re *Abel* (Idaho) 77 Pac. 621, 622.

TANK.

A tank of any kind, as defined by Webster is "an artificial receptacle for liquids; a large basin or cistern." As used in a statute imposing a tax on each oil depot in the state, wherein petroleum or other oils are stored in bulk or tank, the word "tank" is to be construed as referring to oils stored in large oil tanks holding hundreds or thousands of barrels of oil, which are in common use, and not to oils stored in barrels in warehouses or sheds. *Standard Oil Co. v. Commonwealth* (Ky.) 82 S. W. 1020, 1022.

TAX.

See "Transfer Tax."

Assess synonymous, see "Assess."

The crucial attributes of a tax are that it is a toll upon property without the consent of the owner, and the money secured is to be applied toward governmental expenses of the body politic for whose benefit the imposition is to be made. *Heerwagen v. Cross-town St. Ry. Co.*, 86 N. Y. Supp. 218, 225, 90 App. Div. 275.

Levies payable in labor on highways, though in the nature of a tax, are not understood as embraced in the term "tax"; and statutory provisions for assessment are not applicable to it unless made so by express terms. *State v. Ide*, 77 Pac. 961, 965, 85 Wash. 576.

TEACHER.

A statute punishing any guardian of any female under the age of 18 years, or any other person to whose care such female shall have been confided, who shall carnally know her, includes a school teacher, and the relation of teacher and pupil exists as well after the child reaches home as it does in the school room. It exists on Sunday as well as on a school day. *State v. Hesterly*, 81 S. W. 624, 627, 182 Mo. 16.

TELEGRAPH COMPANY.

As common carrier, see "Common Carrier."

TELEPHONE.

The word "telephone," as used in a municipal ordinance constituting a contract between the city and a telephone company, containing a provision for furnishing to the citizens telephone service at a specified rate for business places and dwellings per annum, is used as including all improvements, equipments, and appliances essential in the operation of a telephone to make it most effective in use. *Charles Simon's Sons Co.*

v. Maryland Telephone & Telegraph Co. (Md.) 57 Atl. 193, 197, 63 L. R. A. 727.

TELEPHONE COMPANY.

As quasi public corporation, see "Quasi Public Corporation."

TEMPORARY INSANITY.

Drunkenness is frequently characterized by law writers as temporary insanity. *Waldron v. Angleman* (N. J.) 58 Atl. 568, 569.

TEMPORARY RECEIVER.

The term "temporary receiver" perhaps might better be confined to the mere custodian receiver, who is often appointed, upon the filing of the bill, under the general equity power of the court, in order to preserve the assets from waste until the hearing can be had which will determine whether the corporation is to be disabled or not, and its assets vested in a receiver. *Gallagher v. Asphalt Co. of America* (N. J.) 58 Atl. 403, 408.

TEN DAYS.

See "Within Ten Days."

TENANCY.

See "Joint Tenancy"; "Landlord and Tenant."

TENANT AT WILL.

Where parties leased by parol from a brewer certain premises, they to remain as long as they wanted, and the rental to be determined by the number of barrels of beer purchased from the lessor, and to be payable just as the beer bill was payable they were tenants at will. *Lyons v. Philadelphia & R. R. Co.*, 58 Atl. 924, 209 Pa. 550.

TENANT IN COMMON.

Tenants in common are not privies. "They do not claim under each other. They may claim their several titles from entirely different sources. In this respect they differ from joint tenants and coparceners." As said in *Co. Litt.*, "Tenants in common are they which have lands or tenements in fee simple, fee tail, or for terms of life, etc., and they have such lands or tenements by several titles, and not by a joint title; and none of them know of this several, but they ought by law to occupy these lands or tenements in common." *Allred v. Smith*, 47 S. E. 597, 599, 135 N. C. 443, 65 L. R. A. 924.

TEND.

The use of the word "tend" does not contemplate conjecture. It contemplates

that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith. *Shaw v. New Year Gold Mines Co.* (Mont.) 77 Pac. 515, 516.

TENDERED.

See "Business Tendered."

TENEMENT.

Tenements and hereditaments include every species of realty, as well corporeal as incorporeal. In *re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

TENEMENT HOUSE.

Apartment or community house distinguished, see "Apartment House."

A restrictive covenant in a deed against tenement houses is not to be construed as relating to first-class apartment houses having all the conveniences and appliances of the best order of houses, and externally in their architecture of the character and appearance corresponding with first-class dwellings in the immediate neighborhood. *Kitching v. Brown*, 87 N. Y. Supp. 75, 77, 92 App. Div. 160.

TERM.

See "Adjourned Term."

TERM OF OFFICE.

See "Continuance in Office."

TERMS AND CONDITIONS, RIGHTS, AND PRIVILEGES.

Ordinarily, in the use of legal phraseology, the phrase "terms and conditions, rights and privileges," is not employed to convey power over or relating to the time or period through which the tenure dealt with by the acts is intended to run, but conveys power over or relates to the means, the methods, and the incidents connected with the exercise of such tenure. Such plainly was meant to be the signification of the phrase as used in the acts of 1859, 1861, and 1865, relating to the incorporation of the Chicago city railways, and granting rights thereto in the streets of the city, and providing that the railways shall be constructed, furnished, and operated in such manner and on such terms and conditions and on such rights and privileges as the common council by contract may prescribe. *Govin v. City of Chicago* (U. S.) 132 Fed. 848, 855.

TERRITORY.

See "Defined Territory."

TESTATOR.

The word "testator" applies to "testatrix," irrespective of the act concerning statutes, because "testatrix," as Webster defines it, means "a female testator." Walker v. Hyland (N. J.) 56 Atl. 268, 271.

THAT IS TO SAY.

The words "that is to say," as used in a will whereby the testator, after giving the real estate to his wife, devised to his daughter his personal property, and in fee simple all the real estate, "that is to say that if at the death of my wife my daughter, M., shall then be living the fee to said real estate shall vest in her," etc., clearly mean the same as if the testator had said "by this I mean that if," etc., or "provided if at the death of my wife," etc. Orr v. Yates, 70 N. E. 731, 209 Ill. 222.

THEIR.

The word "their," as used in Laws Ga. 1833, p. 264, relating to the charter of the Georgia Railroad Company, and providing that the stock of the company and its branches shall be exempt from taxation for a fixed period, and after that shall be subject to a tax not exceeding a specified per cent. per annum on the net proceeds of their investments, does not refer to the shareholders who should become interested in the enterprise, but refers to the corporation, and is used in the same sense as if the pronoun "its" had been used instead of "their." Georgia R. & Banking Co. v. Wright (U. S.) 132 Fed. 912, 914.

THEN.

The word "then," as used in a deed of trust stipulating that, in case of the absence from the county of the trustee, another person should become his successor, and in the absence of the trustee and his successor "then the then sheriff of said county, * * * who shall thereupon become their successor to the title * * * with all the powers, duties and obligations thereof," may sell, etc., plainly has reference to whomsoever is sheriff at the time of the default. McNutt v. Mutual Ben. Life Ins. Co., 79 S. W. 703, 704, 181 Mo. 94.

THEN AND THERE.

Where the day and date of the first fact alleged is given, and the others are stated as having "then and there" occurred, it is to be inferred that the facts alleged were coexistent—occurring at the same point of time. State v. Hand (N. J.) 58 Atl. 641.

THERE.

See "Then and There."

THEREAT.

The word "thereat," in Const. art. 11, § 8, declaring that a freeholder's charter should be submitted to the qualified electors of the city at a general or special election, and that, if a majority of the electors voting thereat shall ratify it, it shall be submitted to the Legislature, refers to the particular phrase "general or special election," and has exactly the same meaning as if the sentence had read, "if a majority of such qualified electors voting at such election shall ratify the same." City of Santa Rosa v. Bower, 75 Pac. 829, 830, 142 Cal. 299.

THING.

See "Incorporeal Thing."
Other thing, see "Other."

THING IN ACTION.

See "Chose in Action."

THINK.

See "As She Thinks Proper."

"The word 'think' has various meanings. Its meaning must be ascertained from the connection in which it is used in a sentence. Some of its meanings, according to Webster, are 'to form an opinion by reasoning; to judge; to conclude; to believe.'" An instruction that if the jury should find in favor of plaintiff they should assess her such damages as they think, under the evidence, would compensate her for the pain and suffering she has endured by reason of her injuries, and such further sum as they think would fairly compensate plaintiff for the injuries sustained, can be as well understood by the jury as if the word "believe" or "find" had been used instead of the word "think." Ilges v. St. Louis Transit Co., 77 S. W. 93, 95, 102 Mo. App. 529.

THIRD PARTY.

The former owner and grantee of a tract of land sold and conveyed for nonpayment of taxes thereon is a "third party," within the meaning of the proposition of law that the acts of an officer de facto will be sustained in any proceeding, collateral or direct, in the interest of third parties or the public. Old Dominion Bldg. & Loan Ass'n v. Sohn, 46 S. E. 222, 228, 54 W. Va. 101.

THREAT.

A "threat," within Gen. St. 1902, § 1296, subjecting to punishment any person who shall threaten or use any means to intimidate any person to compel him against his will to do or abstain from doing any act which such person has a legal right to do, is a

menace of such nature as to unsettle the mind of the person on whom it operated. *State v. Stockford*, 58 Atl. 769, 773, 77 Conn. 227.

THREE-CARD MONTE.

Three-card monte is said to be a sleight of hand game or trick played with three cards, one of which is usually a court card. The performer throws the cards face down upon a table in such a manner as to deceive the eye of the onlooker, who is induced to bet that he can pick out the court card. While the cards are manipulated by one person alone, who is commonly called the "dealer," the game is generally known and understood to be a confidence game, and is also declared by the statute to be a confidence game or swindle known as "three-card monte." *State v. Edgen*, 80 S. W. 942, 944, 181 Mo. 582 (citing *Standard Dict.* p. 1147).

TILLING.

See "Farming."

TIMBER.

Slabs are not included in the material designated as "lumber and timber" in the statute giving a lien on the lumber and timber for services in cutting logs. *Engl v. Hardell (Wis.)* 100 N. W. 1046, 1048.

TIME.

See "From Time to Time"; "Reasonable Time."

The words "time and place," in Gen. St. 1902, § 1130, requiring a description in the notice of the time and place of the occurrence of the injury, mean a statement of the day and hour when, and a description of the locality where, the person injured received the direct injury to his person or property from the defendant's negligent act, as nearly as these facts can be given. *Peck v. Fair Haven & W. R. Co.*, 58 Atl. 757, 758, 77 Conn. 161.

TIME OF RENDITION OF JUDGMENT.

The time of the rendition of the judgment, within Gen. St. 1902, §§ 790-793, designating the time of rendition of the judgment as the point of time from which the period limited for procuring an appeal is to be computed, is the time when the court gives its decision in the case, and not the time when the judgment file is made out and signed, which is a matter of subsequent clerical action. *Appeal of Bulkeley*, 57 Atl. 112, 113, 76 Conn. 454.

TINWARE.

See "Sale of Tinware."

TITLE.

See "Color of Title"; "Confer Title of Nobility"; "Marketable Title"; "Perfect Title."

Title is but the means whereby the owner of lands hath the just possession of his property. *Adams v. Hopkins*, 77 Pac. 712, 717, 144 Cal. 19.

The word "title," as used in a deed from a mortgagor to a mortgagee, stipulating that the mortgage was not to be considered as merged in the title, but was to be held as protection to title, meant the title as it existed at the time of the conveyance, and which was then the subject of consideration. The purpose of this provision in the deed was to protect the grantee against any liens or charges on the title which might have intervened intermediate the execution of the mortgage and the deed. *Coon v. Smith*, 88 N. Y. Supp. 261, 262, 43 Misc. Rep. 112.

Possession under a claim of ownership in itself constitutes title in a low degree. It is sufficient to give plaintiff standing to bring an action against those who have no title at all. *Waller v. Julius (Kan.)* 74 Pac. 157.

TO.

The word "to" means within, not up to. A street railroad company was required to run its cars to a certain village. It was not a compliance to construct its road up to the boundary line of the village. *Houghton County St. Ry. Co. v. Common Council of Village of Laurium (Mich.)* 98 N. W. 393, 395.

The word "to" means "into"; as, where a corporation was authorized to construct a road to the city of Hudson, the word "to" meant "into." *People v. Klammer (Mich.)* 100 N. W. 600, 601 (citing *Farmers' Turnpike Road v. Coventry*, 10 Johns. [N. Y.] 389).

The word "to," employed in an act fixing the boundaries of a right of way to Salt Lake City, is a word of exclusion, and excludes the terminus of the railroad, which was then located near the business portion and center of the city. *Moon v. Salt Lake County*, 76 Pac. 222, 224, 27 Utah, 435.

The word "to," as defined by Bouvier, is a term of exclusion, unless by necessary implication it is manifestly used in a different sense. Where plaintiff was allowed "to" the 15th of March to make and serve a case, the word "to" was a term of exclusion, and excluded the 15th day of March. *Maynes v. Gray (Kan.)* 76 Pac. 443.

The word "to" has no one specific meaning in a legal sense, though it is generally a word of exclusion. Its meaning is ascertained from the reason and sense in which it is used. Thus, if a boundary of land extends to a field, the field itself will not be included in the boundary. But generally, if the time named as limiting an extension is designated by a word which includes an extended and indefinite number of days, as to a certain term of court, then the word "to" would limit the time to the first day of such period. *Bloch Queensware Co. v. Smith*, 80 S. W. 592, 107 Mo. App. 13.

"To the October term," where the time to file a bill of exceptions is extended to that time, means to the first of the term—that is, up to and including the first day; and if it is not filed until the second day of that term it is too late. *Bloch Queensware Co. v. Smith*, 80 S. W. 592, 107 Mo. App. 13.

TO BE SHIPPED PROMPT.

See "Prompt."

TO EXCESS.

The expression "to excess," in reference to the use of intoxicating liquors, is equivalent to "excessively" or "intemperately." *Moore v. Prudential Ins. Co.*, 87 N. Y. Supp. 368, 92 App. Div. 135.

TONNAGE.

See "Registered Tonnage."

TOOL

A "tool" is a mechanical implement—any implement used by a craftsman or laborer at his work. Where a contract for the excavation and refilling of a sewer trench provided that plaintiff should furnish all "labor and tools," and excavate the trench to the depth required, and that defendants should furnish all "suitable and proper material," coal used to generate power in plaintiff's engine, used in the work of excavation, was within the term "labor and tools," rather than the term "materials." *Camardella v. Holmes*, 89 N. Y. Supp. 616, 617, 97 App. Div. 120.

TOOL OF TRADE.

See "Common Tool of Trade."

A watch and chain are not exempt as a timepiece constituting a part of the tools of trade of a barber, where among such tools there was also a clock. *In re Everleth* (U. S.) 129 Fed. 620.

TORT.

Pollock, in his treatise on Torts, defines a "tort" to be "an act or omission (not being

merely a breach of duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in the following ways: (1) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of; (2) it may be an act in itself contrary to law, or omission of specific legal duty which causes harm not intended by the person so acting or omitting; (3) it may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented; (4) it may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits to avoid or prevent. A special duty of this kind may be (1) absolute; (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk; in others, he warrants only that all has been done for safety that reasonable care can do." *Drum v. Miller*, 47 S. E. 421, 423, 135 N. C. 204, 65 L. R. A. 890.

TOTAL INCAPACITY.

Under a benefit certificate payable in case insured should become totally incapacitated to perform manual labor, "total incapacity" means inability to perform sustained manual labor, so as to enable one to earn or assist in earning a livelihood. *Grand Lodge Brotherhood of Locomotive Firemen v. Orrell*, 69 N. E. 68, 69, 206 Ill. 208.

TOTAL INSURANCE.

The words "total insurance," as used in a fire policy for \$4,500, which provided that it should be void if the insured should procure any other insurance on the same property, unless otherwise provided by agreement added to the policy, and which contained the clause: "\$3,500 total insurance permitted, concurrent herewith, on buildings," etc. "Other insurance permitted, concurrent herewith, on stock"—contemplate the entire insurance on the property, and limit the insurance, taking into account the amount written in the policy, and the policy did not authorize \$3,500 additional insurance, and it was forfeited by the insured taking a policy for additional insurance on the same property from another company. *Senor v. Western Millers' Mut. Fire Ins. Co.*, 79 S. W. 687, 689, 181 Mo. 104.

TOWN.

See "Organized Town."

The word "town" is often used as a generic term embracive of all such primary municipal corporations as incorporated cities

and villages; and it has become a well-settled rule of construction that the term "town," when used in the general statute, may be applied to or include cities, unless the contrary appears from the whole statute to have been the intention of the Legislature. *Tucker v. Board of Com'rs*, 97 N. W. 103, 104, 90 Minn. 408.

TOWNSHIP.

As district, see "District."

TOY.

Where there was evidence that a 22-caliber Stevens rifle was used for hunting and killing game, and was capable of killing a human being, it was not within Rev. St. 1898, § 49a, prohibiting the use or possession of "any toy pistol, toy revolver, or toy firearm." *Taylor v. Sell* (Wis.) 97 N. W. 498.

Ping pong balls of celluloid are "toys," within Tariff Act, July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]. *United States v. Strauss Bros. & Co.* (U. S.) 128 Fed. 473.

TRACT.

See "Roadbed and Tract."

TRADE.

See "Tool of Trade."

TRADITIONARY EVIDENCE.

The party offering in evidence reputation to prove ancient boundaries must confine his proof to the declarations of persons having competent knowledge of the matter in controversy, and who are since deceased. This species of evidence is very properly denominated "traditionary evidence." *Lay v. Neville*, 25 Cal. 545, 554 (citing 1 Greenl. Ev. §§ 130, 145, and notes; 1 Phil. Ev. [Cow. & H. & Edw. Notes] 218, and note 87).

TRAIN.

See "Mixed Train."

TRAIN DISPATCHER.

"The object of train dispatching is to place in the hands of conductors, who manage the trains of a railroad, proper and safe orders for their guidance. The source of such orders is the office of the train dispatcher from which they emanate, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transitu from the time it leaves the one until it

reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination." *Virginia & S. Ry. Co. v. Clowers' Adm'x*, 47 S. E. 1003, 1004, 102 Va. 867.

TRANSACTIONING BUSINESS.

See, also, "Carrying On Business"; "Doing Business."

By passively continuing to hold a previously existing and valid lien or title, a foreign corporation is not "transacting business" within the state, within the meaning of Rev. St. 1898, § 1770b, providing that no foreign corporation which has not complied with certain requirements shall transact business in the state. The mere commencement and prosecution of a suit by a foreign corporation to enforce a lien on lands in the state acquired by it through the execution, in the state of its domicile, of bonds and trust deeds, prior to the enactment of Rev. St. 1898, § 1770b, providing that no foreign corporation which has not complied with certain requirements shall transact business in the state, is not a "transaction of business" forbidden by the statute. *Chicago Title & Trust Co. v. Bashford* (Wis.) 97 N. W. 940, 941.

TRANSACTION.

"Transaction," in Code Civ. Proc. § 484, relating to the uniting of actions on claims arising out of transactions connected with the same subject of action, means the doing or performance of any business; the management of any affair; the act of transacting or conducting any business; negotiation; management; a proceeding. *Rogers v. Wheeler*, 85 N. Y. Supp. 981, 985, 89 App. Div. 435 (citing Bouv. Law Dict.; Pom. Code Rem. § 473).

"Transactions and communications," within Code Civ. Proc. § 829, prohibiting evidence of personal transactions and communications between interested persons and a decedent, embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. *Holland v. Holland*, 90 N. Y. Supp. 208, 211 (citing *Holcomb v. Holcomb*, 95 N. Y. 316).

The word "transaction," as used in Rev. Code 1899, § 5274, relating to counterclaims, and authorizing the setting up as a counterclaim of a claim arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, is broader in meaning than the word "contract," and includes torts. One slander cannot be set up as a

counterclaim against another slander, although both are uttered at the same time and place and in the same conversation. *Wrege v. Jones* (N. D.) 100 N. W. 705, 706.

The term "transaction," as used in the statute relating to counterclaims, and providing that a counterclaim must arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, is obviously broader than the term "contract," and authorizes matters to be set up as counterclaim which could not be pleaded as arising on the contract relied on by plaintiff. The cause of action arises from the transaction set forth in the complaint when the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect, result in plaintiff's right of action, and, when viewed in another aspect, result favorably to defendant. The transaction is not necessarily confined by the facts stated in the complaint, but the defendant may set up new facts and show the entire transaction, and counterclaim on that state of facts as the transaction on which plaintiff's claim is founded. In an action to recover damages for the alleged fraudulent acts of defendant, a corporation engaged in the business of buying, selling, and dealing in grain, provisions, etc., for future delivery, defendant may set up as a counterclaim a claim based on the fact that it made investments for plaintiff in the purchase of grain for future delivery as outlined in the complaint, and by reason of fluctuation in the market it was necessary, from time to time, to advance money on such purchases to protect the same, and that defendant made a series of such advances, for which judgment was asked. *King v. Coe Commission Co.* (Minn.) 100 N. W. 667, 668.

TRANSFER.

By section 1 of the bankruptcy act of July 1, 1898, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], the word "transfer" is defined to include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. "The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, * * * and by which the result forbidden by the statute may be accomplished; 'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" The giving of a chattel mortgage is a "transfer" of property, as defined by the bankruptcy act, it being a settled law of the state of New York that a chattel mortgage is a sale of the thing mortgaged, and operates as a transfer of the

whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. In *re Riggs Restaurant Co.* (U. S.) 130 Fed. 691, 693 (quoting *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171).

A transfer is defined in the bankruptcy act of 1898 to include the sale and every other and different method of disposing of or parting with property, or the possession of property absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. Insolvents, by depositing money in a bank on an open account, subject to check, do not thereby make a "transfer of property," within the meaning of the act. *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 201, 192 U. S. 138, 48 L. Ed. 880.

The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], though the bank may be at the time a creditor, and under section 68a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], the bank has the right to set off so much of its claims as equals the balance in such account. In *re George M. Hill Co.* (U. S.) 130 Fed. 815, 318, 66 L. R. A. 68 (citing *New York County Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 880).

"It has frequently been held that the word 'transfer,' as used in the national bankruptcy act, includes the payment of money." *Dickenson v. Stults*, 48 S. E. 173, 174, 120 Ga. 632 (citing *Coll. Bankr.* [3d Ed.] 421).

TRANSFER TAX.

A transfer tax must be regarded as a tax, not upon the money which is the subject of the legacy, but upon the passing of that money under the will, in possession or enjoyment. In *re Wolfe's Estate*, 85 N. Y. Supp. 949, 950, 89 App. Div. 349.

TRANSIENT.

The word "transient" is a relative term, which, in the absence of any inflexible statutory or legislative definition, may be the source of much vexation and uncertainty. The abuse sought to be avoided by Code, § 700, giving cities power to define by ordinance who shall be considered transient merchants, to regulate, license, and tax itinerant doctors, etc., is the practice of that class of dealers who, with large or small stocks of goods, establish themselves for a few days, weeks, or months in a place, and then move on into other fields, staying nowhere long enough to have acquired a per-

manent residence, and, while claiming the benefit and protection of the laws of the state, contribute nothing to the local or general public revenue. The provision does not in express terms or by necessary implication give cities the power to exact a license from opticians who fit and adjust spectacles. *City of Waukon v. Fisk* (Iowa) 100 N. W. 475, 477.

TRANSITORY ACTION.

Local action distinguished, see "Local Action."

TRAVEL.

"To travel is to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance." *Hendry v. Town of North Hampton*, 58 Atl. 922, 924, 72 N. H. 351, 64 L. R. A. 70.

TRAVELER.

"A traveler is one who travels in any way." A person riding on a bicycle is a "traveler," within Laws 1893, p. 47, c. 59, § 1, making towns liable for damages to any person traveling on a highway, because of dangerous embankments and defective railings which render it unsuitable for travel. *Hendry v. Town of North Hampton*, 58 Atl. 922, 924, 72 N. H. 351, 64 L. R. A. 70.

The word "travelers," as used in a city ordinance providing that no person shall construct an area into the street in front of any building extending more than five feet, or not provided with a sufficient railing to protect travelers from falling therein, means people who are lawfully using the highway. *Devine v. National Wall Paper Co.*, 88 N. Y. Supp. 704, 707, 95 App. Div. 194.

TRAVELING.

Traveling is "the act of making a journey; change of place; passage." *Hendry v. Town of North Hampton*, 58 Atl. 922, 924, 72 N. H. 351, 64 L. R. A. 70.

TRAVELING PHYSICIAN.

A physician maintaining four offices in different towns, and keeping an assistant at each place, and treating patients at the places at stated intervals, but having his headquarters at one of the places, where he lives with his family and receives his mail, is not a "traveling physician," within the meaning of a statute imposing an occupation tax on physicians, surgeons, etc., traveling from place to place in practicing their profession. *Adams v. State* (Tex.) 78 S. W. 935.

TRAVELING SALESMAN.

The words "traveling salesmen," as used in Rev. St. Mo. 1899, §§ 1024-1026, requiring foreign corporations for pecuniary profit, doing business in the state, to file articles of incorporation and be subject to local visitation, and the payment of taxes on its business, and expressly excepting from the operation of the statute "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident," mean employees of such corporations employed to go into other states and communities to drum up and solicit business for the houses they represent. *Strain v. Chicago Portrait Co.* (U. S.) 126 Fed. 831, 835.

TREASURE TROVE.

Lost property distinguished, see "Lost Property."

Treasure trove, and its legal status, according to Blackstone, is where any money or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king. But if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. *Ferguson v. Ray*, 77 Pac. 600, 601, 44 Or. 557.

TREATMENT.

See "Cruel and Inhuman Treatment."

TREES.

See "Line Trees."

TRESPASS.

Conversion distinguished, see "Conversion."

The word "trespass" frequently—even generally—conveys the idea of force; but it also includes in its largest sense any transgression or offense against the law of nature, of society, or of the county in which we live, whether it relates to a man's person or property. A libel is a trespass. *Cox v. Strickland*, 47 S. E. 912, 913, 120 Ga. 104.

Trespass is an offense against the possession, and an action therefor can be maintained by one not holding the fee. *Roper Lumber Co. v. Elizabeth City Lumber Co.*, 47 S. E. 757, 759, 135 N. C. 742.

Trespass is an action sounding in damages, and the compensation for damage recoverable therein is, as the words imply, to be measured by the plaintiff's damage or loss, arising from the defendant's trespass

or wrongful act set out in the plaintiff's declaration. This is true alike of all forms of the action of trespass, from assault to the latest development of the action of trespass on the case. *Trustees of Dartmouth College v. International Paper Co.* (U. S.) 132 Fed. 92, 93.

TRESPASSER.

See "Willful Trespasser."

A judge who renders an order for commitment and issues a warrant of commitment on it is not necessarily a trespasser. He is such only when he has assumed a jurisdiction which did not belong to him, and so the whole proceeding is *coram non judice*. *McVeigh v. Ripley*, 58 Atl. 701, 703, 77 Conn. 136.

A person on a railroad track a distance from a path used by the public with the acquiescence of the company, and who was not going toward the opening in the railroad fence where the path entered the right of way, is a trespasser. *Le Duc v. New York Cent. & H. R. R. Co.*, 87 N. Y. Supp. 364, 367, 92 App. Div. 107.

TRIAL

See "Speedy Trial."

Any trial, see "Any."

Where a witness in proceedings before a referee dies, and before the evidence is finally submitted the referee also dies, on a subsequent hearing before another referee such testimony is not inadmissible on the ground that the former hearing was not a "trial," within Code Civ. Proc. § 830, allowing evidence of a deceased witness taken at a former trial to be interposed, where the parties against whom the testimony was offered had the opportunity to cross-examine such witness. *Taft v. Little*, 70 N. E. 211, 212, 178 N. Y. 127.

TRIAL BY JURY.

"Trial by jury," in the primary and usual sense of the term at the common law and in the American Constitution, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict, but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if in his opinion it is against the law or the evidence. *Archer v. Board of Levee Inspectors* (U. S.) 128 Fed. 125, 128 (citing *Cap-*

ital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 585, 48 L. Ed. 873).

The right of trial by jury secured by Const., Bill of Rights, § 7, providing that the right of trial by jury shall be secured to all and remain inviolate, includes the elements of a trial by jury as they were known to and understood by the framers of the Constitution and the people who adopted it. The system of trial by jury in criminal cases, which existed in the state for several years prior to the adoption of the Constitution, gave the state, as well as the defendant on trial for crime, a right to have the place of trial changed when necessary to secure a fair and impartial trial, and the Constitution secured the right thus known and understood. Hence Rev. Codes 1899, § 8122, providing for a change of venue on the application of the state's attorney, when a fair and impartial trial of a criminal case cannot be had in the original county, does not violate the constitutional provision. *Barry v. Truax* (N. D.) 99 N. W. 769, 771, 65 L. R. A. 762.

A jury trial is a public proceeding, as well in respect to the production of proof as to the instruction of the jury by the judge. The parties have a right to be heard in respect to everything transacted, and to bring in review all the proceedings at the trial. *Buffalo Structural Steel Co. v. Dickinson*, 90 N. Y. Supp. 268, 270.

TRIBUTARY.

Where one has appropriated water from a river, a tributary thereof, the waters of which he is entitled to prevent another from diverting, need not be a running natural surface stream which empties into the river. *Ogilvy Irrigating & Land Co. v. Insinger* (Colo.) 75 Pac. 598.

TROVER.

The gist of an action of trover is the conversion by defendant of goods to which the plaintiff has the right of possession. *Trustees of Dartmouth College v. International Paper Co.* (U. S.) 132 Fed. 92, 95.

TRUNK RAILWAY.

An electric railroad company authorized to perform the duties of a carrier of freight and passengers between two cities in different states and all intermediate points is a "trunk railway," within a constitutional provision declaring that no city shall grant any franchise to street railways, etc., except to the highest and best bidder therefor, but that the provision shall not apply to a trunk railway. *Diebold v. Kentucky Traction Co.* (Ky.) 77 S. W. 674, 678, 63 L. R. A. 637.

TRUST.

The combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, is a "trust," within the meaning of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], which declares illegal every combination in the form of a trust or otherwise in restraint of interstate or foreign commerce. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 452, 193 U. S. 197, 48 L. Ed. 679.

The term "trust" includes any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized. It was first used in a narrower sense, we believe, of an organization formed by a combination of several corporations under one direction, by the device of a transfer by the stockholders in each corporation of a majority of the stock to a central committee, who issued to the stockholders in return certificates showing, in effect, that, though they had parted with their stock, they were still entitled to share in the profits; the purpose being to control competition in production and transportation, and thus the price to the consumer. *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 75 Pac. 89, 95, 29 Mont. 428.

TRUST.

See "Active Trust"; "Constructive Trust"; "Deed of Trust"; "In Trust"; "Voluntary Trust."
See, also, "Constructive Trust."

A gift to a charitable corporation for its corporate purposes is not a trust in the eyes of the law. *Smith v. Havens Relief Fund Soc.*, 90 N. Y. Supp. 168, 178, 44 Misc. Rep. 594.

TRUST EX MALEFICIO.

A trust *ex maleficio* arises on account of the fraud or misconduct of the trustee in taking title, or by virtue of some illegal act upon his part. *Rogers v. Richards*, 74 Pac. 255, 256, 67 Kan. 708.

TRUSTEE.

See "Involuntary Trustee"; "Substituted Trustee."

Directors of a bank are, in a certain sense, undoubtedly to be considered trustees, but only in that sense in which an agent or bailee intrusted with the care and management of property is considered a

trustee. A director more nearly resembles a managing partner. *Stone v. Rottman*, 83 S. W. 76, 82, 183 Mo. 552.

TRUSTEE OF EXPRESS TRUST.

One who, in concert with other persons, obtained franchises for the construction of street railways in a city, and, before incorporating, tore up certain existing railways, and contracted, on behalf of himself and those associated with him, to sell certain of the material so torn up, is a "trustee of an express trust," within the meaning of a statute authorizing such a trustee to sue in his own name. *Nelson v. Hirsch & Sons' Iron & Rail Co.*, 77 S. W. 590, 594, 102 Mo. App. 498.

A factor is not a "trustee of an express trust," in the strict sense of the term, but he is a "trustee," under Rev. St. 1898, § 2607, defining a trustee of an express trust to include a person with whom or in whose name a contract is made for the benefit of another. *Beardsley v. Schmidt (Wis.)* 98 N. W. 235, 237.

TYPEWRITING.

The word "typewriting" is defined as the process of printing letter by letter by the use of a typewriter. *State ex rel. Coleman v. City of Oakland (Kan.)* 77 Pac. 694, 696.

TYPEWRITTEN.

As printed, see "Printed."

UNAPPROPRIATED.

The terms "unoccupied" and "unappropriated" refer to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law. *Conn v. Oberto (Colo.)* 76 Pac. 369, 370.

UNAVOIDABLE ACCIDENT.

The writ in an action begun within the period of limitations was issued April 16th, and the next day plaintiff's attorney in another county sent the writ by mail to the clerk of the county court, with a letter requesting him to approve the bail bond, and forward the writ to plaintiff's local attorney by United States mail. The clerk complied with the request, and on April 18th forwarded the letter to the latter attorney, who was then away from home, but returned in about a week, when a period of some 12 days still remained for service. He did not find the writ, and knew nothing about it until the following August, when it was discovered in a pigeonhole with mail relating to an official position held by the attorney, which had come in envelopes of

the same sort. The attorney had assumed that his associates in the other county would attend to the service of the writ, and he acted in good faith. The writ failed in service by "unavoidable accident," within the meaning of V. S. 1214, providing that if, in an action commenced within the time limited by statute, the writ fails of sufficient service by unavoidable accident, the plaintiff may have a year from the determination of the original suit to commence a new action. *Tracy v. Grand Trunk Ry. Co. (Vt.)* 57 Atl. 104, 107.

UNAVOIDABLE HINDRANCE.

Where a vessel commenced discharging cargo in Rio de Janeiro on the day that the revolution began there in 1893, in which the insurgents captured government warships in the harbor, and there was thereafter more or less firing between such ships and forts and batteries on shore, and such a condition of affairs was produced by the hostilities as to render it practically impossible to receive the cargo with the dispatch contemplated by the charter, either because of the intrinsic danger incident to unloading or the inability to procure the necessary men to do the work, such condition constituted an unavoidable hindrance, and, to the extent that it prevented compliance with the contract, excused performance, and relieved the charterers from liability under the provision requiring them to pay demurrage for detention by the default of themselves or their agent. *Burrill v. Crossman (U. S.)* 130 Fed. 765, 765.

UNCONDITIONAL CONTRACT IN WRITING.

An order for money drawn by a municipal corporation upon its treasurer, payable upon demand and without condition, is in effect a promissory note, and is an "unconditional contract in writing," within the meaning of a statute providing that, whenever defendant in justice court on an unconditional contract in writing makes defense, he shall make such defense at the first term. *Morgan v. City of Cohutta*, 47 S. E. 971, 972, 120 Ga. 423.

UNCONDITIONAL OWNERSHIP.

See "Sole and Unconditional Ownership."

UNCONTROLLED.

See "Momentarily Uncontrolled."

UNDER THE CONSTITUTION OR LAWS.

Arising under the Constitution or laws, see "Arise—Arising."

UNDERTAKING.

See "Original Undertaking."

UNDUE INFLUENCE.

The word "undue," as used in connection with "undue influence" as affecting the validity of a will, is not used in the sense lexicographers give to it as one of the popular meanings, disproportionate, inordinate, unworthy, as in the phrases "undue excitement," "undue partiality," "undue attachment," or the like; but as a legal phrase it is used in a stricter sense, as denoting something wrong according to the standard morals which the law enforces in the relations of men, and therefore something legally wrong, something violative of a legal duty; in a word, something illegal. *Caughey v. Bridenbaugh*, 57 Atl. 821, 823, 208 Pa. 414.

"It is a rule governing in ascertaining whether undue influence was exerted over the mind of a testator that the influence was such that it induced the testator to act contrary to his own wishes, and to make a different will from what he would have made if he had been left free to exercise his own wishes and desires according to his own judgment and discretion. No matter how great the fraud may have been, nor how vigorous and active the influence produced upon and exercised over the testator, they would not avail to set aside the will unless they were sufficient to overcome the volition and desire of the testator. Not every influence brought to bear upon the mind of the testator by a beneficiary will be classed as undue influence. Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation are permissible, and cannot be held to be undue influence unless they subverted and overthrew the will of the testator, and caused him to do a thing that he did not desire to do. No more could a will made from mere persuasion, entreaty, or argument, which has been weighed and considered by the testator, and his own mind made up and voluntarily formed, be classed as undue influence, than could the arguments of counsel to a court, which are weighed and considered in arriving at a just conclusion as to the law of the case, be designated 'undue influence.'" *Wetz v. Schneider (Tex.)* 78 S. W. 394, 396.

On an issue as to undue influence in the making of a will, the court said that the rule as to undue influence was well settled in the state, and was very aptly stated in *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077, as follows: "In this state the rule is established that such influence must be such as amounts to overpersuasion, coercion, or force, destroying the free agency and will power of testator. It must not be merely the influence of affection or attachment, nor the desire of gratifying the wishes of one beloved and

trusted by the testator." *Hughes v. Rader* (Mo.) 82 S. W. 32, 53.

Undue influence which will invalidate a gift must be something which destroys the free agency of the donor, and substitutes therefor the will of another. What constitutes such undue influence cannot be precisely defined, and each case must be determined upon the consideration of its special facts. The means employed and extent of the influence are immaterial if their effect be to destroy the free agency of the donor. The ultimate facts of undue influence may, and in many cases can only, be established by circumstantial evidence. *Prescott v. Johnson*, 97 N. W. 891, 892, 91 Minn. 273.

UNEQUIVOCAL EVIDENCE.

The expression "unequivocal evidence" in the syllabus and opinion in *Re McCoy's Will*, 89 N. W. 665, 64 Neb. 150, was the equivalent of "evidence of an unequivocal act or conduct." A simple preponderance of the evidence is all that is required to maintain an issue of fact in a civil action. *Davidson's Estate v. Davidson* (Neb.) 97 N. W. 797.

UNFAIR.

The word "unfair" in a publication may sometimes mean dishonest, and when, by a colloquium or innuendo, shown to have this meaning, might give rise to a cause of action; but it does not necessarily involve so serious a charge. It may convey the idea of discrimination. It may mean that one is prejudiced or partial. It may mean illiberal, hard, ungenerous, or exacting. A publication stating the facts and reasons why defendants placed plaintiffs on an unfair list, taken as a whole, casts no imputation upon plaintiffs' character as individuals or upon their solvency or standing as merchants, and is not libelous. *Watters v. Retail Clerks' Union* No. 479, 47 S. E. 911, 912, 120 Ga. 424.

UNFAIR COMPETITION.

Unfair competition in trade is not confined to the imitation of a trade-mark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a trade-name, a label, a wrapper, a package, or almost any other imitation by a business rival of some distinguishing ear-mark of an established business, which the court can see is calculated to mislead the public, and lead purchasers into the belief that they are buying the goods of the first manufacturer. The first question is whether there is an imitation in fact, and this must be determined by inspection of the rival symbols or devices. It is not to be expected, of course, that there will ever be an exact copy. The imitator will always seek to introduce enough difference to justify a claim

that there has been no imitation, while incorporating enough similarities to carry the general effect of the original design to the mind of the unwary purchaser. *Cornelius v. Ferguson* (S. D.) 97 N. W. 388, 390.

UNFAVORABLE.

See "Very Unfavorable."

UNFORTUNATE.

The word "unfortunate," as used in a devise of a fund in a will to be used in organizing and maintaining a home for bettering the condition and comforting the unfortunate widows and orphans of a certain city, is used in the sense of poor or indigent, and a devise for the indigent widows and orphans of a city is good, and not void on the theory that the class named is too indefinite. *Gidley v. Loverberg* (Tex.) 79 S. W. 831, 835.

UNGROUND.

See "Ginger Root, Unground."

UNIFORM.

See "Equal and Uniform."

UNITED STATES.

See "Current Money of the United States."

UNIVERSAL MALICE.

By "universal malice" we do not mean a malicious purpose to take the life of all persons, but it is that depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim. *Mitchell v. State*, 60 Ala. 26, 30.

UNLAWFUL DETAINER.

A tenant does not become primarily an unlawful detainer upon breach of the covenant in the lease to pay rent, but rather upon failure to pay after demand by a legal notice in the statutory time. This constitutes him an unlawful detainer of the premises. *Hunter v. Porter* (Idaho) 77 Pac. 434, 438.

UNLAWFULLY CARRYING A PISTOL.

To constitute the offense of unlawfully carrying a pistol the pistol must be carried on or about defendant's person. *Davis v. State* (Tex.) 82 S. W. 512.

UNNECESSARY DANGER.

See "Exposure to Unnecessary Danger."

UNOCCUPIED.

The terms "unoccupied" and "unappropriated" refer to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law. *Conn v. Oberto* (Colo.) 76 Pac. 369, 370.

UNPROFESSIONAL CONDUCT.

An attorney was declared to be guilty of unprofessional conduct who represented to an ignorant man, who had employed him to obtain for him a divorce, that he filed a bill and obtained a decree of divorce, and misled and deceived him by delivering to him a copy of the fictitious decree, and represented to the mother of the woman whom he was about to make his second wife that her prospective son-in-law was divorced, when he had not filed a bill nor taken any steps toward obtaining for his client a divorce, and when he had not been divorced. *People v. Belinski*, 69 N. E. 5, 6, 205 Ill. 564.

UNREASONABLY RESISTED.

Where, in an action against executors on a note indorsed by testator, the only question litigated was whether testator had waived protest, and such fact was established by a son of testator, who was also the father of the executor and brother of the executrix, whose testimony was not disputed, and whose whereabouts were at all times known to defendants, a finding that payment was "unreasonably resisted," within Code Civ. Proc. § 1836, allowing plaintiff costs where his claim has been unreasonably resisted, was warranted. *Pauley v. Millsbaugh*, 88 N. Y. Supp. 565, 567, 95 App. Div. 208.

UNSOUND MIND.

The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances, a legislative construction being given thereto in harmony with the broad views of courts that they include every phase of unsound mind rendering one incapable of caring for himself or his property. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903.

UNTIL.

The word "until," in New York City Charter, § 1401 (Laws 1901, p. 599, c. 466), providing that judges of the Court of Special Sessions shall hold office until December 31st in the years mentioned, was inclusive. *People v. Fitzgerald*, 89 N. Y. Supp. 268, 96 App. Div. 242.

UPPER STORIES.

In a statute providing that owners of buildings more than two stories high shall

provide convenient exits from the different upper stories, the term "upper stories" means all stories above the ground floor. *Rose v. King*, 49 Ohio St. 213, 221, 30 N. E. 267, 15 L. R. A. 160.

URBAN HOMESTEAD.

In order to constitute land an "urban homestead," it is not necessary that it should have been originally surveyed or platted by the city. It is sufficient that the land is recognized as a part of the plat or plan. It is unimportant that the lots of which it is composed do not conform to the dimensions or shape of lots generally in the platted parts of the city, where its use, controlled by the city and surroundings, impress the property with the character of an urban homestead. A contention, in a suit by the owner to enjoin the sale of such property on execution, that such lot constituted a part of a rural homestead, is untenable. *Harris v. Matthews* (Tex.) 81 S. W. 1198, 1204.

USABLE VALUE.

"Usable value" means the value of the use of the premises to the occupant, as distinct from the rental of the premises in a lease by the owner to a tenant. *Bates v. Holbrook*, 85 N. Y. Supp. 673, 677, 89 App. Div. 548.

USE.

See "Public Use"; "Religious Use."

USE AND OCCUPATION.

See "Action for Use and Occupation."

USED.

The word "used," in a question in an application for life insurance, "Have you ever used spirits, wine, or malt liquors to excess?" does not imply an occasional indulgence in strong drink; it means to be accustomed; to make a practice of. It is a word which is synonymous with custom or habit or habitual indulgence. A negative answer to the question does not constitute a misrepresentation or false statement which will avoid the policy issued thereon merely because it is shown that the insured had sometimes, but not habitually, drank to excess. *Provident Sav. Life Assur. Soc. v. Exchange Bank of Macon* (U. S.) 126 Fed. 360, 361, 61 C. C. A. 310.

USING FOR HIRE.

As used in an ordinance providing for the payment of a license by owners of vehicles used or let for hire, the term "using for hire" was intended to apply to cases where

persons, the hirers, did not take temporary possession, but where the owners handled the wagon and team for pay. *Swetman v. City of Covington (Ky.)* 82 S. W. 386.

USUAL RESIDENCE.

"Usual residence" means customary; common." *State v. Snyder*, 82 S. W. 12, 27, 182 Mo. 462 (quoting *State v. Washburn*, 48 Mo. 240).

USUALLY RESIDENT WITHIN.

Inhabitant of, synonymous, see "Inhabitant of."

USUFRUCT.

The term "usufruct" signifies the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. *Schwartz v. Gerhardt*, 75 Pac. 698, 699, 44 Or. 425 (citing *Bouv. Law Dict.*).

UTILITY.

See "Public Utility."

UTMOST CARE AND SKILL.

The words "utmost care and skill" do not mean the utmost care and diligence which men are capable of exercising, but mean the utmost care consistent with the carrier's undertaking, and with due regard for all the other matters which should be considered in conducting the business. *Ilges v. St. Louis Transit Co.*, 77 S. W. 93, 94, 102 Mo. App. 529 (citing *Dodge v. Boston & B. S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541).

In an action against a street railroad company for personal injuries, the court instructed that the defendant was bound to exercise toward plaintiff "the utmost care, skill, and vigilance" to carry her safely, and also, on her arrival at destination, to stop the car at the usual stopping place, or some other place where it was suitable for plaintiff to alight; and if defendant's servants in charge of the car failed to exercise the utmost care, skill, and vigilance, and by reason thereof did not stop at the usual place, but beyond it at a place unsafe and unsuitable for alighting, and plaintiff was consequently injured while alighting, and while she herself was exercising ordinary care, defendant was liable. Defendant insisted that the phrase, "utmost care, skill, and vigilance," overstated the care defendant was bound to observe, and called for the highest conceivable care, and that the court

should have defined the expression "utmost care and skill" as the care and skill which very cautious men exhibit in similar circumstances. The appellate court, in passing on defendant's objections, said that that objection had often been raised to instructing juries by the words used in the present case, and that it was not the best or most approved form of charge, and that it was well to advise the jury that the law means by "utmost care and skill" the degree of those qualities used by very cautious men in the same vocation. *Fillingham v. St. Louis Transit Co.*, 77 S. W. 314, 317, 102 Mo. App. 573.

VACANCY.

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein. *State v. Acton (Mont.)* 77 Pac. 299, 300.

The term "vacancy," as used in a constitutional provision that the filling of all vacancies not otherwise directed or provided by the Constitution shall be made in such manner as the Legislature shall direct, cannot be made to cover the case of an office of which there is an incumbent in possession, and in the discharge of his duties, merely by the device of extending his term. *State v. Trewhitt (Tenn.)* 82 S. W. 480, 482.

Laws 1903, c. 363, redistricted Maury county, and extinguished a number of civil districts by merging them with other original districts, reducing the number from 25 to 9. The justices of the peace for four districts were left unaffected. The places of the justices for the other five districts could be filled by an election held after 10 days' notice given by the proper authorities; for, notwithstanding these five are new districts, yet the places to be filled in them are "vacancies," within the statute. *State v. Akin (Tenn.)* 79 S. W. 805, 806 (citing *Condon v. Maloney*, 108 Tenn. 82, 65 S. W. 871).

VALUABLE CONSIDERATION.

See "Purchaser for a Valuable Consideration."

VALUE.

See "Assessed Value"; "Cash Value"; "Usable Value"; "Market Value."

The word "value," as used in the Code of 1873, as amended by Laws 1899, c. 104,

providing that if any person by false pretense shall obtain from another person any money, goods, etc., with intent to cheat, and if the value of the property or promissory note or written instrument or security fraudulently obtained shall be \$30 or upwards, such person so offending shall be imprisoned in the penitentiary, etc., means the amount of the liability expressed, assumed, or incurred by means of the written instrument to which the signature was fraudulently obtained. *Moline v. State* (Neb.) 100 N. W. 810, 812.

VEIN.

See "Known Vein."

"Vein of coal," "coal bed," and "coal seam" are used as equivalent terms. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193.

VENDOR'S LIEN.

A vendor's lien "is simply the vendor's right to enforce his claim for the purchase money against or out of the vendor's equitable estate," not his legal estate, for he has none. *Flanagan Estate v. Great Cent. Land Co.* (Or.) 77 Pac. 485, 487 (citing *Security Savings & Trust Co. v. Mackenzie*, 33 Or. 209, 52 Pac. 1046).

"It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation to each other of vendor and vendee. It arises out of and is incident to the purchase, and is founded upon an implied trust between the vendor and purchaser, and the law does not authorize the vendee to transfer this lien with the note taken for the purchase money, even though he expressly proposes to do so." A loan of money to pay the purchase price of land does not create a vendor's lien in the lender. *Hardin v. Hooks* (Ark.) 81 S. W. 386, 387 (quoting *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784).

VENUE.

See "Change of Venue."

VERDICT.

See "Motion for Verdict."

An inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county, and their certificate that said person therein named is insane and a proper subject for treatment in the hospital for the insane, is not a judgment of a court or equivalent thereto, nor is such finding and certificate equivalent to a verdict of a jury or a finding of a court that such person is of unsound mind

and incapable of managing his own estate; its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment. *Leinas v. Weiss* (Ind.) 71 N. E. 254, 255, 256.

VERY UNFAVORABLE.

To say that the general character of a person for truth and veracity is "very unfavorable" is in common parlance but another mode of saying that it is bad in that regard. *Martin's Ex'r v. Martin*, 25 Ala. 201, 211.

VESTED ESTATE.

A future estate is vested when there is a person in being who would have an immediate right to the possession of the property or the determination of all intermediate or preceding estates. In re *Ryder*, 89 N. Y. Supp. 460, 462, 43 Misc. Rep. 476 (citing *Laws 1896*, p. 564, c. 547, § 80).

The rule for determining whether an estate bestowed by a will is vested or contingent is that, where the time of division or payment is of the substance of the gift, the legacy is contingent; when time is mentioned only as a qualifying clause of the payment or division, then the legacy is vested; or, in other words, legacies payable after the death of the testator are either vested or contingent, and, when the testator annexes time to the payment only, the legacy will be vested, but, if of the gift itself, it will be contingent. *Johnson v. Terry*, 36 South. 775, 776, 139 Ala. 614.

VESTED REMAINDER.

See, also, "Contingent Remainder."

"A vested remainder is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who is in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency." A testator devised real estate to his daughter for life, remainder to her children, if any surviving her, otherwise to testator's brothers and sisters, and, in case any one or more or all of them should be dead at the time of his death, the share of such deceased brother or sister should go to and be equally divided among his or her children, share and share alike. At the time of the suit for the partition, testator's daughter, though married, was 50 years of age, and had never had any children. It was held that the remainder to testator's brothers and sisters was not a

vested remainder, but a contingent one, and hence no partition could be had during the daughter's life. *Ruddell v. Wren*, 70 N. E. 751, 753, 208 Ill. 508.

"A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. * * * It is a rule of law that an estate shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come in esse, subject to open and let in others as they are born afterwards." Where a testator who died in March, 1902, by his will bequeathed his residuary estate in trust, the income to be paid to his wife for life, and after her death to be divided between his children then living, the children of any deceased child to take in place of their parent, all children and the heirs of any deceased took a vested interest on the testator's death, which became subject to the legacy tax imposed by section 29 of the war revenue act of 1898, Act June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]. *Land Title & Trust Co. v. McCoach* (U. S.) 127 Fed. 381, 385 (quoting *Doe v. Considine*, 73 U. S. [6 Wall.] 458, 474, 18 L. Ed. 869).

"The true criterion of a vested remainder is the existence in an ascertained person of a present, fixed right of future enjoyment of the estate, limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate." 24 Am. & Eng. Enc. of Law (2d Ed.) 389. Mr. Washburn, in his work on Real Property, says: "The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect." A vested remainder is one "when there is an immediate right of present enjoyment, or a fixed right of future enjoyment." 4 Kent, Comm. 194. "That a remainder cannot be vested unless there be some certain person or persons in being in whom it can be regarded as vested is a proposition as to which, upon principle, it would seem that there could be little doubt, and that such is

the law is recognized by the most authoritative writers and by numerous decisions." 1 *Tiffany's Modern Law of Real Prop.* 120." Testator devised real estate to his wife for life with remainder to J., adding that, on the latter dying before distribution of the property, his issue, if he left any, otherwise his heirs, should receive his share. Held, that J. took a vested remainder, so that he and the life tenant could give a perfect title. *Callison v. Morris*, 98 N. W. 780, 781, 123 Iowa, 297.

The distinction between vested and contingent remainders is clearly stated in the case of *Faber v. Police*, 10 S. C. (10 Rich.) 376, as follows: "According to the elementary writers, a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend on the happening of any future event, but whose enjoyment and possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a person not in being or not ascertained, or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period, but is dependent upon the happening of some future contingency. As it has been well expressed, 'It is not the uncertainty of the estate in the future, but the uncertainty of the right to such enjoyment, which marks the difference between a contingent and a vested remainder.'" A trust deed granted a fee to the trustee for the benefit of the grantor for life, and provided that after her death the trustee should convey the property to certain named children and grandchildren, or, if any of them died before conveyance, leaving children, such children should take the share of their parents. The parties named took a vested, and not a contingent, remainder. *Woodley v. Calhoun*, 48 S. E. 272, 273, 69 S. C. 285.

A testator who died in March, 1901, by his will bequeathed his residuary estate in trust, the income to be paid to his wife during her life, with remainder to his children living at the time of her death, and the lawful issue of any deceased child or children; such issue taking the share only their parent would have taken if living. Held, that the remainder so created was not vested, not being limited to "persons in esse and ascertained," but was contingent, being limited to persons who could not be ascertained until the death of the wife, and that such bequests were not subject to the legacy tax imposed by section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]; the wife being still living at the time of the taking effect of the amend-

ment of June 27, 1902, c. 1160, § 8, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282], exempting from the tax "any contingent beneficial interest not absolutely vested in possession or enjoyment" prior to July 1, 1902. *Land Title & Trust Co. v. McCoach* (U. S.) 129 Fed. 901 (reversing [U. S.] 127 Fed. 381).

VESTED RIGHT.

When the phrase "a vested right" or "a vested interest" is used in other relations, it may with reasonable precision be held to mean some right or interest in property that has become fixed or established, and is no longer open to doubt or controversy. *Graham v. Great Falls Water Power & Town-Site Co.* (Mont.) 76 Pac. 808, 810 (citing *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900).

VICE PRINCIPAL

A vice principal is the representative of the master, for whose acts and negligence the master is responsible. *Southern Ry. Co. v. Cheaves* (Miss.) 36 South. 691, 697.

"Vice principal" is defined as one who performs personal duties of the master, which cannot be delegated, such as the duty to provide reasonably safe machinery and appliances and a reasonably safe place in which to work, to provide for inspection and repair of premises and appliances, and to inform immature, ignorant, or unskilled servants of the dangers of the situation. *Baler v. Selke*, 71 N. E. 1074, 1076, 211 Ill. 512 (citing *Mobile & O. Ry. Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590).

A superintendent or foreman is not necessarily a vice principal simply because he occupies that position. Title or rank has not of itself any special significance in this connection. When engaged with the other servants in the common employment of the master, the superintendent or foreman is a fellow servant, and for his personal negligence the master is not responsible; but when clothed with special authority in respect to the management and conduct of the master's business, a general supervision of it, the control and direction of the other servants under his charge, authority to direct them in the performance of their duties, he is, in respect to those absolute duties the master owes such other servant, a vice principal. He stands in the place of the master in the performance of those duties, whether in reference to the selection of safe instrumentalities, a safe place to work, or in giving proper warning of dangers and risks not known to the servant, or which he could not by the exercise of reasonable prudence discover; and his failure and neglect to perform such absolute duties render the master liable. *Dixon v. Union Ironworks*, 97 N. W. 375, 377, 90 Minn. 492.

If an employé has no authority from the master, then in the very nature of things he cannot be a vice principal. If he has authority, whether express or implied, his vice principalship depends upon whether the scope of such authority includes attention to or performance of any of the nondelegable duties of the master, and, if so, then whether the alleged negligent act is referable to any of those duties. *Beresford v. American Coal Co. (Iowa)* 98 N. W. 902, 904.

VICINAGE.

See "Jury of the Vicinage."

VICINITY.

Under a contract releasing a railroad from all liability for loss by fire of any property "situated or hereafter placed in the vicinity of such track, whether such loss result from negligence or other cause," it was error to submit to the jury the question whether the property destroyed by the fire, which started at a point about 40 feet from the track, and consumed lumber situated some 400 feet from that point and near the tracks, the ground being littered with shavings, which it was the duty, under the contract, of the property owner to clear away, was situated in the vicinity of the tracks, but the court should have so declared as a matter of law. *Mann v. Pere Marquette R. Co. (Mich.)* 97 N. W. 721, 724.

VICINITY CONTRACT.

By the terms of a contract plaintiff was appointed by defendant an agent for the sale of machinery at De Pere, such agent to have the privilege of making sales in the vicinity of De Pere. On the back of the printed form of contract was the following indorsement: "The design of a vicinity contract is to pay an agent the stipulated commission on whatever machinery he may sell under the provisions of the contract, not in the territory of another agent who had the exclusive right to sell in a defined territory." The agent's territory is not a "defined territory," within the meaning of the indorsement on the contract. The business of these agents is not to sit still at some place and sell machinery to those who come to the agent and want to buy it, but to canvass or work their territory; and these vicinity contracts are made rather than those of a definite territory on purpose to meet cases of this kind, where a locality may be more closely connected in a business way with any one village than one near by, and to avoid conflict between different agents from broader territory. *McGeehan v. Gaar, Scott & Co. (Wis.)* 100 N. W. 1072, 1074.

VIOLATION.

See "Action for the Violation of a Law."

VISITATION.

By "visitation" of a corporation is meant the act of examining into its affairs. The purpose of visitation is to supervise, direct, and control the management of the corporation. An application by a bona fide stockholder of a national bank to examine its books, accounts, and loans, etc., in order to determine the value of his stock, is not a "visitation" of the corporation, within Rev. St. U. S. § 241 [U. S. Comp. St. 1901, p. 3517], providing that no national banking association shall be subject to any visitorial powers. *Harkness v. Guthrie*, 75 Pac. 624, 625, 27 Utah, 248.

VIVA VOCE.

The term "viva voce," when applied to elections, is used in opposition or contradistinction to the ballot, and simply means that the voter shall declare himself by voice, instead of by ballot. In *re Brearton*, 89 N. Y. Supp. 893, 899, 44 Misc. Rep. 247.

VOID.

Null synonymous, see "Null."

"Strictly speaking, 'void' means without legal efficacy; ineffectual to bind parties, or to convey or support a right." A contract which is illegal as contrary to public policy is absolutely void, and may be attacked by any one, and in any proceeding in which it is sought to found rights thereon. A sale by a telephone company of its property and franchises is contrary to public policy and void, in the absence of legislative authority. *Cumberland Telephone & Telegraph Co. v. City of Evansville* (U. S.) 127 Fed. 187, 197.

The word "void," as used in Rev. St. U. S. § 3739 [U. S. Comp. St. 1901, p. 2508], declaring that all contracts or agreements made in violation of the section shall be void (the section providing that no member of Congress shall directly or indirectly make, hold, or enjoy any contract entered into in behalf of the United States), is obviously used in the sense of null or of no effect from the beginning, and not admitting of ratification. It is not intended to say that contracts or agreements made in violation of the statute shall by only voidable, or that they shall be only capable of being avoided, at the election of some officer of the government. This statute applies to a contract made between the United States and one who was not at the time a member of Congress, and who became such while the contract was still executory in whole or in part, and in such a case, on his becoming a member, the contract was dissolved, and his obligation to further perform it and his right to enjoy further benefit from it were terminated by

operation of law. *United States v. Dietrich* (U. S.) 126 Fed. 671, 674.

A void contract is in fact no contract, since an instrument of that nature does not alter the relations previously existing between the contracting parties, nor will it serve as the foundation of any right. *Allen v. City of Davenport* (U. S.) 132 Fed. 209, 216.

VOID JUDGMENT.

A void judgment is, "in legal effect, no judgment. By it no rights divest; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. The acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of his authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity, for, if it be null, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of validity." A default judgment against an infant who has been personally served is voidable only. *Cook v. Edson Keith & Co.* (Ind. T.) 82 S. W. 918, 919 (quoting *Freem. Judgm.*).

VOLUNTARY EXPOSURE.

Steeplechase riding is a "voluntary exposure to unnecessary danger," within an insurance policy providing that it shall not cover injuries caused by voluntary exposure to unnecessary danger. *Smith v. Aetna Life Ins. Co.*, 69 N. E. 1059, 185 Mass. 74, 64 L. R. A. 117.

VOLUNTARY PAYMENT.

"A mere protest accompanying a payment does not change its character. It remains, nevertheless, a voluntary payment, and concludes the parties." *Gerry v. Siebrecht*, 88 N. Y. Supp. 1034, 1036 (citing *Flower v. Lance*, 59 N. Y. 603).

VOLUNTARY TRUST.

A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another. The trustee stands upon the same footing as a confidential agent or adviser, and, in cases of minor children, much like a guardian. The confidence reposed is the essence of the relation, and the trust is always for the benefit of some third party or

parties, or for some particular object. In *re* Reith's Estate, 77 Pac. 942, 943, 144 Cal. 314.

VOUCHER.

A "voucher," in *Sess. Laws* 1899, pp. 405, 406, directing that the sheriff shall at the end of each quarter file with the commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred, is a written acquittance or receipt showing the payment of the debt. *Mombert v. Bannock County* (Idaho) 75 Pac. 239, 241.

VULGAR.

A remark to a married woman, "Look me in the eye. Are you satisfied with the man you married?" will not sustain a conviction for using obscene and vulgar language in the presence of a female, where there is nothing in the evidence to indicate that the remark was intended to convey an obscene and vulgar meaning. *Roberts v. State*, 47 S. E. 511, 512, 120 Ga. 177.

WAGE-EARNER.

See "Independent Contractor."

WAGER.

A wager is "a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event." "A wager is an agreement between parties differing as to an uncertain fact or forecast of a future event." In an action to recover money from defendants, obtained from the plaintiff by means of inducing him to believe that a foot race was "fixed," so that one party was sure to win, and persuading the plaintiff to participate to the extent of betting the money of one side to the simulated race as if it were his own, on the assurance that he should receive 20 per cent. of the sum won, he being ignorant at the time that the money all belonged to the parties on both sides of the pretended wager, held that, although he was in delicto, by consenting to act in such deceitful attitude, he was not in pari delicto with the conspirators, and is therefore entitled to recover back the sum of \$5,000 which the conspirators persuaded him to intrust to the possession of one of them as a stakeholder, not to be bet on the race, but to be used to make a showing by the stakeholder in the event of a count of the stake money being called for by one of the feigned bettors. *Wright v. Stewart* (U. S.) 130 Fed. 905, 920 (quoting *Black, Law Dict.*; *Bish. Cont.* par. 530).

Where money is deposited with stock-brokers as a margin, with the understanding that there is to be no actual delivery of stock, though in case of a purchase there could be delivery if desired, and that the

contract was to be adjusted by the payment of the difference between the price named therein and the market price at the time of settlement, the contract is a wager. *Wheeler v. Metropolitan Stock Exchange*, 56 Atl. 754, 72 N. H. 315.

The essence of a wager is that each party stands to win or lose on the result, and that the gains depend on the event. *Thompson v. Williamson* (N. J.) 53 Atl. 602, 604.

WAGES.

See "Laborer for Wages."

Earnings synonymous, see "Earnings."

Salary synonymous, see "Salary."

The compensation received by a man who owned a team, wagons, and a plow, with which he worked by the day for different employers, as he could obtain work, earning usually from \$9 to \$15 per week, and working alone when he could not find work for his team, must fall within the meaning of either "wages," or "hire," as used in *Bankr. Act* July 1, 1898, c. 541, § 1, cl. 27, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], defining a wage earner to be one who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year. In *re Yoder* (U. S.) 127 Fed. 894, 895.

WAGON.

The word "wagon" is synonymous with the word "carriage," and may be used to designate any wheeled vehicle intended to be drawn by horses. *Luce v. Hassam* (Vt.) 58 Atl. 725, 726.

The words "wagon" and "cart" are generic terms, and mean almost any vehicle, whether used for the transportation of persons or property. *Luce v. Hassam* (Vt.) 58 Atl. 725, 726.

WAIVE.

To "waive" means in law to relinquish intentionally a known right, or intentionally to do an act inconsistent with claiming it. *Chamberlain v. City of Saginaw* (Mich.) 97 N. W. 156, 157.

WAIVER.

See "Implied Waiver."

A waiver is a voluntary relinquishment of the right that one party has in his relations to another. *Astrich v. German-American Ins. Co.* (U. S.) 131 Fed. 13, 20.

"Waiver involves an intentional relinquishment of a known right." *Griffith v. Newell*, 48 S. E. 259, 260, 69 S. C. 300 (citing *Carolina Grocery Co. v. Moore*, 63 S. C. 184, 188, 41 S. E. 88).

"Waiver" has generally been defined by the courts as the voluntary relinquishment of

a known right. Without the existence of a right, there can be no abandonment, for there would be nothing to abandon. Statements of local agents of a fire insurance company that one of them was authorized to adjust a loss, and the action of this agent in making out proofs of loss, and professing to adjust the claim, were not a waiver by the company of a provision of the policy that action thereon must be commenced within one year after loss. *Barry & Finan Lumber Co. v. Citizens' Ins. Co.* (Mich.) 98 N. W. 761, 762 (citing *Ostrander, Ins.* § 57).

"Waiver is the intentional relinquishment of a known right." Where, in an action against a nonresident in a state court, its attorney was directed to appear solely for the purpose of removing the cause to the federal court, and on the last day for filing an answer for the cause the attorney filed a petition for removal and removal bond, and applied to the judge for an order of removal, and when, over objection, the court postponed a hearing of the application for removal to the following week, the attorney, believing it necessary to sustain his right to remove, and for that purpose only, orally asked for and obtained an extension of time to plead, such application for time should be construed as an application for an extension of time to appear for the purpose of pleading to the jurisdiction, or otherwise, and did not constitute an appearance sufficient to confer jurisdiction, for there was no relinquishment of the intention to deny the right of the state court to proceed in the cause. *Waters v. Central Trust Co. of New York* (U. S.) 126 Fed. 469, 472, 62 C. C. A. 45 (citing *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240).

WALL

As building, see "Building."

WANT.

A statement by a surety to the holder of a note, "I want it settled," comes far short of being a notice or request to forthwith proceed and collect the note, and may be said to be simply the expression of a wish or desire which every honest man would entertain with reference to a pecuniary obligation resting on him. *Bowling v. Chambers* (Colo.) 77 Pac. 16, 19.

WANTON INJURY.

"Mere proof of an injury caused by breach of duty to exercise ordinary care is not sufficient to establish a cause of action for a wanton injury, and a person cannot be permitted, in an action charging the latter, to recover for the former, if seasonable objections are made." *Turtenwald v. Wiscon-*

sin Lakes Ice & Cartage Co., 98 N. W. 948, 949, 121 Wis. 65 (citing *Wilson v. Chippewa Valley Electric R. Co.* [Wis.] 98 N. W. 536, 66 L. R. A. 912).

WANTON NEGLIGENCE.

Wanton and reckless negligence on the part of a servant of a railroad company in dealing with a trespasser on its train "includes something more than ordinary inadvertence. In its essence it is like a willful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences." Plaintiff, a boy of from eight to nine years of age, who lived near a railroad and was familiar with trains, was injured in jumping off a slowly moving freight car on which he was stealing a ride. The immediate cause of his jumping was an order of the brakeman to get off "or I'll break your neck." There was no such apparent probability of the injury caused as to indicate in the language of the brakeman wanton and reckless negligence. *Bjornquist v. Boston & A. R. Co.*, 70 N. E. 53, 55, 185 Mass. 130.

WANTONLY.

Recklessly synonymous, see "Recklessly."

By the expression "wantonly," as used in an indictment for slander by imputing to a woman a want of chastity, is meant that the words charged to have been uttered by defendant must have been uttered regardless of the consequences, in a reckless manner, or under such circumstances as evinced a mischievous intent and without excuse. *Rainwater v. State* (Tex.) 81 S. W. 38, 39.

WAREHOUSE.

A warehouse "is a house in which wares or goods are kept; a storehouse." *Adams County v. Kansas City & O. Ry. Co.* (Neb.) 99 N. W. 245, 247 (quoting *Cent. Dict.*).

WARPING.

Warping is not a part of the process of weaving. It must precede that of weaving, and its object is to prepare the threads and yarns for the weaving process. *Hoeninghaus v. United States* (U. S.) 131 Fed. 570, 571.

WARRANT.

See "Convey and Warrant."

"Warrants" and "orders" for payment of money are synonymous. A warrant is

an order for the payment of money. *State v. Woods*, 36 South. 626, 627, 112 La. 617.

The word "warranted," as used in Code, art. 81, § 146 (Acts 1808, p. 819, c. 275), obliging a person loaning money on a mortgage on property in the state to make affidavit that he has not required, and will not require, the mortgagor to pay the taxes on the interest warranted to be paid in advance, etc., was intended to mean "covenanted," and the section, as amended by Acts 1902, p. 33, c. 26, uses the word "covenanted." The section does not apply to a mortgage to secure the purchase money of the mortgaged article, interest not being covenanted for, or, so far as appears, secretly or indirectly provided for. *Salabes v. J. Castelberg & Sons* (Md.) 57 Atl. 20, 22, 64 L. R. A. 800.

WARRANT OF ATTACHMENT.

"A warrant of attachment is *meeme* process, and is nothing more than a provisional remedy. It is ancillary to the relief sought in the principal action, and is intended to preserve the property or its proceeds if it has been sold as perishable in the hands of the sheriff or in the custody of the law to abide the event of the suit." *Virginia-Carolina Chemical Co. v. Sloan* (N. C.) 48 S. E. 577.

WARRANTY.

See "Affirmative Warranty"; "Express Warranty"; "Promissory Warranty."

"Warranties in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done or not done after the policy takes effect." *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.* (W. Va.) 46 S. E. 1021.

A warranty in insurance is "a stipulation or agreement on the part of the insured party, in the nature of a condition." A stipulation in a fire policy that the insurance company should not be liable for loss caused, directly or indirectly, by order of any civil authority, is not a "warranty," within Civ. Code Cal. §§ 2607, 2608, providing that a statement in a policy of a matter relating to the thing insured or to the risk as a fact, and a statement which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty; the statute not creating any new definition of warranty in insurance. *Conner v. Manchester Assur. Co.* (U. S.) 130 Fed. 743, 744 (quoting *Bouv. Law Dict.*).

WASTE.

"Waste" may be defined as the "doing of those acts which cause lasting damage to

the freehold or inheritance, or the neglect or omission to do those acts which are required to prevent lasting damage to the freehold or inheritance. The term is not an arbitrary one, to be applied inflexibly, without regard to the quality of the estate, or the relation to it of the person charged to have committed the wrong, but the question as to whether it has been committed in a given case is to be determined in view of the particular facts and circumstances appearing in that case." A mortgagor removed from the mortgaged premises, giving notice of such fact to the mortgagee, and he took possession and rented the premises. At that time the buildings, fences, etc., were out of repair, and while the mortgagee was in possession he made no repairs, but on an accounting between the parties it did not appear that the premises had been in any way permanently injured owing to failure to make repairs. Since the mortgagor was credited on the accounting with any sum that might have been spent for repairs, she was not damaged, and a finding that the mortgagee had not been guilty of permissive waste was correct. *Chapman v. Cooney*, 57 Atl. 928, 929, 25 R. L. 657.

WATER.

See "Appropriation of Water"; "Inland Waters"; "Percolating Water"; "Public Water."

WATER COURSE.

The elements of a water course are definite banks, and with an obvious bed or channel showing the presence of running water at times, anyway. *Erwin v. Erie R. Co.*, 90 N. Y. Supp. 315, 317.

"A stream does not cease to be a water course, and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *Harrington v. Demaris* (Or.) 77 Pac. 603, 606 (citing *Gould, Waters* [3d Ed.] § 264).

WATERPROOF CLOTH.

Woolen or worsted fabrics known as "cravenette cloths," which have been subjected to a process to render them nonabsorbent, are dutiable under Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, par. 369 (26 Stat. 593), as "waterproof cloth." *Brown & Eadie v. United States* (U. S.) 126 Fed. 446.

WATERS OF THE STATE.

In Pen. Code, § 636, providing that every person who shall set any net for catching fish in waters of the state shall be guilty of a misdemeanor, the words "waters of the state" refer to the waters coming within the

regulating power of the state concerning the fish therein. *People v. Miles*, 77 Pac. 666, 669, 143 Cal. 636.

WATERS OF THE UNITED STATES.

See "Navigable Water of the United States."

WATERWORKS COMPANY.

As quasal corporation, see "Quasal Corporation."

WAY.

See "Private Way"; "Public Way."
Private road distinguished, see "Private Road."

The character of a "way," whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who may have occasion to exercise the right is very small. *Railroad Commission of Texas v. St. Louis Southwestern Ry. Co. of Texas (Tex.)* 80 S. W. 102, 104 (citing *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659).

WAYLEAVE.

In 12 Ency. of Laws of England, 575, it is said: "The term 'wayleave' means a right of way. * * * In considering the extent to which a wayleave may be used, the very object of the grant or reservation to which it is ancillary must be borne in mind, and this may involve a user of a different kind from that which was actually in contemplation at the time of the grant or reservation." *Jones & Co. v. Venable (Ga.)* 47 S. E. 549, 551.

WEAPON.

See "Deadly Weapon."

WEARING APPAREL.

Neither a watch and chain, nor a sword and belt, constituting a part of Masonic regalia, are exempt to a bankrupt as "wearing apparel," under the Vermont statute. In *re Everleth (U. S.)* 129 Fed. 620.

Lace neckwear is included in "wearing apparel made wholly or in part of lace," as that phrase is used in paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 80 Stat. 181 [U. S. Comp. St. 1901, p. 1662]. *Goldenberg Bros. & Co. v. United States (U. S.)* 130 Fed. 108, 109.

WEED.

"The word 'weed' has a common, everyday meaning to the mind of every man. It

may also have a technical meaning to the botanist or the chemist. It is a nuisance to the farmer, the gardener, or the owner of a well-kept lawn, notwithstanding that some weeds may contain valuable medicinal properties, which, when extracted, may be of benefit and profit to mankind. But it is a fact of common information, of which courts may properly take judicial notice, that a high, rank growth of weeds in a populous community has a strong tendency to produce sickness and to impair the health of the inhabitants, and so may be a nuisance in such locality, notwithstanding they may be comparatively innocuous in the country, when far away from human habitation." A city ordinance made it a misdemeanor for any owner, lessee, etc., of any part of any lot to allow or maintain on any such lot any growth of weeds to a height of over one foot, and defined the word "weeds," as therein used, to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits. Held, that a conviction for the violation of such ordinance was proper under evidence tending to prove that, at the time the city gave defendant notice to cut down the weeds on his lot, there were weeds on the lot from four to five feet high, about one-third of which were sunflowers, the notice to cut down the weeds having been given in July. *City of St. Louis v. Galt*, 77 S. W. 876, 877, 179 Mo. 8, 63 L. R. A. 778.

WEEK.

See "Successive Weeks."

WELL FOUNDED.

In discussing the contention that the trial court erred in charging that a reasonable doubt must be "well founded" it is said: "The expression is certainly a loose one, and not to be commended. The term 'well founded' has a double significance. It may mean founded on good reasons, or it may be defined as not baseless or having no support. In the latter sense the instruction is not erroneous, for it is well settled that a doubt, to be reasonable, must have some basis either in the evidence, or from a lack of evidence on some material proposition. In other words, it is not a barely possible one, nor one sought after, not a capricious nor an imaginary one, nor one based upon a surmise or groundless conjecture. In other words, it must be a rational or substantial one, having some basis in reason, although it need not be such a one as the jurors may be able to give a reason for." *State v. Mahoney*, 97 N. W. 1089, 1091, 122 Iowa, 168.

WEST HALF.

See "Half."

WESTERLY.

The word "westerly," as used in an order of the county court incorporating a village, which describes the commons as "on the west side of said limits one quarter of a mile in a westerly direction," should be construed to mean due west, rendering the description definite and certain. *State ex rel. Chandler v. Huff*, 79 S. W. 1010, 1012, 105 Mo. App. 354.

WHARFAGE.

Wharfage is the use of a wharf furnished in the ordinary course of navigation. *The James T. Furber* (U. S.) 129 Fed. 808, 810.

WHEN SO MADE.

The words "when so made," in Gen. St. 1897, c. 95, § 590, and Gen. St. 1897, § 4843, providing that the case, when so made, shall be settled, certified, and signed by the judge, evidently include all the preliminary steps to the presentation of the case to the judge for settlement. *Butler v. Scott* (Kan.) 75 Pac. 496, 497.

WHENEVER.

"Whenever" is an adverb of time. It is not the equivalent of 'in any case.' Its meaning, and the only meaning given to it by lexicographers, is 'at whatever time.'" As used in a constitutional provision that, whenever the requisite majority of the judges of the Supreme Court of Appeals sitting are unable to agree upon a decision, the case shall be reheard by a full bench, it does not mean in any case in which the requisite majority of the judges sitting, etc., but means at whatever time it may happen that the requisite majority of the judges sitting, etc., the case shall be reheard. *Funkhouser v. Spahr*, 46 S. E. 378, 379, 102 Va. 308.

WHERE.

The word "where," as used in the statute providing that notice of the time and place of taking depositions shall be served on the adverse party or his attorney, where such party or his attorney resides in the state, is synonymous with "if," and assumes the condition of one or the other—either adverse party or litigant—residing in the state. *Swink v. Anthony* (Mo.) 81 S. W. 915, 916.

WHEREUPON.

The word "whereupon," as used in a municipal charter directing that, on ordinances being passed over his veto, the mayor shall cause them to be published, whereupon they shall be of force as law, means "after

which," and the meaning of the provision is that after the commands of the law as thus given have been obeyed, and not before, the ordinances shall be of the force of law. *Mayor & Board of Trustees of Town of New Iberia v. Moss Hotel Co.*, 36 South. 552, 553, 112 La. 525.

WHILE.

In *Batts' Ann. St.* art. 4560ea, protecting persons, while engaged in the work of operating cars, against the negligence of any servant or employé of the company, the word "while" places a time limit on the protection, and means "during the time such employé may be engaged in the work of operating the locomotive." *Gulf, C. & S. F. Ry. Co. v. Howard* (Tex.) 80 S. W. 229, 230.

WILL.

See "Found with the Will"; "Good Will." Desire equivalent, see "Desire."

WILLFUL—WILLFULLY.

The term "willful," when applied to the intent with which an act is done, implies a purpose or willingness to do the act. *State v. McGahey*, 97 N. W. 835, 837, 12 N. D. 535.

The word "willful," as used in Rev. St. U. S. § 5341 [U. S. Comp. St. 1901, p. 3628], defining "manslaughter" as the unlawful and willful killing of another without malice, means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty; and, while the act must be done with evil design and knowingly, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another, would be a killing done willfully. *Roberts v. United States* (U. S.) 126 Fed. 897, 902, 61 C. O. A. 427.

The word "willful," used "in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately; indicating a purpose to do it without authority; careless whether he has the right or not; in violation of law; and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *State v. Morgan* (N. C.) 48 S. E. 670, 671 (quoting *State v. Whitener*, 93 N. C. 590).

That the term "willfully," when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act referred to. It does not require any intent to violate law or injure another.

Klenk v. Oregon Short Line R. Co., 76 Pac. 214, 215, 27 Utah, 428.

The word "willfully," in Pen. Code, § 639, subjecting to punishment any person who willfully or maliciously displaces, injures, or destroys any water main, means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness. *McMorris v. Howell*, 85 N. Y. Supp. 1018, 1021, 89 App. Div. 272 (citing *Wass v. Stevens*, 128 N. Y. 123, 28 N. E. 21).

WILLFUL AND MALICIOUS INJURY.

The phrase "willful and malicious injuries to the person or property of another," as used in Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as are judgments in actions for fraud or for willful and malicious injuries to the person or property of another, includes a judgment for damages for criminal conversation, and hence such a judgment is not discharged by a discharge in bankruptcy. *Tinker v. Colwell*, 24 Sup. Ct. 505, 506, 193 U. S. 473, 48 L. Ed. 754.

WILLFUL DEFAULT.

The words "willful default" imply more than negligence or carelessness. The word "willful" means intentional, while the word "default" means transgression. Where a testator exempted his trustee from liability for losses occurring without his own willful default, it was evidently his intention to relieve the trustee from everything but his individual intentional transgression. In *re Mallon's Estate*, 89 N. Y. Supp. 554, 43 Misc. Rep. 569.

WILLFUL DESERTION.

Willful desertion is a breach of matrimonial duty, and is composed, first, of a breaking off of matrimonial cohabitation; and, second, an intent in the mind to desert. Both facts must be shown. Mere cessation of cohabitation is not enough. *Tillis v. Tillis* (W. Va.) 46 S. E. 926.

WILLFUL TRESPASSER.

One who takes the ore of another from his land without right either recklessly or with the actual intent so to do is a "willful trespasser"; but one who takes such ore without right, but inadvertently and unintentionally, or in the honest belief that he is exercising his own right, is not a "willful

trespasser." *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (U. S.) 129 Fed. 668, 679.

WINE.

A Japanese alcoholic beverage made from rice by processes similar to those in making beer, which resembles still wine in its percentage of alcohol, which in quality is only remotely similar to wine, is not sufficiently similar to warrant its classification as such, under Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]. *Nishimiya v. United States* (U. S.) 131 Fed. 650.

WINNER.

All those who have won more than they have lost during one sitting by playing at cards are "winners," within the meaning of *Hurd's Rev. St. 1901*, c. 38, § 132, which provides that any person who shall at any time or sitting by playing at cards lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit. *Zellers v. White*, 70 N. E. 669, 672, 208 Ill. 518, 100 Am. St. Rep. 243.

WIRES.

The word "wires," in Laws 1890, c. 566, p. 1148, § 65, providing that the occupant of any premises within 100 feet of the wires of any electric light corporation may require it to supply him with electric light, was intended to designate the wire through which was distributed the electricity with which the houses were to be lighted. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

WISH.

"Undoubtedly the word 'wish' may be equivalent to will or request or direct, if the context justifies that meaning." A testator left his property to his wife and daughter, the will reciting that his mother was living, and dependent upon her children, and therefore requested his wife to pay her such sums as might be requisite for her comfort. The will then added, "and it is my wish and expectation that when my wife, J., shall make her will, disposing of the property left her by me, that she will generously remember the children of my deceased brother, W., and such others as she may choose." The will did not create a trust in favor of the children of the deceased brother. *Russell v. United States Trust Co.* (U. S.) 127 Fed. 445, 447 (citing *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737).

WITH THE WILL.

See "Found with the Will."

WITHIN THE CITY LIMITS.

Where a street railroad company agreed to issue transfer tickets within the city limits, "within the city limits" was interpreted as not to apply only to limits as then fixed, as it must have had in contemplation that the city in the future might exercise the right to annexing territory and thereby extend its limits. *Indiana R. Co. v. Hoffman*, 69 N. E. 399, 401, 161 Ind. 593.

WITHIN THE STATE.

See "Property not within the State."

WITHIN TEN DAYS.

Notice was posted in a custom house that it would be closed June 17th—a holiday observed by local custom, but not established by law. Certain importers, having notice of the closing of the custom house on that day, which was the tenth day after the liquidation of their entry, filed a protest on the day following. Held, that the protest was filed in accordance with the requirements of section 2931, Rev. St., providing that protests shall be made "within ten days after the ascertainment and liquidation of the duties." *Frost & Adams v. Saltonstall* (U. S.) 129 Fed. 481.

WITHIN THREE DAYS.

See "Day."

WITHOUT HER CONSENT.

"Against her will" synonymous, see "Against Her Will."

WITHOUT ISSUE.

See "Die Without Issue."

WITHOUT NOTICE.

Bona fide purchaser without notice, see "Bona Fide Purchaser."

WITHOUT PREJUDICE.

See "Dismissal Without Prejudice."

The phrase, "without prejudice to interested parties," as used in an order consolidating with involuntary proceedings in bankruptcy the proceedings on a voluntary petition subsequently filed, cannot be construed

to mean that a third person who took goods from the possession of the bankrupt on a writ of replevin from a state court, after the petition in involuntary bankruptcy had been filed and a receiver appointed therein, shall be permitted to retain possession of the merchandise taken under the replevin suit. If any signification be attached to the phraseology of the order it must be that the words quoted were inserted for the protection of the petitioning creditor's rights which might otherwise be defeated, and not for the benefit of the adverse claimant. In *re Briskman* (U. S.) 132 Fed. 201, 203.

WITNESS.

Any other witness, see "Any Other."

WOOD.

See "Logs of Wood."

WORK.

See "Public Work"; "Street Work."

The word "work," as used in a city charter, providing that all work exceeding in cost a specified sum shall be let to the lowest reasonable and responsible bidder, includes structures such as buildings and bridges. *Chippewa Bridge Co. v. City of Durand* (Wis.) 99 N. W. 603, 606.

"Work," as used in *Batts' Ann. St.* art. 4560e, protecting all persons while engaged in the work of operating cars against the negligence of any servant or employé of the company, is synonymous with "at," and in its connection means the doing of those things which constitute operating the locomotives, etc., and the person so engaged is protected against the negligence of any other employé during the time he is engaged in the act of operating the machinery. A person employed about a locomotive roundhouse to take charge of engines was not, while on his way to take charge of a locomotive and before he began to perform the act of operating the machinery, a servant engaged in the work of operating the cars, locomotive, or trains of a railroad, so as to give him or his representatives a right to recover for his injury when caused through the negligence of a fellow servant. *Gulf, O. & S. F. Ry. Co. v. Howard* (Tex.) 80 S. W. 229, 230.

WORK OF NECESSITY.

Courts, in construing the term "necessity" as used in statutes relating to the statute prohibiting work on the Sabbath excepting work of necessity, is given a liberal rather than a literal interpretation, and it is "not an absolute, unavoidable, physical necessity that is meant, but rather an economic and

moral necessity." Where a belt in a mill employing 200 persons broke on a Saturday through an unexpected defect, and could not be repaired that day because gasoline could not be procured in a town of 3,000 inhabitants, the repairing of it Sunday morning, without which the mill would have to be shut down Monday, as, after the belt was glued, it had to dry 18 hours before it could be used, was a work of necessity, within the statute. *State v. Collett* (Ark.) 79 S. W. 791, 792, 64 L. R. A. 204 (quoting *Shipley v. State*, 61 Ark. 216, 219, 32 S. W. 489, 33 S. W. 107).

WORSHIP.

See "House of Worship."

WORTHY.

The word "worthy" is elastic in its meaning, according to the context in which used. It may—perhaps, more exactly, does—mean virtuous, or of good standing, but its restriction to such significance would be absurd when used in a will enjoining the trustees of a fund to select subjects worthy of assistance; would strain through a distorting filter this testator's bounty, in view of the situations which he evidently contemplated as likely to surround its distribution. *Kronshage v. Varrell* (Wis.) 97 N. W. 923, 930.

WOUND.

See "Death Resulting from the Wound."

WRIT OF ERROR.

Appeal distinguished, see "Appeal."

A writ of error has been called an original writ, because it issued out of a reviewing court and was directed to the trial court; but it acts upon the record rather than upon the parties, removing the record into the supervising tribunal. The Supreme Court declares it to be "rather a continuation of the original litigation than the commencement of a new action." *Bristol v. United States* (U. S.) 129 Fed. 87, 89, 63 C. C. A. 529.

WRIT OF ERROR CORAM NOBIS.

The function of a writ of error coram nobis "is to vacate a judgment in the court where it was rendered by bringing some fact to the knowledge of that court which was not previously known, and which, if known, would have prevented the rendition of the judgment." On such a writ only such errors of fact can be assigned as are consistent with the record before the court in which the case was tried. *Hadley v. Bernero*, 78 S. W. 64, 67, 103 Mo. App. 549.

WRIT OF HABEAS CORPUS.

See "Habeas Corpus."

WRIT OF MANDAMUS.

See "Mandamus."

WRIT OF PROHIBITION.

See "Prohibition."

WRIT OF REVIEW.

The writ of review bears the same relation to our system of civil procedure that the writ of certiorari sustained to the common law, the name only of the latter having been changed by statute, and, like the ancient mode of procedure, the modern writ merely brings up the record. *McAnish v. Grant*, 74 Pac. 396, 397, 44 Or. 57.

A writ of review will lie only when the inferior court or tribunal has exceeded its jurisdiction or exercised its functions illegally or contrary to the course of procedure applicable to the matter before it. It cannot be used as a substitute for an appeal, nor can the mere error of an inferior court, officer, or tribunal, either of fact or of law, in the exercise of rightful jurisdiction, be reviewed or considered in such a proceeding. *Farrow v. Nevin*, 75 Pac. 711, 713, 44 Or. 496.

WRITTEN CONTRACT.

A "written contract" has been defined as "one which in all its terms is in writing." *Bishop on Cont.* (Enlarged Ed.) § 163. The signature of both parties is not always a necessary requisite to a written contract. *National Cash Register Co. v. Leako*, 58 Atl. 967, 968, 77 Conn. 276.

WRONG.

The term "wrong," in the maxim, "Equity will not suffer wrong without a remedy," has a significance which does not reach violations of mere moral rights. Any other wrong is said to involve a corresponding primary legal or equitable right, with an equitable or legal remedy, according to circumstances, for the former, and an equitable remedy for the latter. *Harrigan v. Gilchrist*, 99 N. W. 909, 933, 121 Wis. 127 (citing *Pom. Eq. Jur.* 424).

WRONGFUL ACT.

The term "wrongful act," as used in *Rev. St. Idaho*, § 4100, providing that when a person's death is caused by the wrongful act of another his heirs or personal representatives may maintain an action for damages against the person causing the death, implies

the omission of some duty, and that duty must be a duty owing to the decedent. It cannot be that if the death was caused by rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful. The death of a free passenger on a railway train, not due to the omission on the part of the railway company of any duty owing to the deceased, cannot be considered wrongful, within Rev. St. Idaho, § 4100. *Northern Pac. R. Co. v. Adams*, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513.

YEAR.

See "First Ten Years."

When reference is made to a certain year the presumption is that the calendar year is meant; but where a legislative body is acting under a constitution providing a fiscal year different from the calendar year, its fiscal legislation should be referred to the fiscal year, and not to the calendar year. *State v. Jennings*, 47 S. E. 683, 685, 68 S. C. 411.

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